



Ruthanne Fuller
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ZONING BOARD OF APPEALS

To: Zoning Board of Appeals Members
From: Adrianna Henriquez, Clerk
Date:
Subject: Materials for **January 23, 2019** Public Hearing

Hello,

Please see the following supplemental materials for the upcoming hearing on **January 23, 2019** Public Meeting & Hearing. The following members are scheduled to sit: **Brooke Lipsitt (Chair), Stuart Snyder, Barbara Huggins Carboni, Michael Rossi, Bill McLaughlin and Vincent Farina (Alternate).**

1. Supplemental Material for 138 Berkeley Street (#11-18)

Thank you,

Adrianna Henriquez

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City of Newton
Zoning Board of Appeals
#11-18

Lee Breckenridge and Robert A. Margo, appellants, v.
John Lojek, Commissioner, Inspectional Services, appellee

Memorandum in Support of Appeal to Zoning Board of Appeals

Introduction

The builder of a new house at 138 Berkeley St., Newton built a six-foot solid wood perimeter fence in August 2018, without obtaining a fence permit under the Newton fence ordinance. After receiving a notice of the violation from Inspectional Services, the builder applied for a fence permit on Sept. 4, 2018 and received a fence permit the same day. (See <http://apps.newtonma.gov/apps/test/p/18090025/Fence%20Permit%20App.pdf> and <http://apps.newtonma.gov/apps/test/p/18090025/FENCE%2009042018%20134818.pdf>).

Upon learning of the terms of the fence permit, on Sept. 9, the appellant Lee Breckenridge wrote to the Commissioner of Inspectional Services asking the Commissioner to revise the fence permit and to enforce the requirements of the fence ordinance. See attachment A to appellants' ZBA appeal. (This letter is also posted online in Attachment D to the staff memo for the Urban Design Commission for the meeting on Oct. 17, 2018, <http://www.newtonma.gov/civicax/filebank/documents/92130>).

The Commissioner did not respond directly to the appellant's letter at that time. Rather, the Commissioner informed the builder of the issues affecting the validity of the fence permit. As appellants understand it, the Commissioner provided information and instructions to the builder on how to apply to the Urban Design Commission UDC for an exception to the requirements of the fence ordinance in order to gain permission for the fence as constructed, or to obtain revisions to the permit in order to mitigate any hardship conditions.

The builder thereupon applied to the UDC on Sept. 17, 2018, requesting an exception to the requirements of the fence ordinance. In that application the builder conceded that the fence as constructed did not meet the requirements of the fence ordinance concerning perimeter fences bordering a public way. See Attachment B to the appellants' ZBA appeal. (The application also appears online in the UDC staff memo, <http://www.newtonma.gov/civicax/filebank/documents/92130>).

The UDC held a hearing on the builder's request for an exception to the fence ordinance on Oct. 17, 2018. (See <http://www.newtonma.gov/civicax/filebank/documents/92022>). The proceedings were continued without resolution. The UDC requested further information and a written decision from the Commissioner of Inspectional Services, as shown in the ensuing staff memo. See <http://www.newtonma.gov/civicax/filebank/documents/92816> , p. 7 and Attachment C.

The Commissioner then sent a determination concerning the terms and validity of the fence permit on Nov. 27, 2018. The Commissioner's determination was sent to the appellants as a

“determination letter... with the conclusion that the property owner has the right to construct a fence, as per the Zoning Ordinance, as a side lot line fence....” See attachment to Appellants’ ZBA appeal.

The Commissioner’s determination was posted online in Inspectional Services as a “Letter of Determination.” See http://apps.newtonma.gov/apps/test/permit7.php?permit_num=18090025 . Although the document is styled “inter-office correspondence,” the document explicitly provides a “Summary and conclusion of fence appeal” from the Inspectional Services Department. As a consequence of the determination by the Commissioner of Inspectional Services, the UDC proceedings were administratively terminated without further hearing. See attachment to Appellants’ ZBA appeal.

In this memorandum in support of Appellants’ ZBA appeal, the appellants discuss, first, some questions regarding the authority of the Zoning Board of Appeals to consider the appellants’ challenge to the Commissioner’s decision-making with respect to the fence at 138 Berkeley St. The memorandum then addresses the substance of the appellants’ challenge to the Commissioner’s actions under the fence ordinance.

Preliminary issues concerning the scope of the ZBA’s authority

1. The Zoning Board of Appeals has authority to consider appeals of decisions under the Fence Ordinance

Under Section 7.7 of the Newton Zoning Ordinance, the Zoning Board of Appeals has authority to consider appeals from decisions and orders made “in violation of any provision of M.G.L. Chapter 40A or any section of this Chapter.”

The Newton Fence Ordinance, (Rev. Ord. Ch. 5, Art. III, Fences) is incorporated in the Development Standards of the Newton Zoning Ordinance, found in Art. V, in Section 5.4 “Fences and Retaining Walls.” Section 5.4.1 provides: “Fences. Fences are regulated in Revised Ordinances Chapter 5, Article III, Fences.” Notably, neither the section on Fences nor the associated provisions on Retaining Walls in Sec. 5.4.2. suggest that these topics are not a part of the Zoning Ordinance. Certain other development standards -- not pertaining to “structures” -- are not incorporated in the Zoning Ordinance, and these development standards are explicitly excluded from the chapter. See Sec. 5.7, Noise; Sec. 5.8, Outdoor Lighting; Sec. 5.9, Tree Protection; Sec. 5.10, Floodplain, Watershed Protection. All of these sections state explicitly that the topic “is not a part of this Chapter.” By implication, fences and retaining walls under Sec. 5.4 are in fact included as part of the Chapter.

It should be noted, in addition, that the Newton Fence Ordinance, (Rev. Ord. Ch. 5, Art. III, Fences) is a zoning ordinance within the definition of the Massachusetts Zoning Act, Mass. Gen. Laws ch. 40 sec. 1A. (“Zoning”, ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.”) The Zoning Act in Section 8 authorizes the Zoning Board of Appeals (the permit granting authority) to consider appeals based upon a “violation of any

provision of this chapter or any ordinance or by-law adopted thereunder.” The Fence Ordinance is an “ordinance or by-law” adopted pursuant to zoning authority recognized in the Massachusetts Zoning Act and by virtue of that definition, subject to appeals to the Zoning Board of Appeals.

2. The determination by the Commissioner of Inspectional Services is a “decision” subject to appeal to the Zoning Board of Appeals

Under Section 7.7 of the Newton Zoning Ordinance, the Zoning Board of Appeals has authority to consider appeals by persons aggrieved by “an order or decision of the Commissioner of Inspectional Services...in violation of any provision of M.G.L. Chapter 40A or any section of this Chapter.” Although the Commissioner’s action has been framed as a memorandum, and posted online as a “Letter of Determination,” there can be no doubt that this document constitutes an “order or decision” by the Commissioner that has affected the rights and interests of the landowner and the appellants.

The Letter of Determination effectively refuses to revise the fence permit and to provide enforcement of the fence ordinance as requested in the appellants’ letter to the Commissioner dated Sept. 9, 2018. It explicitly rejects the appellants’ legal grounds for their request under the fence ordinance. It upholds the terms of the fence permit as it was issued on Sept. 4.

The Commissioner’s determination also goes beyond upholding the permit as issued. It announces that the landowner is “entitled” under the Fence Ordinance to build a fence 8 feet tall, and not simply to build a solid six-foot fence under the fence permit that was issued. The appellants are concerned, therefore, that the decision purports to dispose of future applications of the Fence Ordinance to the property at 138 Berkeley St.

The appellants have received no other written communication from the Commissioner in response to their request for revision of the permit and enforcement of the fence ordinance, and they do not expect to receive any further response, given the apparent finality of the Commissioner’s decision.

3. The Appellants are aggrieved persons who have standing to pursue an appeal from the Commissioner’s decision

Under Section 7.7 of the Newton Zoning Ordinance, the Zoning Board of Appeals has authority to consider appeals by persons “aggrieved by an order or decision of the Commissioner of Inspectional Services...” The appellants are persons so aggrieved. The fence at 138 Berkeley Street is located directly across the Peirce School recreational fields from the appellants’ property at 173 Berkeley Street. The fence is visible from both first story and second story windows in the appellants’ house. It is visible from the front and side yard. Given the location of their home, the appellants travel frequently along the sidewalk and roadway on Berkeley Street and along the sidewalk and roadway between Berkeley Street and Ruane Road. The appellants also make frequent use of the recreational fields located between their house and the house at 138 Berkeley Street.

As viewed from all of these locations by the appellants, the solid six-foot wall-like fence at 138 Berkeley St. effectively cuts the Berkeley Street neighborhood in two and blocks the view to and from the recreational fields and the Peirce School roadway. The fence thus has a significant visual impact on the appellants' use and enjoyment of their own property and their use of the immediately adjoining city owned property that constitutes the streetscape and open spaces nearby.

The intent of the Fence Ordinance is "to regulate the location and type of fences in order to promote and to protect the open and natural characteristics of Newton streetscapes and neighborhoods, the unencumbered passage of pedestrians on city sidewalks and to assure the safe visibility of both pedestrians and motor vehicular traffic." Sec. 5-30(a). The appellants' concerns fall squarely within the types of interests specified in the Fence Ordinance, but their affected interests go well beyond those of the general public. Indeed, the visual impact on the appellants' own property is more significant than for some of the immediate abutters to 138 Berkeley St. who are located on Ruane Road, since their houses do not provide a direct view of the fence and its impairment of the streetscape along Berkeley Street and across the Peirce School fields and roadway.

4. The Appellants' appeal is timely and within the deadline for bringing an appeal.

Section 7.7.2 of the Newton Zoning Ordinance provides that "[a]ny appeal shall be taken within 30 days from the date of the order or decision which is being appealed. The appellants filed this appeal on December 26, 2018, within 30 days of the issuance of the Commissioner's Letter of Determination.

In certain recent cases, Massachusetts courts have ruled that an aggrieved party's appeal from an enforcement decision by a municipal inspectional services official was not timely when the aggrieved party failed to appeal within 30 days from an antecedent issuance of a building permit. See *Gallivan v. Wellesley Zoning Board of Appeals*, 71 Mass. App. Ct. 850 (2008) and *Connors v. Annino*, 460 Mass. 790 (2011) and subsequent cases. (A discussion may also be found in Massachusetts Zoning Manual (MCLE, Inc. 6th ed. 2017, sec. 13.3.5)).

These cases are not dispositive in the current situation and they do not undermine the timeliness of the Appellants' appeal, for several reasons.

The Newton Fence Ordinance has a special ancillary procedure for obtaining input from the Newton Urban Design Commission concerning the terms of a fence permit. Sec. 5-30(c) provides: "An individual who has been denied a fence permit by the Commissioner may appeal such denial to the Urban Design Commission in accordance with the procedure for such appeals established by the Commission. The Urban Design Commission shall issue the fence permit if the Commission determines that the proposed fence complies with the requirements of this ordinance, or if owing to conditions especially affecting a particular lot compliance with the provisions of this ordinance would involve substantial hardship." The Urban Design Commission also has broad powers to provide information, advice and recommendations regarding matters related to urban design and beautification programs. See Ch. 22, Art. IV, secs. 22-80 to 22-94 of the Newton Revised Ordinances.

In the current case, the Commissioner of Inspectional Services, before the expiration of 30 days from the date of the issuance of the fence permit, instigated and encouraged the filing of a fence appeal to the Urban Design Commission. As shown in the builder's appeal to the Urban Design Commission, the Commissioner apparently reached a determination that the fence permit as issued did not comply with the Fence Ordinance, but offered the builder at 138 Berkeley St. the option of pursuing an exemption from the relevant requirements through the Urban Design Commission, before taking action to revise the permit and enforce the terms of the fence ordinance.

A Fence Appeal before the Urban Design Commission followed. The appellants were led to believe that the Commissioner had concluded that the fence permit as initially formulated had been issued in error but that any appeal of revisions to the fence permit as initially formulated would be premature, since the Urban Design Commission had the authority to revisit the terms of the permit and to formulate new or different conditions based on its findings.

The appellants suggest to the Zoning Board of Appeals that the Fence Appeal provisions of the Fence Ordinance should be construed by the Zoning Board of Appeals as tolling the time for an aggrieved party to seek review of a fence permit. The terms of a fence permit as initially issued by a district inspector, unlike other types of building permits, should not be considered final, if a fence appeal is filed and remains pending with the Urban Design Commission within the initial 30-day deadline for a party to seek relief from the Zoning Board of Appeals.

Any other interpretation of the Fence Ordinance and the 30-day deadline provisions of the Zoning Ordinance would result in petitions to the Zoning Board of Appeals at a time when the final provisions of a fence permit have not been finally resolved. Given the ensuing deadlines for filing fees, hearings, and decisions at the Zoning Board of Appeals, there will be unfair impacts on all affected parties, and wasteful use of resources, if the Zoning Board of Appeals does not wait for final resolution of the terms of the relevant fence permit at the administrative level.

Notably, the judicial opinions cited above dealing with building permits outside the context of the Newton Fence Ordinance, do not suggest that equitable considerations are irrelevant to interpreting the 30-day deadline for appeals to the Zoning Board of Appeals. Indeed, these cases point out that the deadline could be adjusted, for example, if the aggrieved party did not have a fair and reasonable opportunity to learn of the issuance of a building permit before the running of the deadline. Those cases also appear to focus on questions of fairness to a landowner when the landowner has relied on the issuance of a building permit before constructing a building. Here, by contrast, there are no such considerations of fairness because the fence was built before a permit was sought or issued.

In summary, the appellants urge the Zoning Board of Appeals to interpret all parts of the relevant ordinances governing challenges to fence permit decisions in order to achieve fairness for all affected parties and effective oversight of administrative determinations. The deadline for challenging the terms of a fence permit should run from the final disposition of an Urban Design Commission review, if any. In the current situation, that final disposition and the ultimate

rejection of the appellants request for revision of the permit and enforcement of the Fence Ordinance occurred with the issuance of the Letter of Determination by the Commissioner of Inspectional Services on November 27, 2018.

The Commissioner's Letter of Determination, the underlying fence permit, and the fence as constructed prior to issuance of the fence permit all violate the requirements of the Fence Ordinance.

The fence as constructed, the subsequently-issued fence permit, and the Commissioner's Letter of Determination following review and reconsideration of the fence permit violate basic design requirements in the fence ordinance.

Fence Bordering a Public Way.

First, the fence is a solid wall-like six-foot fence that borders the Pierce School roadway, a one-way street connecting Berkeley St. to Ruane Road. This road is paved and open to the public; it has posted street signs; it is used routinely for through traffic, and it is owned and maintained by the City of Newton. It is marked as a one-way road on the Assessors' base road map. The fence as constructed and subsequently authorized is therefore a fence bordering a "public or private way" and located within five feet of the lot line. Consequently, it should meet "front lot line" requirements. To meet the requirements of the ordinance, it should be no more than four feet tall on the lot line, or it should be set back from the lot line and open at the top, or it should be set back at least five feet from the lot line to fall outside the scope of the ordinance. See Fence Ordinance Secs. 5-30(b)(definitions) and 5-30(d)(1)(fences bordering a front lot line).

Corner Lot Requirements.

Second, the fence as constructed and authorized violates the separate corner lot requirements of Sec. 5-30(f)(7) of the Fence Ordinance. According to the provisions protecting visibility at an intersection, the fence should be no more than four feet high in the first twenty-five feet of the front yard (i.e. along the lot line running from Berkeley St. toward Ruane Rd., next to the Peirce School road).

As defined in Sec. 1.5.2.F. of the Zoning Ordinance, a corner lot is: "A lot fronting on 2 intersecting streets which form an interior angle of 120 degrees or less....The provisions of this paragraph shall apply to a lot fronting on an open space dedicated to the public use in the same manner as to a lot fronting on a street."

As discussed previously, the fence in question is located at the intersection of two public ways, Berkeley Street and the Peirce School roadway. Even if the Peirce School roadway were not a public way, the appellants suggest that the fence would still be required to meet the corner lot requirements of the Fence Ordinance, because it adjoins the open space of the Peirce School recreational fields. While the roadway itself is pavement that would not be included in a calculation of the square footage of open space at this location, the extensive open space reaching on either side of the roadway indeed constitutes an important public open space

extensively used by the school, the residents of the neighborhood, and by other inhabitants of the City.

In summary, the appellants ask the Zoning Board of Appeals to overturn the Letter of Determination issued by the Commissioner of Inspectional Services on November 27, 2018 and to take further measures to ensure that the fence at 138 Berkeley Street meets all relevant requirements of the Fence Ordinance.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lee P. Breckenridge". The signature is written in black ink and is positioned above the printed name.

Lee P. Breckenridge

On behalf of the appellants:

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