



CITY OF SOMERVILLE, MASSACHUSETTS
MAYOR'S OFFICE OF STRATEGIC PLANNING & COMMUNITY DEVELOPMENT
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JOSH SAFDIE
DREW KANE (ALT.)

Case #: ZBA 2017-90
Site: 43 Victoria
Date of Decision: April 17, 2019
Decision: *Petition Approved with Conditions*
Date Filed with City Clerk: April 26, 2019

ZBA DECISION

Site: 43 Victoria Street

Applicant / Owner Name: Paul Yu
Applicant / Owner Address: 43 Victoria Street, Somerville, MA 02144
City Councilor: Katjana Ballantyne

Legal Notice: Applicant and Owner, Paul Yu, is seeking a Variance for fence height to approve a currently existing 8' fence on the rear property line. RB Zone. Ward 7.

*Case number was listed as ZBA 2019-23 on Legal Notice, but correct case number is 2019-20.

<u>Zoning District/Ward:</u>	RB Zone. Ward 7.
<u>Zoning Approval Sought:</u>	SZO §5.5
<u>Date of Application:</u>	February 14, 2019
<u>Date(s) of Public Hearing:</u>	April 17, 2019
<u>Date of Decision:</u>	April 17, 2019
<u>Vote:</u>	4-0

Case # ZBA 2019-20 was opened before the Zoning Board of Appeals in the Council Chambers at Somerville City Hall on April 17, 2019. Notice of the Public Hearing was given to persons affected and was published and posted, all as required by M.G.L. c. 40A, sec. 11 and the Somerville Zoning Ordinance. On April 17, 2019 the Zoning Board of Appeals took a vote.



CITY HALL • 93 HIGHLAND AVENUE • SOMERVILLE, MASSACHUSETTS 02143
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I. DESCRIPTION:

The proposal is to approve a currently-existing 8’ fence which exceeds the maximum of 6’ fences allowed by the SZO.

II. FINDINGS FOR SPECIAL PERMIT (SZO §5.5.3):

In order to grant a variance the Board must make certain findings and determinations as outlined in §5.5.3 of the SZO.

1. *There are “special circumstances relating to soil conditions, shape or topography of land or structures which especially affect such land or structures but not affecting generally the zoning district in which it is located, causing substantial hardship, financial or otherwise.”*

Applicant’s response: The special circumstance in soil conditions, shape, and topography of the land consist of a 2 foot difference in elevation between the rear yard of 43 Victoria Street (higher), and the rear lot of 40 Waterhouse (lower), as marked by a 2 foot high retaining wall consisting of a single row of concrete blocks stacked 2 feet high bordering these two properties. The presence of this retaining wall necessitates placement of the fence at the lower elevation below the retaining wall, as the retaining wall itself would be an unstable anchor for the fenceposts. If placed on top of the retaining wall, a gust of wind would blow the fence over and destroy the retaining wall and surrounding landscaping at the same time. Placing a 6 foot high fence on top of the retaining wall on the 43 Victoria side would be permitted under current code, would provide sufficient privacy between the two homes, but would not be physically stable. Placing a 6 foot high fence below the retaining wall on the 40 Waterhouse side would also be permitted under current code, would be physically stable, but would not provide sufficient privacy between the homes as adult individuals of average height walking near the fence in the rear yard of 43 Victoria would peer down into the rear yard of 40 Waterhouse. Placing an 8 foot high fence below the retaining wall achieves the same visual effect as placing a 6 foot high fence on top of the retaining wall, but is physically stable, and provides the same degree of privacy that is permitted by current code if the wall were anchored on top of the retaining wall.

The Board’s response: The rear yard of 43 Victoria Street sits approximately 2’ above the rear yard of 38 Waterhouse Street with a retaining wall separating them. According to the applicant, the retaining wall is too unstable for a fence to be anchored into it, and would need to be replaced before that could happen. Replacing the retaining wall would be expensive and could reasonably be seen as causing a financial hardship for the applicant. Instead of replacing the retaining wall, the applicant received permission from the neighbor at 38 Waterhouse to place the fence on the lower side of the retaining wall. Due to the unusual topography of the two lots, the Board believes that this condition is met.

2. *“The variance requested is the minimum variance that will grant reasonable relief to the owner, and is necessary for a reasonable use of the building or land.”*

Applicant’s response: The variance being requested would be the minimum variance that would allow the owner of 43 Victoria to have the benefit of a 6 foot high privacy fence when viewed from its rear yard, a fence that would otherwise be permitted if anchored on top of the retaining wall. In fact, when viewed from the side of either lot, this variance achieves the same visual effect as a 6 foot high privacy fence anchored into the retaining wall. A shorter fence by 1/2, 1, or 2 feet would defeat the privacy function by allowing adults of average height walking in the rear yard of 43 Victoria to peer down into the lot of 40



Waterhouse. A 6 foot high fence anchored in the top of the retaining wall would be at high risk for failure and damage to the retaining wall and adjoining landscaping. While reinforcements to the existing retaining wall with extensive masonry work could mitigate the failure risk of a fence anchored on top of the retaining wall, these reinforcements would pose a hardship for both owners by multiplying the cost of construction several-fold, and would remain at high risk for failure due to weather conditions.

The Board's response: If the variance is not granted the simplest way to achieve the same degree of privacy as the two parties currently enjoy would likely be to demolish and rebuild the retaining wall and then place a new 6' fence on top of the retaining wall. If the applicant were to do that, the resulting fence would not visually be significantly different than the existing situation. The residents at 38 Waterhouse would see a 2' retaining wall topped by a 6' fence rather than simply seeing an 8' fence. The Board believes this variance is the minimum relief necessary for the applicant's reasonable use of the land.

3. *"The granting of the variance would be in harmony with the general purpose and intent of this Ordinance and would not be injurious to the neighborhood or otherwise detrimental to the public welfare."*

Applicant's response: The proposed variance does not have an impact on the neighborhood beyond that of a 6 foot high fence anchored on top of the retaining wall as permitted by code, whereas the proposed configuration has greater stability. The most important impact of this fence is the aesthetic and functional impact on the owner/resident of 40 Waterhouse. Based on the factors cited in (a) and (b), the owner of 40 Waterhouse Joseph Amaral prefers the current fence configuration and documents his support for this variance in an accompanying letter. This fence was designed with the joint participation and funding from the owners of 43 Victoria and 40 Waterhouse. Since that the proposed configuration has the same visual impact as a 6 foot high fence anchored on top of the retaining wall, there should be no aesthetic or functional impact of this variance on any of the other abutters or neighbors to this fence, and no potential for injury to public welfare. The people residing in neighboring buildings would not be differentially impacted by this proposed fence configuration vs. a 6 foot high fence anchored on top of the retaining wall, and would not be inconvenienced or adversely affected in either situation. Similarly, this fence will not have any measurable impact on the character or use of the nearby buildings, or traffic conditions in this area, and this lack of impact would not change over time or with changes in the number of persons occupying or working in nearby buildings, or changes in future traffic conditions.

The Board's response: The ordinance regulating fence height states that "Fences shall not be more than six (6) feet high above the existing grade." Had the applicant anchored the fence on the upper side of the retaining wall rather than the lower side it would comply with the ordinance and would not require a variance. The neighbor at 38 Waterhouse—the person most directly impacted by the fence—is in full support of the fence and sent Staff a message expressing his strong support for keeping the fence as-is and having the variance granted. The fence complies with the spirit of the Ordinance and is not detrimental to the public welfare. The Board believes this condition is met.

III.DECISION:

Present and sitting were Members Orsola Susan Fontano, Danielle Evans, Drew Kane and Elaine Severino. Upon making the above findings, Danielle Evans made a motion to approve the request for a Variance. Elaine Severino seconded the motion. The Zoning Board of Appeals voted **4-0** to **APPROVE** the request **WITH CONDITIONS**. The following conditions were attached:



#	Condition	Timeframe for Compliance	Verified (initial)	Notes						
1	Approval is for the 8' fence at the rear property line. This approval is based upon the following application materials and the plans submitted by the Applicant:	BP/CO	ISD/Plng.							
	<table border="1"> <thead> <tr> <th>Date</th> <th>Submission</th> </tr> </thead> <tbody> <tr> <td>February 14, 2019</td> <td>Initial application submitted to the City Clerk's Office</td> </tr> <tr> <td>April 1, 2019</td> <td>Updated plans submitted to OSPCD (A-1)</td> </tr> </tbody> </table>				Date	Submission	February 14, 2019	Initial application submitted to the City Clerk's Office	April 1, 2019	Updated plans submitted to OSPCD (A-1)
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February 14, 2019	Initial application submitted to the City Clerk's Office									
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Any changes to the approved plans that are not <i>de minimis</i> must receive SPGA approval.										
Final Sign-Off										
2	The Applicant shall contact Planning Staff at least five working days in advance of a request for a final inspection by Inspectional Services to ensure the proposal was constructed in accordance with the plans and information submitted and the conditions attached to this approval.	Final sign off	Plng.							



Attest, by the Zoning Board of Appeals:

Orsola Susan Fontano, *Chairman*
Danielle Evans, *Clerk*
Elaine Severino
Drew Kane (Alt.)

Attest, by the Administrative Assistant:

Monique Baldwin

Copies of this decision are filed in the Somerville City Clerk's office.
Copies of all plans referred to in this decision and a detailed record of the
SPGA proceedings are filed in the Somerville Planning Dept.

CLERK'S CERTIFICATE

Any appeal of this decision must be filed within twenty days after the date this notice is filed in the Office of the City Clerk, and must be filed in accordance with M.G.L. c. 40A, sec. 17 and SZO sec. 3.2.10.

In accordance with M.G.L. c. 40 A, sec. 11, no variance shall take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

Also in accordance with M.G.L. c. 40 A, sec. 11, a special permit shall not take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed Special Permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.

The owner or applicant shall pay the fee for recording or registering. Furthermore, a permit from the Division of Inspectional Services shall be required in order to proceed with any project favorably decided upon by this decision, and upon request, the Applicant shall present evidence to the Building Official that this decision is properly recorded.

This is a true and correct copy of the decision filed on _____ in the Office of the City Clerk, and twenty days have elapsed, and

FOR VARIANCE(S) WITHIN

_____ there have been no appeals filed in the Office of the City Clerk, or
_____ any appeals that were filed have been finally dismissed or denied.

FOR SPECIAL PERMIT(S) WITHIN

_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

Signed _____ City Clerk Date _____

