

# Hull Zoning Board of Appeals

The October 1, 2015 meeting of the Board of Appeals was held at 7:30 p.m. at the Hull Municipal Building, 253 Atlantic Ave., Hull, Massachusetts.

Members present: Alana Swiec, Chair  
Roger Atherton, Clerk  
Patrick Finn, Associate Member  
Philip Furman, Associate Member

Also present were Town Counsel James Lampke, Building Commissioner Peter Lombardo, and Building Department Local Inspector Bartley Kelly.

## Minutes

A motion was made to approve the minutes of September 3, 2015 and September 17, 2015. Finn questioned the recording secretary about the ending time of the September 17 meeting. She stated that Atherton was the minute-taker of record for that meeting, and that she had requested a clarification on the end of the meeting as the tape shut off while parties were still talking. Atherton stated that this was a conversation about which members would be present at the following meeting and that the meeting had ended at the recorded time of 8:15 p.m. Members then unanimously voted to approve the minutes of September 3 and September 17, 2015.

Vote:	Swiec	Yes
	Atherton	Yes
	Finn	Yes

## Public Hearing: 62 L St.

**Start Time:** 7:35 p.m.

**Applicants:** Philip D. Foley and Robert F. Gaffuri

**General relief sought:** To appeal the decision of the Building Commissioner to issue a permit to add a safety net on an existing fence at 62 L Street, Hull, MA.

**Sitting:** Swiec, Atherton, Finn

### Summary of Discussion:

This was a continuation of a hearing begun on August 20, 2015, which was continued on September 3 and September 17, 2015. The appellants, Philip D. Foley and Robert F. Gaffuri were appealing the decision of the Building Commissioner to issue a permit to add a safety net to an existing fence at 62 L Street. The safety net is situated between their property and that of their neighbor, Sandra E. Fromm, the owner of 62 L Street. The hearing was continued to this date to allow the Board time to review documents presented by abutters and to get a report from the Building Commissioner.

As stated in previous meetings, all participants agree that Fromm initially built and installed the safety net without a permit and the permit was issued after complaints had been made by the appellants.

At the beginning of the hearing, Swiec read aloud a portion of a letter that Fromm had sent to the Board, reiterating that the facts of the case were that she had installed a safety net on an existing fence and had received a permit for it, which was included with the letter. Atherton read a communication he had received from the Building Department giving the timeline of the issuance of the permit and stating that the only issue before the Board was the Building Department's decision to do so.

At the ZBA hearing of the appeal, the ZBA also reviewed the Hull Zoning Bylaw definitions, Section 22-1, relevant selections as follows:

**Structure:** A combination of materials assembled at a fixed location to give support or shelter, such as a building, bridge, tower, framework, retaining wall, tank, tunnel, stadium, platform, bin, fence, flagpole or the like.

Mr. Lombardo explained that there is nothing in the Hull Zoning bylaws that helped with the issues of a safety net or fence, so he turned to Section 22-1, which indicates *Meaning of Words*: Unless otherwise expressly stated, the following italic words and phrases appearing in this zoning bylaw shall have the meanings indicated by tried definitions immediately following in this section. Words and phrases not defined in this article, but defined in the Massachusetts State Building Code, 780 CMR shall have the meanings given in that code. Words and phrases not defined in either this article or the Code shall have the meanings as defined in the American Heritage Dictionary of the English Language. (Emphasis added.).

Finn read the American Heritage Dictionary's definitions of fence, safety net, and boundary in order to clarify terminology:

**safety net:** 1. A large net for catching one that falls or jumps, as from a circus trapeze.

**Fence:** 1. A structure serving as an enclosure, a barrier, or a *boundary*, usually made of posts or stakes joined together by boards, wire, or rails.

**bound·a·ry:** 1. Something that indicates a border or limit.

Kelly explained that when a permit is requested, the Building Department consults both the town zoning bylaws and the State Building Code. While the town bylaws do not contain any information on the height limit of fences, the State Building Code does require that a permit be issued for any fence over six feet in height. He cited 780 CMR, Residential Building Code Section 105.2. He said that it does not provide other guidelines or conditions regarding such a fence.

Kelly further stated that when he inspected the safety net, his concern was that it be sound. When he examined it, he determined that it was. He then issued the permit. The appellants contended that Kelly should have looked at the net from both sides of the fence because of the wind. Kelly said that he looked at how it was attached to the poles and made sure that it was structurally sound and would stand up.

Lampke said that the Building Department grants permits according to applicable law and that Fromm filled out a State form and the Building Department was satisfied that it met State requirements. He said that the State Building Code does not set forward other criteria that a fence has to meet and that therefore the Building Department can't deny a permit based on other criteria. However, he said, if the Building Department had deemed the safety net unsafe, they would have denied the permit.

Swiec and Atherton noted that the safety net was not actually part of the existing fence, but was several inches away from it. Kelly and Lombardo said that this would not have had an effect of the issuance of the permit.

Mary Mancini, summer resident at 69 K St., questioned Lombardo and Kelly at length about whether they would issue a permit for any fence over six feet, regardless of other factors about the fence. They reiterated several times that they were required to issue a permit for a fence over six feet and that no other guidelines were provided by the State Building Code regarding the matter. She also asked to see the plot plan that showed the existing chain link fence as part of Fromm's property. Kelly said that it was the fence on the boundary between the two properties and as such was visible as the property line on the plot plan. He said that the fence went around two sides of Fromm's property, facing in. Mancini contended that there was no fence shown on the plot plan. Kelly stated that it was an engineer-certified plot plan. Gaffuri contended that the plot plan that Fromm showed them was incorrect.

Lampke said that while he empathized with the appellants, the question of the Building Department's issuance of the permit was not under the jurisdiction of the Board of Appeals. He stated that the jurisdiction of the Board is on matters that apply to the town's zoning bylaws, which this does not. He said that there are other venues that the

appellants could explore and explained that he had spoken to the appellants about this outside of the meeting and had explained their options.

The appellants again questioned Fromm's ability to get a permit to attach anything to a fence that an engineer's report stated was, in part, on their land. Lampke explained that this also was not under the jurisdiction of the Board of Appeals and that it is a civil matter and would have to be addressed as such. He stated that neither the Board nor the town adjudicates land ownership issues.

Diane Kelly, summer resident at 69 K St., questioned, as she had in previous meetings, whether the wording of the town zoning bylaw means that nothing is allowable that is not in the bylaw. Mancini again argued that when something is not in the bylaw, a determination from the Board of Appeals is required.

Mancini had stated in a previous meeting that the closest link to the bylaw she could find was based on a comment that Bartley Kelly had made to the one of the appellants that the fact that the safety net was under 14' was the reason Fromm did not have to file an impact statement when filing for the permit. Mancini had said in the previous meeting that the only reference she could find in the bylaw to 14' height was in Table 50, which provides dimensional requirements for accessory structures. In that document, the maximum height is defined as 14' and the setback requirement is 6'.

Kelly said that he could not recall the specifics of the conversation, but he thought that the appellant had asked him if anyone could build a fence of any height they wanted. Kelly thought that this was the point at which he might have mentioned 14', as it is the height limit of an accessory structure, and that would probably be the point at which they would review a fence height. He stated that if a fence was over 14', he probably would have sought further advice. However, he said, the safety net is not an accessory structure. Questioned by Mancini as to whether he considered abutters, Kelly said that if a matter has something to do with zoning bylaws it triggers the notification of abutters. He said that he could not deny the permit based on the information given to him.

Mancini said that the 14' height limit of an accessory structure has a 6' setback. Lampke noted that if a fence had to have a 6' setback, there would be alleyways between backyard fences and that this would not be defensible in court.

Lampke said that the appellants' points about quality of life and property value may be legitimate and correct, but these are not adjudicated by the Board of Appeals. He said that questions about whose fence it is or whether it is a nuisance are not within the Boards' jurisdiction and neither is the State Building Code. He said that anyone who feels unfairly impacted may be able to remedy it in other ways. He said that the Board was dealing with something that was not within their jurisdiction and that whether the permit was issued properly was not properly before this body.

The appellants stated, as they had in previous meetings, that they would be happy to reach a compromise with Fromm. Fromm stated, as she had in a previous meeting, that she would prefer not to move or lower the net.

#### **Action taken:**

Swiec requested a motion to grant the appeal, but no motion was made. Atherton made a motion to deny the appeal because in his opinion there was not sufficient legal support in the bylaws. The motion was seconded by Finn. The vote was as follows:

Vote:	Swiec	No
	Atherton	Yes
	Finn	Abstain


Atherton then made a motion to grant the appeal. This was seconded by Swiec. The vote was as follows:

Vote:	Swiec	Yes
	Atherton	No
	Finn	Abstain

A unanimous vote is required to grant an appeal, and as both motions failed, the appeal was denied. The decision of the Building Commissioner to issue a permit to add a safety net on an existing fence at 62 L Street, Hull, has not been rescinded. Swiec noted that the appellants have the right to appeal the Board's decision. Lampke mentioned District Court, Superior Court, Land Court, or Housing Court as possible venues for appeal.

The hearing was closed at 9:10 p.m. The meeting concluded at 9:15 p.m.

Recorded by: Catherine Goldhammer

Minutes Approved: 10/28/2015 

*All actions taken: All action taken includes not only votes and other formal decisions made at a meeting, but also discussion or consideration of issues for which no vote is taken or final determination is made. Each discussion held at the meeting must be identified; in most cases this is accomplished by setting forth a summary of each discussion. A verbatim record of discussions is not required.*