

**ZONING BOARD OF APPEALS**

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August 15, 2023

Remote

7:30 pm

Zoning Board of Appeals Members Present:

J. Randolph Becker

Walter B. Adams

Peter Covo

PUBLIC HEARING**ZBA 2008-43, JILL MURPHY, 48 PARKER ROAD**

Present at the public hearing were Laurence Shind, Esq., Jill Murphy, the Petitioner, David Himmelberger, Esq., and Dr. Deya Corzo.

Mr. Shind said that he sent a letter and attachments to the Board last week. He said that he presented information as best as he could to discuss what trees had been removed by the Murphys, which was not documented at the time because they did not know that a hearing would be involved. He said that he included an exhibit that locates to the best of their knowledge the trees that were removed. He said that his clients did not realize at the time that any tree removal would need the approval of the Board, despite that being part of the property records. He said that Ms. Murphy was not aware of that restriction. He said that it was not identified to her at the time of closing.

Mr. Shind said that the request is to allow after the fact tree removal. He said that the first three trees were removed in 2018 to 2019 and are summarized in an email from the arborist from Belmont Landscape who took those trees down. He said that those trees were located at the rear of the lot along the Perrin Park boundary. He said that the trees were one pine and two hemlocks that were either diseased or dead and dropping branches, shown as A, B and C on Exhibit A. He said that the trees were taken out due to safety concerns. He said that three more trees were removed in 2021 by Stumpy's, shown as D, E, and F. He said that those trees were along either the rear or on the side that abuts the Perrin Park walkway. He said that the trees were on the opposite side of the property from 50 Parker Road. He said that one of the trees was identified by a neighbor as dropping branches on the walkway and was a hazard to people walking there. He said that the other two trees had branches come down during windstorms. He said that the homeowner was concerned about her own safety, that of her family and the walkers on the Perrin Park walkway. Mr. Shind said that the arborist at Stumpy's who was in charge of the work is no longer there. He said that Stumpy's did not keep a record of the trees. He said that the approximate location of the trees is shown on Exhibit A.

Mr. Shind said that Ms. Murphy has some pruning done to trees that were along the boundary between 48 and 50 Parker Road. He said that the trees were on the neighbor's property but had overhanging branches. He said that the work was done by Belmont Landscape and were normal pruning operations, and in their opinion, did not impact the health of the trees. He said that the trees were later taken down by Dr. Corzo. He said that those trees were not among the trees that violated the 2008 condition.

Mr. Shind said that at the previous hearing, the Board had concerns about privacy and screening between 48 and 50 Parker Road. He said that Ms. Murphy is proposing to add trees, arbor vitae or something similar, that would provide screening where there are currently no trees, in the area between the end of her driveway and the beginning of the sport court. He said that on Exhibit A, the proposed area is between where the cars are parked and the beginning of the sport court. He said that the proposal is for six evergreen trees, 10 feet high.

Mr. Shind said that concerns were raised about the speaker system at the sport court. He said that his client has decided to take it out entirely, so there will be no outdoor speaker at the sport court.

Mr. Shind said that there is currently one pole light fixture at the rear of the property along the rear of the sport court. He said that to be sure that there is no spillage onto 50 Parker Road, the fixture was moved to point downward. He said that they submitted a photometric plan to the Board that shows that there is minimal light spillage onto 50 Parker Road. He said that the only spillage is at the back corner of the lot.

Mr. Shind said that the tennis backboard or fence is on the side of the sport court that is closest to 50 Parker Road. He said that the court was designed with the fence in place. He said that his client is willing to provide screening between the two lots at the back of the tennis fence. He said that since its position is very close to the lot line, no trees or shrubs can be installed in that area. He said that they can put faux shrubbery in that is green and looks like shrubbery to screen the wall.

Mr. Shind said that the Board asked that the Murphys go back to the original conditions from 2008 to check that there are no other active violations. He said that he provided proof of compliance. He said that Exhibit D shows that there is quite a bit of mature landscaping in front of the house at 48 Parker Road. He said that the footpath to Perrin Park along the east side of 48 Parker Road has not been impeded and has been maintained, as shown on the photograph submitted. He said that Parker Road jogs where 48 Parker Road is located. He said that Exhibit F shows that there is unimpeded emergency access to 48 Parker Road. He said that the only item that they were not able to provide is the landscape plan that was required to be provided. He said that they confirmed with the Zoning Board Office that they currently do not have that plan.

Mr. Himmelberger said that he sent a letter today that provided further comments and observations. He said that Dr. Corzo wanted to acknowledge the willingness of the Murphys to remove the outdoor speaker system, adjust the light to prevent light spillage, and to plant six 8 to 10 feet tall evergreen screening trees, hopefully of a high, fast growing nature. He said that the issue that is still disturbing to his client is that they have to look at the tennis wall. He said that they realize that they are hamstrung by the fact that they did not have the opportunity in real time, to review a request to take down trees that allowed for the sport court to be built. He said that he observed the relationship between the arborist and the Murphys. He said that on his visit there, he saw no trees in distress and found it odd that the only ones were on the Murphy's property. He said that his client's point is about the assertion by the arborist about unsightly tree branches that were cut down, which she believes hastened the death of the trees at 50 Parker Road. He said that she now has to look at an unattractive sports wall. He said that Dr. Corzo's request was to have the wall flipped to the other end of the sport court or against the Perrin Park border. He said that request has been declined. He said that this is a difficult case to try to discern what happened and why things happened after the fact. He said that Dr. Corzo's consistent observation is that she would have had an opportunity to weigh in with proper notification and it is unfortunate that it is after the fact.

Dr. Corzo said that it is a difficult situation to try to reach a satisfactory response for everybody by doing things in retrospect. She said that by not being able to give feedback in real time, they were robbed of the opportunity to say something about the tennis wall that is close to her property. She said that the wall is about 20 feet tall, only 8 feet from the property. She said that she would have had a say about that in real time because it is really unsightly. She said that for four years they have tried to get the use of the light late at night under control. She said that they provided an exhibit of 40 such instances. She said that does not include occasional phone calls. She said that she works weird hours, so she prefers to be contacted by text. She said that there has not been a willingness to control the hours of the light use that spills over the first and second floor. She said that she welcomes the proposal to refocus the light for less spillage. She said that she called the Wellesley Police in April and spoke with Sergeant Carrasquillo and he had a conversation with Ms. Murphy. She said that the situation continues today with late at night use of the light.

Dr. Corzo said that they never asked for the trees on her property to be pruned. She said that she asked for a quote from them. She said that one branch that fell was removed in February of 2019. She said that she provided a picture of that. She said that the branch was high up and fell on and broke some of the fence between the properties. She said that the Murphy's landscapers cut all branches of the branches on her property that overhung the Murphy's property. She said that the branches were cut repeatedly. She said that the persistent aggressive pruning caused the trees to die. She said that she has pictures dating back to 2016 where you can see the trees on her property have long branches. She said that she did not give permission to have branches overhanging the Murphy's property to be cut. She said that after the trees on her property died, she had five trees removed and they planted 15 trees along the line to make up for the loss of the screening. She said that welcomed that the Murphys will plant trees. She said that because the sport court is only 8 feet from the property line, the trees will only be partial screening. She said that the tennis wall will not be screened. She asked that the tennis wall be relocated even though it will incur additional costs. She said that she has had to pay for removal of the trees and for replacement with 15 new trees, as well as additional screens on the windows to protect against the light. She said that she has done her best to deal with the situation and would be happy if the wall is relocated. She said that there is ample space to relocate the wall. She said that it is not attractive so close to her property line.

Mr. Becker discussed the process that the Board for similar cases where the property owner had done something that was not allowed under the bylaw that did not come to light until long after the violation was performed. He said that the Board tried to look objectively at the facts of the case to determine if the Board had known at the time the violation occurred, would the Board have issued the permit and if it would have issued a permit, what the conditions would have been. He said that the Board tried to lay out a timeline to make sure that there were no steps in the bylaw that were being leap frogged or left behind.

Mr. Becker thanked both parties for providing documentation. He said that it was useful in trying to understand the timeline and the meaning of what was referred to as several trees.

Mr. Adams asked about the back of the property, the path to Perrin Park, the location of the light fixture and the tennis wall. Mr. Himmelberger displayed a GIS aerial maps from 2022 back to 2004. Mr. Shind some of the trees are not on the Murphy's property. He said that some are shadows of trees on adjacent properties. He said that the conversation concerns six mature trees that were removed by the current homeowner, none of which about 50 Parker Road. He said that there was no evidence by Dr. Corzo or Mr. Himmelberger that pruning adversely affected the trees. He said that the Murphy's arborist said it was healthy pruning.

Mr. Adams said that it is reasonable to expect that six large trees will be put back. He said the Murphys voluntarily removed the audio system and repositioned the lighting. He said that there is a compelling reason why the Murphys should be required to relocate the tennis wall. He said that there is an expense involved. He said that the Murphys may try to sue the original contractor for the costs. He said that the current location of the tennis wall is an imposition to Dr. Corzo with the sound of the tennis balls up against the wall adjacent to their property.

Mr. Covo asked if there was a reason that the sport court was put to one side of the property rather than in the middle. Mr. Shind said that it was to try to keep as much of the yard open and usable as possible. Ms. Murphy said that the company that they hired recommended the location because of the level of the land. She said that they have two boys and the location gave them space for other sports on the other side. Mr. Covo confirmed that the tennis backboard was installed at the same time. He said that on the photographs, it does not appear that the backboard goes the full length of the sport court. He asked if it is a regulation size basketball court. Ms. Murphy said that she thinks that it is smaller. Mr. Himmelberger said that the court is approximately 60 feet by 45 feet. Mr. Covo said that half a tennis court is about 40 feet. He said that they probably could not put the backboard against the Perrin Park side and still be able to hit a tennis ball. He said that in Mr. Himmelberger's letter there was something about finishing the backboard. He asked what that means. He said that dampers can be put on to soften the sound. Ms. Murphy said that the sport court company told them that they can make it look like the front without the lines. She said that it would be green, whereas it is currently brown and unfinished on the back. Mr. Covo said that it will be more of an aesthetic finish, not a dampening of the sound. He said that his experience is that no matter which side the backboard is on, the sound will be the same. Ms. Murphy said that they never knew that this was an issue. She said that she is happy to put a faux covering over it. She said that they will screen the other side.

Mr. Covo asked Mr. Himmelberger and Dr. Corzo if the screening that was offered from the closest corner of the sport court to the parking area would block out the backboard and the sport court. Dr. Corzo displayed photographs. She displayed the location of the proposed trees. She said that they will not cover the tennis wall at the back. She said that her picture was taken before she planted the trees. She said that even with the trees, it will not be enough to cover the wall. She said that the proposed trees go up to the beginning of the tennis court. She said that it will only be screened from one angle. She said that it is not a pleasant view from the first floor and back yard or from the second floor. She said that is why she is requesting that the sport court be relocated.

Mr. Covo asked if planting behind the tennis backboard would shield it enough. Dr. Corzo said that she did not believe that would be possible. She said that there is gravel between the wall and the tennis complex. Mr. Covo asked about having more trees on Dr. Corzo's property. He said that there appears to be space there. Dr. Corzo said that she put a shed there in 2022.

Mr. Himmelberger asked Dr. Corzo to display Slide 5 that shows gravel between the back of the board and the fence. He said that it seems to be only in that area. He said that there appears to be dirt in the photograph in the upper left hand corner. He asked if there is any way to remove the gravel and plant trees in the eight foot swath. Ms. Murphy said that the gravel is there for water drainage. She said that it pitches down. Mr. Himmelberger said that it appears that drainage is to the property line versus to the back yard and the Perrin Park line. Ms. Murphy said that they also have a drain system. She said that the tennis wall is 15 feet high.

Mr. Covo asked about cover that could be placed on the wall. Mr. Shind said that they could put up some kind of faux greenery along the wall if that is something that Mr. Himmelberger and Dr. Corzo would like them to explore.

Ms. Murphy said that she spoke with Cricket Vlass, who is the arborist for the town, and they discussed the ash tree that was dead and the trees on 50 Parker Road that the neighbor said were killed by the Murphy's landscapers. She said that Ms. Vlass said that the trees were hemlocks. She said that cutting branches would probably not kill them. She said that they probably died due to woolly adelgid, which is an invasive insect that attacks hemlocks. She said that Ms. Vlass said that most of the hemlocks in town are dying because of that. She said that her family believes that they are not responsible for killing the trees. Mr. Becker said that good documentation was submitted after the previous hearing. He said that the Board does not want to deal with hearsay speculation. He said that the Board wants to deal with documentation.

Ms. Murphy said that Dr. Corzo removed trees and planted new ones. She asked why the trees were only 6 feet. Mr. Becker said that is not part of this case.

Mr. Becker said that he started looking at the timeline for this at 2008. He said that as he moved through time, he postulated what would have happened in the best of all worlds. He said that when some of the trees started showing distress or damage or there was a concern that they might be removed, under the 2008 special permit, someone should have come forward and asked for a modification to the permit. He said that he asked the Building Inspector if he knew about other sport courts in town because he wanted to look at what they had to do for permitting. He said that he was told that there are 36 sport courts in town but did not see a lot of permitting. He said that he looked at the Zoning Bylaw for uses of property in residential districts. He said that sport courts are not enumerated in the bylaw, which means that they would come as an allowed use, either because they are an accessory use or there was a path to a special permit. He said that the Building Inspector said that it is an accessory use. He said that it was good to see the photographs from Dr. Corzo because they helped him to extend the timeline beyond 2019. He said that the trees identified as D, E and F in Mr. Shind's letter were removed in 2021, after the sport court was built. He said that he is struggling with what he would have done if the permit application had come before the Board under those conditions. He said that the Board has to think about what mitigations it would have sought at the time that the application was made and how do they fit in with the rest of it. He questioned whether the Board has everything it needs to resolve the case.

Mr. Adams said that the Board needs to discuss whether it wants something done or undone and what is the Board's enforcement authority to see that is does get done or undone. He said that he was still not convinced that the tennis wall in its current location will not create additional hardships to the Corzos. He said that muffling the sound of the ball on the tennis wall defeats the purpose. He said that to do that you would create an absorbent surface that may affect how the ball bounces off the wall. He said that it is so much closer to the Corzo's property than any other place that they could locate it on the property. He said that sight and sound issues could be mitigated to some degree by relocating it somewhere else. He said that he looked carefully at the plans that were submitted with the details of the back of the tennis wall. He said that he was trying to get a sense of how difficult it would be to relocate it. He said that it appears that the vertical supports are integral to the concrete or pre-cast concrete base. He said that he was not sure if that was part of the court or separate. He said that it looks like a system where the base posts are secured to the ground all around the court and integral to the court surface. He said that the wall is supported by gravity loads, impact and wind loads by diagonal, horizontal steel structural elements that go down to the posts driven into the ground. He said that the wall, posts and screen to the far end of the court could be relocated further away.

Mr. Becker said that he looked at this as a permit modification and the conditions that go along with it. He said that the challenge in this case is sorting the impacts of the trees versus some of the other impacts that are not tree but are inherent in the whole installation.

Mr. Covo said that if the Murphys were to move the backboard from its current location to along the Perrin Park line, Dr. Corzo will still see it. He said that Dr. Corzo will see it even if it is on the far side, opposite her. He said that it comes down to screening.

Mr. Himmelberger discussed screening the entire exterior of the rear in black chain link. He said that currently the tennis wall is set off by the green and what appears to be unfinished wood of beige or tan. He said that your eye may be more drawn to it than if it was black. He said that he did not know if adding faux screening will work. He said that nothing will block it until the trees grow up and screen it. Ms. Murphy asked if painting the tennis wall black would be better than painting green. She said that they could put up some faux screening to see if the Corzos like it. Dr. Corzo said that the fence is 6 feet and the tennis wall is 15 feet high, approximately 20 feet wide, and 8 feet from the property line. She said that if it is put against Perrin Park, people will not see the back of the wall because there are so many trees.

Mr. Becker said that the Board needs to focus on the public hearing. He said that the proceeding can be stayed if the parties would like to negotiate.

Ms. Murphy said that the tennis wall was built with a bracing system with poles, distances and certain measurements between that are not congruent with the other sides of the court. She said that they would have to redo the fencing system if the wall is relocated.

Mr. Himmelberger discussed fencing. He discussed attaching panels at the back of the tennis wall. He said that what is currently there is less attractive than what would be there if the wall was flipped around. He said that if the smooth side faces Dr. Corzo, it would still be an issue but less of one.

Mr. Becker asked if any member of the public wished to speak to the petition.

Mr. Adams said that the Board seems to be focusing on the tennis wall and deciding whether painting it a uniform color or creating a flat surface on the back would make the structure not so apparent. He said that it is currently a natural wood framework. He said that faux ivy that is kept functioning in its purpose will hide it and may help to dampen sound. He said that the Board would expect the Murphys to go along with their offer in the letter to remove the sound capabilities from the court area and planting more trees. He said that planting the trees in the original location may not be the best solution. He said that the more trees that get put along the Murphy/Corzo line, the better it will be for the Corzos. Mr. Shind said that the intent was to put 6 new evergreen trees between 48 and 50 Parker Road.

Mr. Adams asked if it would be possible to plant some sort of vegetation between the wall and the property line. Mr. Becker said that there are trees that can survive in an 8 foot width and would not necessarily need soil for the full eight foot width for its full length. He said that detail that can be worked out once the Board has to whole framework.

Mr. Becker discussed procedure for the Board.

Mr. Himmelberger said that it is not known what is in the 8 foot swath between the tennis wall and the property line. He asked if there is any opportunity to ask the installer if there is anything that could be planted there.

Mr. Shind said that the sole remaining issue seems to be how to screen the tennis wall. He said that his client offered and is still willing to screen it by painting, finishing, faux screening, or shrubs. He said that could be a condition.

Ms. Murphy said that she asked a landscaper from Weston Landscaping about putting trees behind the backboard. She said that it is on a slant. She said that she was told that there is not enough width and the trees would not survive. Mr. Adams said that it would have been useful if Ms. Murphy had brought someone like that to the hearing. He said that the Board would get an idea of what is feasible.

Mr. Becker discussed continuing the hearing so that the Board can review draft conditions versus discussing conditions at this hearing. Mr. Adams said that he would prefer to continue the hearing. He discussed faux screening. He said that Dr. Corzo and Ms. Murphy could consult their landscapers about planting vegetation behind the tennis wall.

Mr. Becker said that when the Board decided in 2008 that only one tree could come down they should have known that those trees would die sooner rather than later. He said that there was not much guidance in the minutes as to what the Board's thoughts were when they did it. He said that the current Board has to deal with it and find ways to balance the issue.

Mr. Covo said that there are too many issues going on and there are other considerations to be made. He said that there is an opportunity for the parties to get together to brainstorm. He said that the Board could do it through a business meeting.

Mr. Becker discussed keeping the public hearing open so that the Board can take input from the two parties. He said that the next scheduled public hearing is on September 7, 2023.

Mr. Adams said that at the next public hearing, the Board will hear what was discussed between the parties. He said that he would like to see written documentation or a representative from a reputable landscaping company present to discuss the issues.

Mr. Adams moved, Mr. Covo seconded the motion, and the Board voted unanimously to continue the hearing to September 7, 2023.

Mr. Covo voted aye.

Mr. Adams voted aye.

Mr. Becker voted aye.

As there was no further business to come before the Board, the hearing was adjourned at 9:14 pm.

Respectfully submitted,

Lenore R. Mahoney
Executive Secretary

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