



Town of Brookline

Massachusetts

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BOARD OF APPEALS
Jesse Geller, Chairman
Mark Zuroff
Johanna Schneider

Town Hall, 1st Floor
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Brookline, MA 02445-6899
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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2019-0042
12 EUSTON STREET, BROOKLINE, MA

Petitioner, Heleni Thayre, filed an administrative appeal of a Building Department Notice of Violation, dated May 10, 2019, which cited the Petitioner for renting their property as a short term rental advertised on Airbnb.com which was considered a violation of the Town of Brookline Zoning By-Law. The administrative appeal was filed on June 10, 2019.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed August 29, 2019 at 7:00 PM., in the Select Board's Hearing Room as the date, time and place for the public hearing. Notice of the hearing was mailed to the Petitioners, to their attorney, Scott Gladstone, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on August 15, 2019 and August 22, 2019 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

Notice of Hearing

Pursuant to M.G.L., C. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

12 EUSTON STREET, #3, BROOKLINE, MA 02446 - Appeal of Notice of Violation against AirBnB unit, in a(n) M-2.0 APARTMENT HOUSE on 08/29/2019 at 19:00 in the 6th Floor Select Board's Hearing Room (Petitioner/Owner: THAYRE, HELENI K) Precinct 1

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

The Town of Brookline does not discriminate in its programs or activities on the basis of disability or handicap or any other characteristic protected under applicable federal, state or local law. Individuals who are in need of auxiliary aids for effective communication in Town programs or activities may make their needs known by contacting the Town's ADA Compliance Officer. Assistive Listening Devices are available at the Public Safety Building for public use at Town of Brookline meetings and events. Those who need effective communication services should dial 711 and ask the operator to dial the Town's ADA Compliance Officer.

If you have any questions regarding this Notice or the Assistive Listening Device, please contact Caitlin Haynes at 617-730-2345 or at chaynes@brooklinema.gov.

**Jesse Geller, Chair
Christopher Hussey
Mark Zuroff**

Publish: 08/15/2019 & 08/22/2019

On August 29, 2019 at the time and place specified in the notice, this Board held a public hearing. At the August 29th hearing, the Petitioner requested that the public hearing be continued to December 5, 2019. The Board agreed and continued the case to December 5, 2019. The Board was unable to schedule a meeting for December 5, 2019, so the public hearing was rescheduled for December 19, 2019. Notice of the hearing was mailed to the Petitioners, to their attorney, Scott Gladstone, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on December 5, 2019 and December 12, 2019 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

Notice of Hearing

Pursuant to M.G.L., C. 40A, the Board of Appeals will conduct a public hearing on **12/19/2019 at 7:30 PM** in the **6th Floor Select Board's Hearing Room, Town Hall, 333 Washington Street, Brookline**, on the following:

12 EUSTON STREET, #3, BROOKLINE, MA 02446. *Petitioner – Heleni Thayre.* Administrative Appeal of Notice of Violation against AirBnB unit. M-2.0 APARTMENT HOUSE Zone. Precinct 1.

*Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the **Planning and Community Development Department at 617-730-2130**, or by checking the Town meeting calendar at: www.brooklinema.gov.*

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**Jesse Geller, Chair
Mark Zuroff
Johanna Schneider**

Publish: 12/05/2019 & 12/12/2019

Present at the continued hearing on December 19th were Chair Johanna Schneider and Board Members Kate Poverman and Randolph Meiklejohn. Also present at the hearing were Charlotte Leis, Zoning Coordinator & Planner, and Joe Braga, Deputy Building Commissioner.

The case was presented by Scott Gladstone, Attorney at Law. Also in attendance was the Petitioner and owner of the property, Heleni Thayre.

Attorney Scott Gladstone waived the public reading of notice.

Mr. Gladstone stated that the case is an administrative appeal of a notice of violation. Mr. Gladstone opined that the Petitioner's use of her property for the purposes of short-term rentals falls under Use #51, (which states in part "within a dwelling unit, the renting of not more than two rooms as a lodging without separate cooking facilities and for not more than two lodgers") and relies on the definition of a

“lodger” (defined in By-law Section 2.12 as “a person who rents space for living or sleeping purposes and who is not within the second degree of kinship to the lessor”). Mr. Gladstone explained that the Building Department has read into that definition the idea that “lodger” applies only to people staying more than 30 days. Mr. Gladstone contended that the definition of “lodger” does not explicitly indicate a time limit and therefore short-term lodgers should be allowed.

Petitioner Heleni Thayre explained her history with the apartment and why she wants to be able to use it as a short-term rental rather than for long-term rentals. She has had bad experiences with long-term rentals, but has only had good experiences with short-term rentals. She has never had a restriction on how long her tenants could rent for. She believes it is not safe for her to be renting out to long term rentals due to her age.

Board Chair Johanna Schneider asked whether Use 51 is permitted in the district by Special Permit. Mr. Gladstone responded that it was a by-right use. Board Chair Schneider asked if the Petitioner’s short-term rental would be prohibited or allowed by Special Permit if it were categorized under Use 7 (Lodging House, defined in Section 12.2 of the By-law as a dwelling structure in which sleeping accommodations without individual cooking facilities are designed to be let for compensation to four or more persons not within the second degree of kinship to the owner or operator.”). Mr. Gladstone stated that it would be allowed by Special Permit, but since Use 7 is for four (4) or more lodgers, it doesn’t apply in this case. Board Chair Schneider asked for more information on the configuration of the apartment. Mr. Gladstone stated that it has 1.5 baths, three (3) bedrooms, and one (1) kitchen. He further noted that Use 51 allows for renting of spare bedroom. Board Chair Schneider asked how many rooms were available for short-term rental tenants. Petitioner Thayer said one (1) room. Mr. Gladstone added that the room doesn’t have separate kitchen facilities.

Board Member Kate Poverman asked if the Petitioner had registered with the Commonwealth as a Short-Term Rental Operator. Petitioner Thayre said that she had to close down her operation before she could register, but will register with the Commonwealth if allowed to reopen. Board Member Poverman disclosed that she has a short-term rental on Cape Cod in Truro. She stated that the Commonwealth permits short-term rentals to operate, and allows communities to decide whether or not to allow them. Mr. Gladstone added that the Town is collecting taxes on short-term rental uses collected by the Commonwealth, despite the Building Department considering them to be an illegal use.

Deputy Building Commissioner Joe Braga circulated a December 19, 2019 memorandum of the Building Commissioner regarding his interpretation of whether "lodger" refers to short or long term lodgers. According to the memorandum, the Building Department has long interpreted Use 51 as allowing only long term rentals (non-transient/greater than 30 days). The memorandum further states that the By-law is one of inclusion such that if a use is not permitted in the Table of Use Regulations, it is not permitted and, because short term rentals are not listed on the Table of Use Regulations, it is the position of the Building Commissioner that the use is not allowed. Mr. Braga in his testimony noted that various Town departments have been working on addressing this issue for months so that the Town can regulate them properly. Mr. Braga explained that the Building Department deals with illegal short-term rentals all the time, including clear and flagrant violations of the zoning code and life safety regulations. Board Member Randolph Meiklejohn asked for a brief recess so that Board members could review the Building Commissioner's memo in more detail.

The Board entered into a 5-minute recess.

Mr. Gladstone requested to address the memorandum. Board Chair Schneider permitted him to do so. According to Mr. Gladstone, in the memorandum, the Building Commissioner acknowledges that by-law does not explicitly address the time frame of a lodger's stay, and that he requests deference to the

Building Department's interpretation. Mr. Gladstone asserted that the plain reading of the By-law should allow for both short term and long term lodgers. Mr. Gladstone stated that he had been talking with the Building Commissioner for two years about short-term rentals, and that he finally wrote his own proposal for a zoning change to address this issue since he felt there was no movement by the Town on the issue. Town Meeting did not act on Mr. Gladstone's article in part because the Planning Department said they would bring a proposed amendment to the next Town Meeting. Mr. Gladstone conceded that if the Board were to approve this request it would create a new non-conformity for this unit, but not generally. Mr. Gladstone insisted that the Petitioner's use clearly falls within Use 51 when read in plain English, as there is nothing in the By-law that distinguishes between a short-term and a long-term lodger.

Board Chair Schneider asked whether the agreements that Airbnb users enter into are technically a lease - and therefore are they are renting - or are they something else. Mr. Gladstone explained that there is a contract, in some ways even more comprehensive than with a hotel. Mr. Gladstone argued that renting is that act of trading money for the right to occupy a living space so Airbnb users are indeed renters. Board Chair Schneider asked about the standard duration of Airbnb durations. Petitioner Thayre said that she rents for a maximum of eight (8) days and minimum of two (2) days, but that the average is probably about three (3) days.

Board Member Meiklejohn asked why there was so much focus on the 30-day threshold. Mr. Braga explained that the Building Code is clear on the issue, but it's not referenced in the Zoning By-law.

Board Chair Schneider asked whether there were any members of the public in attendance who wished to speak on the matter.

Marsha Lapson (resident of Stearns Road) asked where the Airbnb guests park. Petitioner Thayre explained that she used to offer her parking space to guests but it was used so infrequently that she no

longer offers parking and tells prospective guests that if they need parking they should seek other accommodations.

Carole Capper (12 Euston Street, #2) stated she lives directly under the subject short-term rental unit. She had talked to Mr. Braga a lot about this issue and reported the violation. She doesn't want the business operating in her building. She stated that the average stay as she has experienced it is two (2) days and she can clearly hear when people come in and out. She said that she bought her condominium with the expectation that the building wouldn't be operated as a business. The operation of the short-term rental has created an unnecessary burden on the condominium in general relating to insurance, water, noise, and wear and tear on the building. Such activity had not been considered when writing condominium documents. Ms. Capper said that it's one thing in a house, but different in a shared living space. She was not consulted when unit started getting rented on AirBnb. She has been to meetings by Planning Department regarding short-term rentals. She concluded by saying that she was fine with the long term rentals Petitioner Thayre has had over the years, but not the transient renters.

Ana Albuquerque (24 Euston St, #2, Pct 1 Town Meeting Member) stated that she doesn't want her neighbors using condos as short-term rentals. Heating and water are shared expenses, so she doesn't want neighbors using more heating/water without her having a say but forcing her to subsidize it.

Board Chair Schneider asked if members of the public had any issues relating to this specific enforcement request.

Paul Warren (71 Carlton St, Town Meeting Member) said he is concerned about the decision tonight because he thinks it is very important. He stated that he is intimately familiar with issue of transient vs. long-term rentals. He added that zoning is about expectations, and the Town is not currently expecting to deal with short-term rentals. Mr. Warren stated that he wants this issue to be decided by Town Meeting, not by the Zoning Board of Appeals.

Board Chair Schneider clarified that the primary question is whether this case falls under Use 7 or Use 51 – operation issues are not really relevant. Mr. Gladstone argued that short-term rentals could fall under Use 7 or Use 51 depending on whether they rent to four (4) or more people (Use 7) or two (2) or fewer people (Use 51).

Board Chair Schneider asked if Town Counsel has provided an opinion. Zoning Coordinator Charlotte Leis stated that Counsel had worked on the memo with the Building Commissioner, so Counsel has endorsed the Building Commissioner’s interpretation.

Board Member Meiklejohn suggested that since short-term rentals are not listed in the Use Table, the By-law is effectively saying that short-term rentals fit within none of the uses currently documented in the use table and are therefore prohibited.

Board Chair Schneider said that she is very uncomfortable making a decision about something that is the subject of pending legislation within the town. Clearly the issue of short-term rentals is not dealt with in the By-law, and clearly it needs to be. Board Chair Schneider said that she is personally against short-term rentals being operated without the support of the neighborhood, but that that is a separate issue from whether or not it’s permitted by the Zoning By-law. Ms. Schneider wasn’t confident that short-term rentals count as rentals at all but was certain that the By-law did not contemplate the use. She felt that short-term rentals fell into a class of their own and therefore should be listed as an allowed use within the use table.

Board Members Poverman added that the Town would not be in violation of state law if the Town forbade short-term rentals. She stated that she was hesitant to go against the interpretation of the Building Commissioner.

Board Chair Schneider summarized that the main issue is whether the short-term rental use was contemplated in the definitions and use table of the By-law. She stated that she doesn’t think it was and

added that there is a good case to be made that short-term rentals are a separate use. She chided the Town for not having passed regulations relating to this use previously. She opined that this is a use that is different in kind than either of the two uses this could be shoehorned into (Use 7 or Use 51). In her opinion, until the Town passes a short-term rental by-law, this is not a permitted use under the By-law.

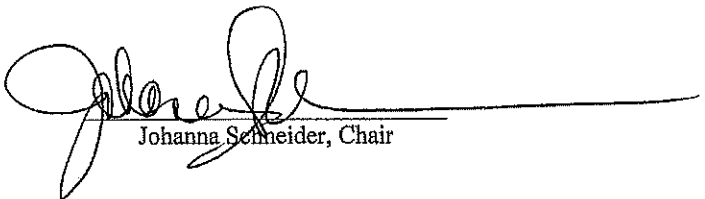
Board Member Poverman stated that because the use is not specifically allowed and because it is not a state-given right, it is not allowed by the Zoning By-law.

Board Member Meiklejohn agreed with Board Member Poverman and Board Chair Schneider.

Accordingly, the Board voted unanimously to reject the Petitioner's Administrative Appeal (filed June 10, 2019) and uphold the Building Department's Notice of Violation (dated May 10, 2019) which cited the Petitioner for renting their property as a short term rental advertised on Airbnb.com – a use not allowed under the Town's Zoning By-law.

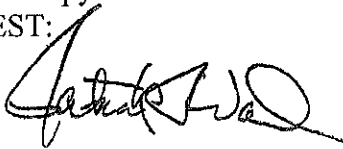
Unanimous Decision of
The Board of Appeals

Filing Date: Feb 02/05/2020



Johanna Schneider, Chair

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals