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MAYOR

CITY OF SALEM, MASSACHUSETTS BOARD OF APPEALS

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2021 FEB 26 AM 9:30
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February 18, 2021 Decision City of Salem Board of Appeals

Petition of JOHNNY POLANCO for a special permit per Section 8.2.4 *Entrance Corridor Overlay District: Fences* to allow a six-foot tall decorative concrete wall at the single-family house at 140 HIGHLAND AVENUE (Map 14, Lot 264) (R1 and ECOD Zoning Districts).

A public hearing on the above Petition was opened on November 18, 2020 pursuant to M.G.L. Ch. 40A, § 11. The hearing was continued to December 16, 2020; continued to January 20; continued to February 17, 2021; and closed on February 17, 2021.

On November 18, 2020, Mike Duffy (Chair), Peter Copelas, Rosa Ordaz, Carly McClain, Paul Viccica, and Jimmy Tsitsinos were present; Steven Smalley was absent. On December 16, 2020, Mike Duffy (Chair), Rosa Ordaz, Paul Viccica, Carly McClain, and Steven Smalley were present; Peter Copelas, and Jimmy Tsitsinos were absent. On January 20, 2021, Mike Duffy (Chair), Paul Viccica, Rosa Ordaz, Carly McClain, and Steven Smalley were present; Peter Copelas, and Jimmy Tsitsinos were absent. On February 17, 2021 Mike Duffy (Chair), Paul Viccica, Carly McClain, and Steven Smalley were present; and Peter Copelas, Rosa Ordaz, and Jimmy Tsitsinos were absent.

The petitioner seeks a special permit per Section 8.2.4 *Entrance Corridor Overlay District: Fences* to allow a six-foot tall decorative concrete wall at the single-family house at 140 Highland Avenue.

Statements of Fact:

1. In the Statement of Grounds that accompanies the petition date-stamped November 4, 2020 the petitioner requested a special permit per Section 8.2.4 *Entrance Corridor Overlay District: Fences* “to allow a 6 foot High [sic] decorative concrete wall”.
2. 140 Highland Avenue is owned by petitioner Johnny Polanco.
3. 140 Highland Avenue is a single-family home in the Residential One-Family (R1) zoning district and the Entrance Corridor Overlay District (ECOD).
4. At the time of the application, the property contains one single-family home, and an existing concrete wall along the periphery of the property.
5. Per Section 8.2.4 *Fences* of the Salem Zoning Ordinance, “no fence along the front or side lot line shall be more than four (4) feet in height”.
6. The proposal is to retain a wall on the property that exceeds the maximum allowable fence height in the Entrance Corridor Overlay District (ECOD). Per the application, the wall is described to be a six (6) feet tall.

7. The requested relief, if granted, would allow the petitioner to retain an existing decorative concrete wall that exceeds the maximum allowable height of four (4) feet.
8. Due to the ongoing COVID-19 pandemic and related precautions and Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, the November 18, 2020 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
9. At the November 18, 2020 public hearing, petitioner Johnny Polanco discussed the proposal. Mr. Polanco presented a plot plan and photographs, and discussed his application. Mr. Polanco explained his intention was to construct a four-foot wall based on a building permit he had received. He stated that the property is uneven, so he built a fence that exceeds the permitted four feet in order to maintain what he believes is a good visual appearance. Mr. Polanco explained the wall was built for safety, as he was noticing debris flying into his yard and house from Highland Avenue, some of which have damages his house and nearly hit his children.
10. At the November 18, 2020 public hearing one (1) member of the public commented on the proposal. Barbara Peckham of 144 Highland Avenue introduced herself as the abutting property owner. Ms. Peckham stated that the wall runs along her driveway and creates visibility issues for her exiting her driveway onto Highland Avenue. She stated that she has difficulty seeing people approaching on the sidewalk from the direction of 140 Highland Avenue around the corner of the wall.
11. At the November 18, 2020 public hearing the Board requested that the applicant provide drawings of the fence with dimensions, which at the time of the hearing, had not been provided by the petitioner.
12. At the November 18, 2020 public hearing of the Board of Appeals, the board voted five (5) in favor (Carly McClain, Paul Viccica, Jimmy Tsitsinos, Rosa Ordaz, and Mike Duffy (Chair)) and none (0) opposed to continue the hearing to the December 16, 2020 public hearing.
13. For the same reasons as noted in statement #8 above, the December 16, 2020 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
14. At the December 16, 2020 public hearing the petitioner, Johnny Polanco, introduced his attorney, Vincent Phelan, who would represent him going forward. Mr. Phelan stated that he was only recently informed of the case and was unable to adequately review the petition and materials. Mr. Phelan requested to continue the application.
15. At the December 16, 2020 public hearing Board member Carly McCain stated that there were safety concerns regarding this proposal and suggested that the matter not be continued beyond the January public hearing. Mr. Phelan agreed. Chair Duffy suggested that Mr. Phelan contact the abutting neighbor regarding the safety issue.
16. At the December 16, 2020 meeting of the Board of Appeals, the board voted five (5) in favor (Paul Viccica, Rosa Ordaz, Steven Smalley, Carly McClain, and Mike Duffy (Chair)) and none (0) opposed to continue the hearing to the January 20, 2021 public hearing.

17. On January 19, 2020, the petitioner, Johnny Polanco, submitted a petition with 27 signatures in support of the petition. Mr. Polanco also submitted additional photographs showing the wall and various objects he states have “been hitting [his] fence”.
18. On January 20, 2020, Mr. Polanco submitted a letter from City Councilor Domingo Dominguez in support of the petition.
19. For the same reasons as noted in statement #8 above, the January 20, 2021 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
20. At the January 20, 2021 public hearing, petitioner Johnny Polanco was represented by attorney Vincent Phelan. Mr. Polanco and Mr. Phelan re-stated that the wall was built to protect the petitioner’s family from debris that he reports flies onto his property from Highland Ave.
21. At the January 20, 2021 public hearing the Board reviewed and discussed the public comment submitted ahead of the meeting. Mr. Viccica asked if Mr. Polanco has ever walked in the abutting property’s driveway to see how much view of the sidewalk and street is obstructed by the wall. Mr. Polanco responded that he would not have built the wall if he thought it was unsafe. Mr. Polanco explained that he received a building permit for the wall, and only realized the wall was out of compliance when the abutting neighbor expressed concern. Mr. Phelan stated there was no intention to make the wall higher than allowed, but that it stemmed from the construction team insisting on maintaining an even level across the top of the wall.
22. At the January 20, 2021 public hearing one (1) member of the public, the abutting neighbor, Barbara Peckham, spoke in opposition to the proposal. No (0) members of the public spoke in opposition to the proposal. At least six (6) members of the public commented on the proposal. Some spoke positively of the benefits of the lighting along the top of the wall, and expressed understanding the petitioner’s concern for their family’s safety. Some members of the public expressed concern that the wall is creating an unsafe condition for the abutter, Ms. Peckham.
23. At the January 20, 2021 public hearing Ward 4 City Councilor Timothy Flynn stated he has visited the site with Councilors Dibble and Dominguez but has been unable to have a conversation with the abutter, Ms. Peckham. Councilor Flynn expressed willingness to help negotiate an agreement between the petitioner and Ms. Peckham.
24. At the January 20, 2021 public hearing Board member Rosa Ordaz stated concern that continuing will not lead to a resolution. She noted that at the November and December meetings the board recommended that the petitioner talk to his neighbor to discuss an agreement, but there has been little sign that a successful discussion is a possibility. Carly McClain noted that at the December meeting she expressed not wanting to continue the petition past the January meeting because of the safety issue. She acknowledged the communication difficulties due to the pandemic, but still has reservations about continuing. Ms. McClain expressed a willingness to continue so the applicant can have a little more time to discuss the proposal with the neighbor, and Councilor Flynn can help mediate.

25. At the January 20, 2021 meeting of the Board of Appeals, the board voted five (4) in favor (Paul Viccica, Mike Duffy (Chair), Carly McClain, Steven Smalley) and one (1) opposed (Rosa Ordaz) to continue the hearing to the February 17, 2021 public hearing.
26. On February 11, 2021, Attorney Phelan emailed Staff Planner Lev McCarthy to update the Board on Mr. Polanco's attempts to discuss the proposal with his neighbor at 144 Highland Ave. Mr. Phelan wrote that Councilor Flynn, "attempted to broker a meeting between the neighbors, to discuss a mutually agreeable settlement, and this request was respectfully declined". Mr. Phelan also reported that Mr. Polanco, "sent a settlement proposal to the neighbor, hand delivered, via regular mail, and certified mail. We have yet to receive a response".
27. On February 16, 2021 the petitioner, Johnny Polanco, submitted via email a series of images depicting alterations to the corner of the wall adjacent to the driveway for 144 Highland Ave. The images appear to show two options: 1) lowering a portion of the wall at the corner and replacing it with vertical bars, or 2) inseting the corner to make a beveled corner.
28. On February 17, 2021, the abutting neighbor, Barbara Peckham of 144 Highland Avenue submitted a video that Ms. Peckham says was recorded by Councilor Flynn. The video appears to show the point-of-view of a driver pulling out of Ms. Peckham's driveway at 144 Highland Avenue.
29. For the same reasons as noted in statement #8 above, the February 17, 2021 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
30. At the February 17, 2021 public hearing, petitioner Johnny Polanco was represented by attorney Vincent Phelan. Mr. Phelan stated that the petitioner has attempted to contact the abutting neighbor to discuss options to adjust the fence to accommodate the safety concerns. He stated they have been unable to make contact or have a discussion. Mr. Polanco and Mr. Phelan presented two ideas for how to adjust the wall to accommodate the safety concerns. As described in statement #27 above, the options were both intended to adjust the design of the wall at the corner of the front lot line and the side lot line that abut with the neighboring property at 144 Highland Avenue.
31. At the February 17, 2021 public hearing, the Board reviewed the video recording submitted by Ms. Peckham described in statement #28 above.
32. At the February 17, 2021 public hearing Building Commissioner Thomas St. Pierre, and Board Member Paul Viccica discussed the two corner design options proposed by the petitioner. Mr. St. Pierre and Mr. Viccica noted that moving the wall back from the corner will make a considerable improvement to the visibility. Moving the wall back from the corner would not only improve the safety of the abutting neighbor and the applicant, but would improve the safety of people using the sidewalk at this corner of the property.
33. At the February 17, 2021 public hearing one (1) member of the public, the abutting neighbor, Barbara Peckham, commented on the proposal. Ms. Peckham acknowledged receiving letters from the applicant. Ms. Peckham stated that the materials she received from the applicant only included one of the design ideas described above in statements #27 and #30 above, so the public hearing is the first time she is seeing both design ideas. Ms. Peckham expressed concern about safety. She described having difficulty seeing if people are

approaching the driveway along the sidewalk. Ms. Peckham confirmed that she was contacted by Councilor Flynn who was attempting to facilitate a dialogue between her and the petitioner. Ms. Peckham stated that she declined the invitation.

34. At the February 17, 2021 public hearing Building Commissioner Thomas St. Pierre and Board member Paul Viccica discussed what design changes to the wall would suffice to make the proposal safe enough to be approved. Mr. Viccica stipulated that the design changes could be included in the Zoning Board of Appeals decision as a special condition.
35. At the February 17, 2021 public hearing Board member Carly McClain stated that the wall seems to have some positive effects on safety and some negative effects on safety. Ms. McClain recalls at the January 20, 2021 public hearing there were public comments that spoke in support of the proposal, describing how the lighting on the wall increased visibility. Ms. McClain also notes that the applicant has suggested the wall improves the safety of his family, protecting his children from debris that flies off Highland Avenue. Ms. McClain stated that the positive and negative should be considered.
36. At the February 17, 2021 public hearing Mr. Viccica suggested that the wall could be adjusted to remove the post on the corner of the lot, and replace it with two posts, one along the front lot line, and a second along the side lot line adjacent to 144 Highland Avenue. Both posts would be moved so they are no closer than twelve (12) feet to the corner of the lot. A new section of wall would connect those two posts at a forty-five (45) degree angle. Chair Duffy expressed that the design alterations described by Mr. Viccica seemed to be an appropriate compromise that preserves the safety of the petitioner and the abutting neighbor.

The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearings, and after thorough review of the petition, including the application narrative and plans, makes the following **findings** that the proposed project meets the provisions of the City of Salem Zoning Ordinance:

Special Permit Findings:

The Board finds that the proposed modifications will not be substantially more detrimental than the existing nonconforming structure to the neighborhood:

1. Social, economic, or community needs are served by this proposal.
2. Traffic flow and safety, including parking and loading: No negative impact is anticipated. The design alterations included as a special condition to this decision preserves the safety of the petitioner and the neighborhood.
3. Adequate utilities and other public services already service the structure.
4. Impacts on the natural environment, including drainage: No negative impact is anticipated.
5. Neighborhood character: The wall is in keeping with the neighborhood character.

6. Potential fiscal impact, including impact on City tax base and employment: There is a potential positive fiscal impact, including enhancing the City's tax base, as a result of the improvements to the property.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted four (4) in favor (Mike Duffy (Chair), Paul Viccica, Carly McClain, Steven Smalley) and none (0) opposed to grant Johnny Polanco a special permit per Section 8.2.4 *Entrance Corridor Overlay District: Fences* to allow a six-foot tall decorative concrete wall at the single-family house at 140 Highland Avenue.

Standard Conditions:

1. Petitioner shall comply with all city and state statutes, ordinances, codes and regulations.
2. All construction shall be done as per the plans and dimensions submitted to and approved by the building commissioner.
3. Petitioner shall obtain a building permit prior to beginning any construction.
4. A Certificate of Inspection is to be obtained.
5. Petitioner is to obtain approval from any City Board or Commission having jurisdiction including, but not limited to, the Planning Board.
6. All construction shall be done per the plans and dimensions, submitted to and approved by this Board, as amended. No change, extension, material corrections, additions, substitutions, alterations, and/or modification to an approval by this Board shall be permitted without the approval of this Board, unless such change has been deemed a minor field change by the Building Commissioner in consultation with the Chair of the Board of Appeals.

Special Conditions:

1. Modification to the existing wall will be done per the following description. No portion of the wall will be built on the triangle of land bounded as follows: One corner ("first corner") at the intersection of the front lot line, and the side lot line abutting 144 Highland Avenue; a second corner twelve (12) feet from the "first corner" along the front lot line; and a third corner twelve (12) feet from from the "first corner" along the side lot line abutting 144 Highland Avenue.
2. Any structures that are incumbered by the modification will be relocated by the property owner at the owner's expense. The piece of land belonging to 140 Highland Avenue outside the wall shall be maintained by the owner.

Mike Duffy / LM
Mike Duffy, ^{Chair}
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.