COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
LAURINDA MONTEIRO (TEIXEIRA)
Complainant

v. DOCKET NO. 06-BPR-02560

CITY OF BROCKTON ZONING BOARD
Respondent

Appearances: Linda M. Davidson, Esq. for Complainant
Kevin P. Feeley, Jr., Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On October 17, 2006, Complainant, Laurinda Monteiro, filed a housing complaint with this Commission alleging that Respondent, City of Brockton Zoning Board of Appeals, discriminated against her on the basis of national origin, race, color and gender in violation of G.L. c. 151B §4(6) by denying her a building permit, and by denying her appeal for zoning relief, which prevented her from constructing a home on property she owned in a residential district in the City of Brockton. On September 10, 2007, the Investigating Commissioner amended the Complaint to add a violation of G.L. c. 272, §§92A, 98, and 98A, the public accommodations law. The Investigating Commissioner found probable cause to credit the allegations of the complaint and denied a Motion to Dismiss by Respondent arguing that the Commission lacked jurisdiction to address the issues raised in the complaint. Conciliation efforts were unsuccessful

and the matter was certified for hearing. The only issue before me is Complainant's June 2006 request for a variance.

Respondent subsequently filed a Petition in Plymouth County Superior Court seeking review of the MCAD's exercise of its jurisdiction and its finding of probable cause pursuant to G.L. c. 231A, §§ 1 et seq., c. 249 §4, c. 151B §6, and c. 30A §14. The proceedings in Superior Court were stayed in July of 2009. The matter was certified for hearing at the Commission and a hearing was held before the undersigned Hearing Officer on October 4 and 5, 2010. At the commencement of the Hearing, Respondent renewed its Motion to Dismiss on the grounds that MCAD lacks jurisdiction to rule on local zoning matters and that any appeal from a decision of the Zoning Board of Appeals properly lies in the Land Court or Superior Court. The Hearing Officer reserved a ruling on the issue until after the facts had been presented and Respondent preserved its right to raise the jurisdictional issue on appeal.

Subsequent to the Hearing, Complainant submitted a post-hearing brief. Respondents did not file a post-hearing brief. Having considered the record evidence and the arguments of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Laurinda Teixeira Monteiro is a black female of Cape Verdean descent who resided in Brockton, Massachusetts for many years. In 1979, Complainant purchased a house on property at 107 Litchfield, Street in Brockton now known as Plot 1, with land adjacent to the property now known as Plot 2. (Ex. C-2) She paid $42,500 for the house and property. At the time of purchase in 1979 there was one deed for 13,644 square feet of land and there were not two lots. (Ex. C-7)

2. Complainant purchased the land with the understanding that she would be able to subdivide the land and construct a home on Plot 2. She testified that the seller informed her that she would require a zoning variance to build a home on Plot 2, but she did not know what this meant. Complainant testified on cross-examination that in 1985 or 1986 she hired a surveyor and had the land sub-divided into two parcels. Plot 1 is 6,943 square feet and Plot 2 is 6,480 square feet. (Ex. C-2) The sub-division resulted in the house on Plot 1 encroaching onto Plot 2 and rendered Plot 2 unbuildable. Complainant stated that she did not review the surveyor's plan and did not know about the encroachment at the time. She does not remember going before the town Planning Board prior to sub-dividing the land but testified she now understands that at the time she required the City's approval to sub-divide the land.

3. Complainant testified that she anticipated eventually building a home on Plot 2 first for her mother and later for her daughter. In 1986 Complainant applied to the Zoning Board of Appeals for a variance seeking relief from lot size and frontage requirements for Plot 2, representing that she sought to build a home on the lot and that her sister expressed a desire to purchase it. The petition was opposed by City Councilor Packard and four neighbors, and was denied for insufficient showing of hardship. Attorney Philip Nessralla was Chairman of the Board and voted to deny the variance, along with four other members of the Board. (Ex. C-4)

4. Complainant resided in the house at 107 Litchfield St. on Plot 1 for some 10 years with her three daughters. In 1989 Complainant sold the land and house at 107 Litchfield Street known as Plot 1 for $125,000, and retained the adjacent vacant land known as Plot 2, because the buyers did not wish to purchase the second lot. At the time Complainant's attorney informed her that the house on Plot 1 at 107 Litchfield St. encroached onto Plot 2 and that she would have to grant an easement to the purchasers. She testified that she did not understand the import of

this, but that her attorney prepared the necessary documents granting the easement which she signed at the closing. (Ex.C-6)

5. Complainant then moved to Taunton, Massachusetts and purchased a home for $200,000 where she resided for thirteen years. She sold the home for somewhere between $320,000 and $325,000. She testified that she subsequently resided in Brockton intermittently for a period of few years with her mother and currently resides in an apartment in Raynham with her daughter, where she sleeps on the sofa. She described herself as "homeless." Complainant testified that she receives Social Security Disability Benefits because of problems with her joints, hip surgery and emotional problems.

6. Complainant re-applied for a variance for Plot 2 in 2002 and 2006. In 2002, Complainant's petition again sought relief from frontage and area requirements. The petition was opposed by five abutters to the property for reasons related to existing drainage and sewer problems which plague the area which they asserted would be exacerbated by grading for new construction. The petition noted the encroachment of the existing dwelling on Plot1 onto the land at Plot 2. The petition was unanimously denied by the five member Board chaired by Attorney Anthony Eonas for failure to prove a hardship that met the statutory provisions for granting a variance and for negative impact on the orderly development of the neighborhood.

7. When Complainant again applied for a variance in 2006, she was represented by Attorney Nessralla, who had chaired the Zoning Board in 1986 when she first sought a variance. Bruce Malcolm, an independent land surveyor, prepared a plan for her and was present at the Zoning Board proceedings in 2006. Malcolm routinely prepares plans for the Zoning Board of Appeals and frequently appears before the Board. He testified that the house located on Plot 1 encroached by 24 square feet onto the existing lot line of Plot 2 and that he proposed a new lot

line that reduced Plot 2 by 315 square feet and would leave Plot number 2 unemcumbered. This would have required Complainant to convey a portion of her land in Plot 2 to the owners of Plot 1. According to Malcolm, a conveyance is required to move the plot line and the owner of Plot 1 must agree to assume ownership. He also testified that a change in plot plan requires a vote of the City Planning Board and that Complainant had not complied with this procedure in 2006. Complainant testified that Malcolm informed her that the lot line had to be moved, but she also claimed she was unaware of this issue until 2010. I find this testimony to be inconsistent and not credible. I do, however, believe that Complainant never fully understood these issues, and she admitted she never saw or read the petition that was submitted to the ZBA on her behalf in 2006.

8. Malcolm testified that the proceedings before the Zoning Board are business-like and professional and that in his observation all applicants are treated respectfully. He testified that in his experience, the Board fairly considers every case before it without regard to race, color or gender. He stated that most properties are unique and that one cannot expect that a petition for a variance will be granted and that one cannot predict what the Board will decide in any given case. He also stated that no properties in the area were identical to Complainant's lot and that Complainant's petition in 2006 had not addressed the drainage issue for the surrounding neighborhood. Based on the neighborhood opposition to the variance, Malcolm was not surprised that Complainant's petition was denied.

9. Complainant testified that by July of 2006, Plot 2 was the last undeveloped lot in the neighborhood and sixteen other houses had been built. Complainant's neighbor, Carol Kershaw, who lives at 108 Litchfield Street directly across from Plot 1 supported Complainant's petition and testified that when she moved into her home in November of 1979 there were no houses on Litchfield Street west of Plot 1, or west of her lot which was Plot 19 or south of Plot 1. Kershaw

also testified that the houses built after she moved in were built on swamp and the eight houses had water problems. She stated that her neighbors were aware of the water issues because they were the ones who instigated action against the developer to prevent further planned building on an adjoining street.

10. Complainant testified that at the 2006 Zoning Board Hearing her attorney Mr. Nesralla made a presentation, and Mr. Malcolm presented his plans on her behalf. She stood at the bar behind her attorney as he spoke. After their presentations the neighbors were allowed to speak in opposition to the petition. Ms. Kershaw spoke on behalf of Complainant. When these presentations were completed the Chair of the Board, Mr. Eonas, asked if anyone else wished to speak and when Complainant asked to say something the Chair looked right at her, ignored her request, and did not recognize her. Complainant stated that this slight made her very angry, because the neighbors had been allowed to speak more than once, and she believed that not allowing her to rebut their statements was discrimination. She stated that she was so angry that she slammed the door on her way out. It is apparent that she remains angry and hurt to this day at not being recognized by the Chair and for not being given the opportunity to speak at the 2006 Hearing.

11. Complainant testified that she never understood the import of the language in the Zoning Board decisions denying her a variance and that her ability to read and write English was limited. She testified that she believes she was discriminated against because she was not allowed to speak at the 2006 hearing, and that but for what occurred on that occasion, she would not be alleging discrimination. However, she acknowledged that both Attorney Nesralla and Bruce Malcolm made full presentations on her behalf at the 2006 hearing and did a good job. She testified that she also felt the decision denying her the variance was discriminatory because

her lot was the last undeveloped lot in the neighborhood and sixteen other houses had been built in the vicinity. Complainant was informed that she could appeal the 2006 denial to court but she did not do so, upon the advice of Attorney Nesralla, who informed that it would be a waste of money and she wouldn't prevail. Complainant testified that she was angry at Attorney Nesralla because he informed her that the property should have been considered grandfathered as a corner lot and that a variance should have been granted in 1986. She noted with irony that Nesralla was the Chair of the Zoning Board in 1986 and had voted against her variance.

12. Complainant applied for a variance again in 2010 and was once again denied. She testified that she has appealed that decision. She stated that the current owner of the house at 107 Litchfield on Plot 1 is opposed to her request for a variance because of the size of the lot and the proximity to his house. She testified that she cannot sell the property because it is not a buildable lot and she will fight until she dies to be able to construct a house on her land. She admitted that the allegation in her MCAD complaint filed in October of 2006 that her property met with all the side line requirements is inaccurate and that she did not know at the time whether the lot met all the requirements for building. She also admitted that she knows of no other variance granted to allow building on a lot with an encroachment such as hers. While she now understands that the variance cannot be secured until the lot line issue is resolved, she testified that she cannot understand why it took so long for someone to explain this to her, and believes she was not well served by her previous attorneys.

13. Anthony Eonas testified that he has been a member of the Brockton Zoning Board of Appeals for 21 years and has served as the Board Chairman for 15 years. He was the Chair of the Board in 2002 and 2006. Eonas has an MBA and JD degrees and is a professor at Suffolk University where he is Chair of the Department of Business Law and Ethics. He is active on a

number of other Brockton city Boards or Commissions. He testified that up to 100 cases may come before the Zoning Board in a year and that in 2006 on the night Complainant's petition was presented, 23 petitions were heard. He testified that the hearings can be contentious and that he needs to keep a semblance of order, so he conducts hearings in a consistent manner. He calls all those who have an interest in the matter to come forward to the bar to speak, and hears from the petitioner or his/her attorney first, then the public and then any local politicians. He stated that he generally does not allow rebuttal from petitioners, but occasionally will allow counsel for the petitioner to clarify a matter. On rare occasions an attorney may request that the client speak. He stated that he has often been criticized for allowing everyone to speak for or against a petition. Eonas testified that he does not recall the specifics of the presentations at Complainant's hearing in 2006, nor does he recall her trying to get his attention or asking to speak. He does recall that Complainant slammed the door on her way out.

14. According to Eonas, the Zoning Board has authority to make rulings on petitions for variances pursuant to G.L. c. 40A § 10 and it may consider hardships caused by circumstances such as the topography of the land, shape of the land, soil conditions and existing foundations. The Board must consider the impact the variance will have on the orderly development of the neighborhood. Eonas stated that financial hardship, alone, is not sufficient grounds for granting a variance. He recollected the reasons Complainant's variance was denied in 2006 from his review of the documents. He stated that the problem of the encroachment was a hardship that Complainant created when she sub-divided the property and it had to be addressed before a variance could be granted. Complainant was seeking a variance of the side-line requirements in 2006, which provide for a minimum of 30 feet between houses, and while non-compliance with this requirement won't necessarily defeat a petition because that is the whole point of a variance,

in Complainant's case, the encroachment of the house onto Complainant's lot was the big unresolved issue. Another reason for the denial was that the house Complainant proposed to build was only 11-12 feet from the existing home, and while one plan showed a porch, another plan did not. He felt the proposal was not clear. Eonas also noted that any proposed changes in a plot plan must be approved by the town Planning Board prior to being brought back to the Zoning Board for a new hearing. Eonas testified that Brockton is a very diverse city and that it is common for people of color to seek zoning variances. He was present at the 2010 Board hearing where Complainant's petition for a variance was again denied, and he specifically noted the opposition to Complainant's petition at that hearing because he was aware of the discrimination complaint at MCAD. According to Eonas, some 60% of those opposed were people of color. I credit his testimony.

15. Kenneth Galligan is the former Fire Chief for the City of Brockton and sat on the Zoning Board from 1993 to February of 2010 pursuant to a City Ordinance. He is currently an alternate member of the Board. He stated that the Board has five members and three alternates who attend when a regular member cannot. He agreed that Chairman Eonas runs meetings by the book and that participants are treated professionally and fairly. He was present at Complainant's hearing in 2006 and recalls there was a question regarding the sideline of Complainant's property and that the existing house on the adjacent property encroaches onto the property line. The Board was uncertain as to how the encroachment came about and was concerned that this issue be resolved before they would vote to grant a variance. He recalled that the Board was also concerned about the size of the lot, the size of the house Complainant proposed to build and its proximity to the lot line. He stated that the 30 foot sideline requirement is a fire and safety issue to prevent fires from spreading from one building to

another. Galligan did not recall that Complainant was not allowed to speak but stated that petitioners who are represented by counsel typically do not speak and that the Board defers to the petitioner's attorney to make that request. He stated that he has never knowingly discriminated against any petitioner based on race or gender and that many petitioners both white and black have been denied variances. He distinguished Complainant's case from one where a driveway encroached on a petitioner's property and where said encroachment did not result in the denial of a variance because the lot in that case was an otherwise buildable lot and the petitioner could revoke the right of access to the driveway. In contrast, Complainant had deeded a permanent easement for the existing house on lot 1 which rendered her lot unbuildable and she could not order the homeowner to tear the house down. I credit Galligan's testimony.

16. Stephen Bernard is an African American a member of the Zoning Board who was appointed by the Mayor of Brockton and served for fourteen years. He is a member of the Brockton area NAACP and was its President for 8 years. He is very active in a number of other civic organizations in Brockton. Bernard confirmed how the ZBA hearings are conducted and stated that generally the Chair does not allow additional comments from the petitioner, unless the Board has a specific question. He was present during Complainant's hearing in 2006 and stated that while he has no specific memory of the conduct of the hearing he does not recall anything out of the ordinary occurring. He stated that he does specifically recall that there was the problem of a home that encroached on Complainant's lot line, because he had never seen anything like that before. He stated that not only was there an absence of requisite set-back provisions, but the house from the adjacent lot encroached onto Complainant's lot. For these reasons he voted against Complainant's petition. Bernard testified that he has been a victim of discrimination and recognizes it when he sees it. He stated that if he believed a petitioner was

being treated in a discriminatory fashion, he would make it know during the deliberations of the Board. He stated that Complainant's petition was processed and decided the same as all others without regard to her race and color. I credit his testimony.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 272 § 92 and 98A prohibit discrimination in a place of place of public accommodation. Complainant asserts that proceedings before a municipal zoning board are covered by the public accommodations law. Complainant also alleges that in as much as her petition for zoning relief implicates her fair opportunity to housing, the prohibitions against housing discrimination found in G.L. c. 151B apply to her situation.

It is a violation of M.G.L. c. 272 § 98 to make any distinction, to discriminate, or to restrict a person's access to a place of public accommodation based on race or color. The protections of M.G.L. c. 272 have been held to include the provision of certain services or benefits such as insurance, [1] and the statute has been interpreted broadly to extend beyond access to physical structures. While there is no dispute that access to public buildings and fair access to public proceedings are guaranteed by the public accommodations law, Respondent disputes that the decisions of a local zoning board are reviewable under c. 151B and it contests the Commission's jurisdiction to adjudicate or alter the decision of a zoning board. Respondent argues that there is a specific statutory scheme that provides a right to appeal zoning board decisions to the Courts of the Commonwealth, and that this is the proper and exclusive route for challenging a zoning board decision. G.L. c. 40A § 17. Even though the Massachusetts Public Accommodations law has been held to extend beyond a physical site, to the provision of certain benefits or services, Respondent argues that decisions in zoning board proceedings do not fall

[1] Samartin v. Metropolitan Life Insurance, 27 MDLR 210 (2005).

within the definition of a "place of public accommodation, resort or amusement" as contemplated by or defined in M.G.L. c. 272 § 92A. Furthermore, Respondent denies that it discriminated against Complainant relative to her admission to or treatment in a place of public accommodation. I conclude that the actual decision of the zoning board is not reviewable pursuant to c. 272 § 98, because the legislature has created a statutory scheme which provides for a mechanism of review through the courts,[2] and that it is not within the Commission's authority to alter or amend such decision. However, the question of whether Complainant was denied equal access to the public proceedings on account of her race and color, national origin, or gender is an issue that this Commission may reach and decide.

I have further concluded that the provisions of G.L. c. 151B s. 4(7) do not apply to facts of the instant case. Section 4(7) prohibits *inter alia* discrimination by owners, lessees, real estate brokers and managing agents on land intended for the erection of housing. It also prohibits discrimination by other persons having the right of ownership or possession or the right to rent, lease or sell the subject property or to negotiate the sale or lease of said property. Complainant is the owner of the land in question, with attendant rights to possession and control. As such, it is the Complainant, and not the ZBA that would be subject to the discrimination laws. However, Complainant asserts that because the zoning regulations, as interpreted by the ZBA, restrict her ability to build upon or sell the land in question, that the ZBA's actions constitute discrimination within the meaning of G.L. c. 151B. Her claim sounds more in the nature of an unconstitutional taking as opposed to a claim of housing discrimination. To conclude that the Zoning Board's decision constituted unlawful discrimination within the meaning of the fair housing statute would

[2] The Commission has held that the public accommodations law G.L. c. 272 s. 98, does not apply in the education context where there is an existing comprehensive statutory scheme for addressing educational issues. Beagan v. Town of Falmouth School Department 9 MDLR 1209 (1987); Barrett v. City of Worcester School Department 23 MDLR 22 (2001)

require an extraordinarily broad reading c. 151B, which would completely disregard the plain meaning of the statute. Nonetheless, assuming the Commission has properly invoked jurisdiction in this matter under G.L. c. 272 § 98, a review of the facts fails to support a claim of discrimination by the Zoning Board. As discussed below, I have determined that Complainant was not denied access to the process or treated less favorably than other petitioners based on her race and color or other protected classes.

Complainant claims that she was denied fair access to the process before the Zoning Board of Appeals at her hearing in 2006, because she attempted to speak and the Chair of the Board, Anthony Eonas, refused to recognize her. She admitted at the hearing, that but for that one event, she would not be alleging discrimination against the Zoning Board. She believes that she was denied the opportunity to address the Board on that evening because of her race, national origin and gender. While Complainant may have been treated rudely on that evening, the evidence does not support a conclusion that it was for discriminatory reasons. The Board members confirmed that there is a pre-determined process for the presentation of petitions and for public comment from "interested parties," and that petitioners are generally not allowed to speak in rebuttal. Moreover, the Board members confirmed that when petitioners are represented by counsel, as was Complainant, counsel makes the presentation to the Board and petitioners are allowed to speak only on very rare occasions when counsel specifically requests permission for the client to be heard. This did not occur in Complainant's case. The evidence suggests that despite Complainant feeling slighted and disrespected, there was no intent to exclude her comments on account of her race, national origin or gender. The Board members noted that they heard 23 petitions that evening and that the process must be orderly and efficient in order for the

Board to complete its work in a timely fashion and for petitioners and interested parties to be heard on every matter scheduled before the Board.

There was a suggestion by Complainant that there is a cozy relationship between the Board and certain developers and attorneys who appear before it and that this results in greater access and biased decisions in favor of certain petitioners. This, in and of itself, is not unlawful discrimination prohibited by c. 151B. However, this allegation was partially dispelled by Complainant's expert who testified that in his vast experience before the Board, one can never predict the outcome, that the process may seem discretionary, but that petitioners are treated fairly, without regard to race, national origin, gender or other external factors. In addition, Complainant was represented by counsel who has served as City Solicitor, and who is, not only well known in the City and to the Board, but who also served as the former Chair of the Board that had ruled on at least one of Complainant's previous petitions. One could draw the reasonable inference that if such cozy relationships existed, that Complainant's counsel would have had some influence with the Board.

As evidence that the decision to deny her a variance was tainted by improper motive, Complainant offered evidence of a number of petitions for variances granted by the Board in other years, in what she asserts were similar circumstances to hers. However, each of these situations was shown to be unique or dissimilar from her circumstances and none of them had the unusual difficulty of the encroachment of an existing house on the land for which the variance was sought. Moreover there was testimony that this was a hardship that had been created by Complainant when she sub-divided the land many years earlier, without prior approval, thereby creating the circumstances which rendered the second lot unbuildable. She subsequently granted a permanent easement to the homeowner who purchased the land and home located at 107

Litchfield Street from her in 1989. Finally there was substantial opposition from "interested parties" who were abutters that existing drainage and flooding problems that plagued the neighborhood would be exacerbated by the building of a home on the non-conforming lot. These were all legitimate non-discriminatory reasons for the Board's action, and Complainant has not persuaded me that they were a pretext for discrimination. See Lipchitz v. Raytheon, 434 Mass. 493 (200). If the reasons were insufficient or unsupportable under the applicable laws and regulations governing zoning appeals or the conduct of zoning boards, that is not an issue for this Commission to determine. Therefore, I conclude that Respondents actions were not a violation of G.L. c. 272 § 98A or c. 151B §4(7) and that the Complaint should be dismissed.

IV. ORDER

Pursuant to G.L. c. 151B § 5 the above referenced complaint is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so a party must file a Notice of Appeal of this decision to the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty(30) days of receipt of this Order.

So Ordered this 3rd day of November, 2011.

Eugenia M. Guastaferri
Hearing Officer