

TOWN of BROOKLINE
Massachusetts

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2011-0006

Petitioner, Benglewood LLC, applied to the Building Commissioner for permission to construct a twenty unit residential building on the rear portion of the lot at 1842 Beacon St. The application to the Building Commissioner stated that the lot at 1842 Beacon Street would be subdivided prior to development. The Building Commissioner denied the request for a building permit and an appeal was taken to this Board.

On February 3, 2011, the Board met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed April 7, 2011, at 7:15 p.m. in the Selectmen's Hearing Room on the sixth floor of the Town Hall as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioners, their attorney (if any of record), to the owners of 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 March 7, 2011 and March 24, 2011 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.39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **BENGLEWOOD LLC**
Owner: **BENGLEWOOD LLC**
Location of Premises: **1842 Beacon Street**
Date of Hearing: **April 07, 2011**
Time of Hearing: **07:00 PM**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor**

A public hearing will be held for a variance and/or a special permit from

5.20; Floor Area Ratio Regulations, Lots 1 and 2, variance required
5.01; Table of Dimensional Requirements, Landscape Open Space, Lot 2, variance required
6.02; Table of Off-Street Parking Space Requirements, Lot 2, variance required

Modification of the following prior Board of Appeals Cases:

1647 30 July 1970

1656 18 September 1970

1716 February 1972

#2365 February 1980

Off the zoning By-Law to

Subdivide the existing lot at 1842 Beacon Street and construct, on the existing parking lot, a four story 20 unit residential building with three levels of residences above and two levels of parking below (one below grade) with a total of 81 parking

At 1842 Beacon Street

Said Premise located in a Lot #1, lies within M-1.0 (apartment house) resident district.

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-730-2134 or check meeting calendar at:

<http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>

The Town of Brookline does not discriminate on the basis of disability to admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617-730-2327

**Enid Starr
Jesse Geller
Robert DeVries**

At the time and place specified in the notice, a public hearing was held by this Board. Present at the hearing were Board Members Jesse Geller, Jonathan Book, and Lisa Serafin. Petitioner was represented at the hearing by Attorney Jeffrey P. Allen.

At the hearing Planner Courtney Synowiec, distributed the Planning Board Report dated March 24, 2011.

Mr. Allen stated that this is a request for permission to subdivide the existing lot at 1842 Beacon Street and construct, on the rear portion of the lot, a four story, 20 unit residential building with three levels of residences above and two levels of parking below. Attorney Jeffrey P. Allen, whose professional address is Denner Pellegrino LLP, 4 Longfellow Place, Boston,

Massachusetts, representing the applicant, Benglewood LLC, 93 Union Street, Newton, Massachusetts, waived the reading of the notice.

Attorney Allen stated that his clients are seeking only zoning relief this evening and that the subdivision will be sought at a later time. Mr. Allen stressed that the zoning relief being requested is based on the lots being separated as shown in the submitted plan. Using a map, Attorney stated that this lot has a unique shape within the zoning district. Attorney Allen noted that Lot 2 has an existing medical office building on it with underground parking, and that Lot 1 is the lot where the applicant proposed to construct the new building and parking. Attorney Allen stated that this proposal has received unanimous support from the Planning Board and he further detailed the number of Design Review and Planning Board hearings held concerning this project. Attorney Allen stated that there will be no changes to Lot 2 other than a few cosmetic changes and the addition of a handicap ramp to the front of the medical office building. He stated that all of the use changes will occur on Lot 1, where the applicant is proposing a twenty unit residential building. Using two scale models, Attorney Allen describes the two lots and the construction that is proposed.

Attorney Allen stated that, with one exception this proposal is almost identical to a decision approved by the Zoning Board of Appeals in 1987. He stated that the only difference is that the proposed building was 17 units and not the 20 units in this proposal. Attorney Allen stated that the three new units are affordable units and the remaining 17 units will be market units. He noted that in 1987 there were several differences in the zoning relief because the applicant had planned to keep the lots together. Attorney Allen stated that the applicants think that is no longer wise because they believe from an operational basis it is better to separate the lot. He noted that the new building meets the FAR, height, setback and affordable housing requirements. He stated that the most significant relief on the rear lot has to do with open space. He noted that the total amount of the open space complies. He added that the applicant has an excess of 1,403 square feet of landscaped open space but is deficient by 1,364 square feet of usable open space. Attorney Allen noted that can be cured by Section 5.43 of the Zoning By-Law because the deficiency is caused by the loss of useable open space on a strip of land in front of the building which is occasioned by the Zoning By-Law not allowing the first 10 feet of the front yard setback to be counted towards useable open space. He added that this Board, in the past, has determined that is a dimensional requirement that can be cured by Section 5.43 of the Zoning By-Law. If allowed to use that strip of land for useable open space, under Section 5.43 of the Zoning By-Law, then the proposal will comply with both the useable open space and the landscaped open space. He noted that if relief is granted under Section 5.43 of the Zoning By-Law, it is by special permit that will require counter-balancing condition. He added that when we review those conditions the Board will see that the applicants are proposing counter-balancing conditions well in excess of any comparable project. Attorney Allen stated that the other relief needed for the new building is for dual use parking. He stated that some of the parking in the new building will be used for the existing medical building. Attorney Allen noted that they currently rent out parking to people in the neighborhood and he expects the applicant will continue to do that since there is more than enough parking in this proposal. Attorney Allen stated that for a new residential structure it requires relatively simple zoning relief due to the compliance with FAR, height, setback and affordable housing.

Attorney Allen stated that Lot 2 contains the existing medical office building. Attorney Allen stated that if the lot is subdivided, Lot 2 will require relief from Floor Area Ratio (FAR) requirements. He stated that the applicants are seeking a variance, although there is a school of thought, that building doesn't actually need zoning relief. He stated that the building was constructed in 1970 under a 4.0 FAR and that nothing is being done to that building. He cited Chapter 40A, Section 6 where it states that a zoning ordinance or by-law shall not apply to structure or use lawfully in existence or lawfully begun unless substantially altered. Attorney Allen stated that this building or its use is not changing. He added that, while he believes that this is a pre-existing non-conforming use, he is seeking a variance to be safe and in fact an FAR variance was granted for this building in 1987. He noted that in the 1980's this building had an FAR of 2.6 or 2.7 but, since then, the calculated FAR has increased without change in the building due solely to changes in the Zoning By-Law definition of FAR. He stated that for all of those reasons it makes sense to grant a variance for this building for FAR, especially when looking at the shape of the lot that exists. He added that when measuring the FAR for the new proposed lot, depending on which definition is used, the calculation of FAR could be of 2.9 or 3.15. He noted that either is well below the initial FAR for this lot of 4.0.

Attorney Allen stated that the proposal will also require special permit relief from rear yard setback requirements, which may be granted under Section 5.43 of the Zoning By-Law subject to provision of counterbalancing conditions. He noted that the rear yard setback's impact will only be on the applicant, as the only impact will be between the existing medical office building and the proposed new building. He stated that it will not impact the neighbors. Attorney Allen stated that there are substantial community benefits from the proposal. He stated that on Lot 1, the applicant is installing new shrubs, trees, plantings and benches along Englewood Avenue and around the entire site. He noted that the existing transformer, that is clearly visible on the site, will be relocated to a concealed location in the parking garage at the lower level.

In addition to the other benefits, Attorney Allen stated that the Town originally required a design for site drainage that would handle a twenty-five year storm. He noted that after the first Planning Board hearing, where there were questions about the drainage, the developers went back, and as an additional counter-balancing condition, designed the drainage for a 50 year storm – doubling the capacity that the Town required. Attorney Allen stated that currently there are no storm water controls on the site, so this is a drastic improvement by capturing 100% of the storm water from the site. Additionally, because Englewood floods frequently, he stated that they will reduce the rate of the water into the street system by 70%, negating the flooding condition that currently exists. Attorney Allen stated that the applicant will also do a direct sewer pipe connection to Beacon Street. He stated that currently there is too much water trying to go through the sewer pipe on Englewood and that is what causes the flooding and backflow on Englewood Avenue. He stated that the applicant is going to install a new sewer pipe in the street to avoid tapping into the existing sewer line. Attorney Allen noted that this new sewer line will be 15 inches in diameter, while the existing remaining sewer line is only 12 inches in diameter. He added that the 15 inches far exceeds what is required for a sewer line but will help the Town divert sewerage from upper Englewood Avenue when they connect to it – making the 12 inch line dedicated to lower Englewood Avenue. He noted that this will more than double the capacity and minimize the flooding conditions that exist on this street.

Attorney Allen stated that on the lot improved by the existing medical office building the applicant was also proposing some counter-balancing conditions. He stated that the applicant will be installing a handicap ramp at the front entrance of the existing building and will improve the landscaping around that building, which will include new shrubs and perennial flowers. He added that the applicant expects to continue offering 24 hour parking to the neighbors. He noted that there currently exist 16 nighttime and weekend spaces that are not being utilized.

Attorney Allen stated that this new building will aesthetically enhance the streetscape and completes the neighborhood. He said that when it is built it will follow the curve of the street and that nobody will see the whole of the building at once. Attorney Allen stated that the architect designed the building so that while there is parking at grade level under the building accessible in the rear it appears to be living space from the front of the building. He added that there are currently three curb cuts at this site and the applicant will be reducing that to two curbs cuts, one to access the grade parking and one to access the underground parking.

Architect Kevin Deabler, of Rode Architects, Inc., 535 Albany Street, Boston, Massachusetts, using a power point presentation, presented an overview of the context of the proposal and showed some of the final renderings which resulted from meetings with the Planning Board. Mr. Deabler started his presentation to the Board with an aerial view of the project. He noted that the proposed building falls in line with the surrounding buildings and essentially follows the geometry of the street layout. Mr. Deabler added that the proposed building matches the sweeping curve of Englewood Avenue. He noted that the portion of the project that is on the M-1 portion of the lot complies with all setbacks and density guidelines. Mr. Deabler stated that this proposed building is consistent, architecturally, with other buildings in the neighborhood and that the front yard is primarily landscape. He added that the proposal will also replace dead street trees and continue the sidewalk where curb cuts have been eliminated. Mr. Deabler stated that there is a plaza at the front entry of the building. He noted that during the DAT process they received feedback that the entry needed greater prominence, which was addressed. He also noted that they broke up the window areas by adding different materials that contrast with the masonry and continues up three stories. He also stated that the parking under the building is covered up by louvres which are consistent with other buildings in the area.

Attorney Jeffrey P. Allen stated that the presentation demonstrates that this parking lot is unique to Brookline, particularly in a residential district. He stated that, not only will this new building be more consistent with the neighborhood, it will also add to and improve the neighborhood. He stated that most of the abutters are multi-family homes but there are two single family homes that are also unique to the neighborhood. Attorney Allen stated that they believe this project will be beneficial to the Town of Brookline and the neighborhood and will add truly beneficial affordable housing, particularly because of its location on Beacon Street and the proximity of public transportation.

Chairman Geller asked if any Members of the Board had questions for the applicant's development team.

Zoning Board of Appeals Member Jonathan Book asked when the Town down-zoned the Beacon Street parcel from 4.0 FAR to 2.0 FAR and the rear lot from 2.0 FAR to 1.0 FAR. Attorney Allen stated that it was done sometime between 1970 and 1987. Mr. Book asked Attorney Allen to explain how the sub-division of the lot and creation of the new building results in the existing building not complying with the Zoning By-Law. Attorney Allen stated that it is put into non-compliance under the current By-Law but not under the By-Law that was in existence when it was built. Attorney Allen stated that it is his position that if a building is built under a 4.0 FAR, that forever for the life of that building, that is the applicable FAR for that building. He noted that Chapter 40A, Section 6 provides that any new By-Law does not apply to an existing building or structure, whether you divide the land or not. He noted that the same argument was made by Attorney Herbert Goodwin in the 1987 case but the Board decided to take the safe route and grant a variance instead. Mr. Book stated that Attorney Allen spoke of this building as being a pre-existing non-conforming structure and asked how he reaches the conclusion that it is pre-existing. Attorney Allen responded that as long as it stays under 4.0 it is pre-existing. He added, however, that it is not non-conforming. He noted that Section 6 does not talk to non-conforming. He stated that Section 6 states that no zoning by-law shall lawfully apply to buildings or structures lawfully in existence. Attorney Allen stated that there is no question that the down-zoning occurred after this building was lawfully in existence. He stated that unless we were changing that building through an addition or an extension, that building stays under the current zoning. He noted that the rear lot was subject to down-zoning and the applicant must comply because there was no building or structure on it. He submits that the building in the front only has to comply with an FAR of 4.0 because it was lawfully in existence. He added that you cannot have a by-law affect a lawful building. He also added that even though the relief is being triggered by the sub-division he doesn't believe it affects its status under Chapter 40A, Section 6.

Zoning Board of Appeals Member Lisa Serafin asks Attorney Allen about the dual parking and what uses that he sees occurring and how the applicant will control that. Attorney Allen stated that every condominium unit will have one parking space that is not part of the dual use. He added that what will be dual use are any second spaces for the units that are not being used. He noted that the owners will have the option to rent a second space and if not rented they will be made available to the neighbors as well as the 81 dual use spaces for the medical office building.

Zoning Board of Appeals Chairman Jesse Geller asked Attorney Allen for the total number of bedrooms for the project. Attorney Allen stated that there was proposed 36 bedrooms. Chairman Geller asked what the ramification would have been if more usable open space was required. Attorney Allen stated that the applicant would have pushed back the building, lost some parking, which would have impacted the buildings in the rear. He noted that the benches in front of the building are actually in the strip of land that can't be counted as usable open space under the Zoning By-Law but which is actually being used as open space. Mr. Geller asked if Mr. Allen knew of any other application of dual use parking to a residential structure. Mr. Allen responded that he believed 1180 Beacon Street was one such example.

The Members of the Board asked questions concerning the basis for the applicant's request for a variance. Mr. Allen noted that, in his opinion, the applicant could undertake the project without subdividing the lot and therefore without need of a variance, but in that case

would need special permit relief under the public benefits section of the Zoning By-Law. Attorney Allen noted that he believes subdividing the lot provides a better project.

Zoning Board of Appeals Chairman Jesse Geller asked if there was anyone present who wished to speak in favor of this application. There was noone.

Zoning Board of Appeals Chairman Jesse Geller asked if there was anyone present who wished to speak in opposition.

Jon E. Moseley, a resident of 37 Englewood Avenue, Brookline, Massachusetts, stated that he looks directly onto the proposed building and is concerned with what will happen with the parking. He noted that some in his condominium building have rented parking there for as long as 25 years. He stated that the parking is potentially not going to be guaranteed to us any longer. He stated that he believes there was a condition attached to the 1987 approval that would have grandfathered in people who park on the lot. He stated that he would like to see something similar applied to this proposal because access to 24 hour parking in that area is needed.

Zoning Board of Appeals Member Jonathan Book asked if there is currently an agreement in place that guarantees those spaces to existing parkers. Planner, Courtney Synowiec stated that overnight parking renters park under month to month leases.

Attorney Douglas A. Troyer, whose professional address is Marcus Errico Emmer & Brooks P.C., 45 Braintree Hill Office Park, Braintree, Massachusetts, representing the 1856 Beacon Street Condominium Trust, stated that he is vigorously opposed to this proposal because it fails to comply with zoning, it adversely impacts the neighborhood, and it will have substantial impact on his client's personal property rights. Attorney Troyer stated that the applicant is requesting a variance for Lot 2 based upon their own self-inflicted hardship. He noted that the applicant has offered no evidence to demonstrate any hardship nor have they offered anything that would survive Chapter 40A, Section 10. Attorney Troyer then went on to read Section 10 variance requirements. Attorney Troyer noted, as in this instance, where the hardship has been self created, the Courts have been consistently hostile to relief. He stated that here the applicant is taking a lot, which is currently in compliance and is seeking relief. A variance is not a discretionary grant to deviate from the Zoning By-Law. It must meet the statutory requirements. He stated that since the need is self-imposed, the variance should be denied. He also added that nothing prevents the applicant from not subdividing the lot and building an appropriate sized building on it. Attorney Troyer stated that the applicant is simply stuffing too much onto this lot. He also noted that the shape of the lot should not be confused with the size of the lot. He stated that a lot lacking in area is not eligible for a variance based solely on this circumstance. He noted that because the lot is too small to qualify as a buildable lot, Section 10 gives the Board no authority to grant a variance. Attorney Troyer stated that the 1856 Beacon Street Condominium Trust opposes the grant of this variance and believes, if it is granted, it would not survive appeal.

Attorney Troyer stated that the applicant seeks a variance, or in the alternative a special permit, for minimal useable open space. He stated that the applicant is again creating its own hardship. He stated that in an effort to get the variance, the applicant is asking this Board to take into consideration all the additional benefits they are proposing as counter balancing conditions

in order to allow this project to go forward. Attorney Troyer stated that the open space requirements are not sufficient and the proposed minimal useable open space proposed is substantially deficient.

Attorney Troyer stated that the applicant is arguing for a variance under Chapter 40A, Section 6, because they are grandfathered. He stated, as opposing counsel has already indicated, that there is not one case on point in Massachusetts in support of the applicant's proposed rationale. Attorney Troyer stated that the real issue the applicant has is a legal and marketing issue. He stated that they have completely failed to provide evidence for a variance. The issues concerning taxes and the preparation of condominium documents are not valid reasons for a variance.

Attorney Troyer stated that his client currently has its garbage storage located in the back of its building and it has a private company remove the garbage. He stated that the proposed building will completely block that access. The Trust has been having their garbage removed in this manner for 30 years. He stated that he understands this is a property rights issue and that the condominium association will have to bring litigation to resolve this issue. Attorney Troyer stated that while the Board shouldn't be concerned about property rights issues, they should be concerned about the impact on the Town. He stated that the result will be trash being placed on Beacon Street with recyclables. He noted that it will be an eyesore and a safety concern and the Town will have to deal with the impact on the neighborhood, Town services and sidewalk safety. Attorney Troyer stated that what the Board has before it is an applicant in essence, saying that they don't need the variance so why don't you just grant it using Chapter 40A, Section 6 as authority. Attorney Troyer emphasized that there is no case law in support of the applicant's argument.

Zoning Board of Appeals Chairman Jesse Geller asked Attorney Troyer what was the "loss of the use of the benefit of the property" to which he made reference. Attorney Troyer stated that he was referring to the loss of access across the applicant's property to the garbage for disposal and the hardship created if his client has to drag the garbage to the front of the condominium on Beacon Street.

Alex Burke, a resident of 38 Englewood Avenue, Boston, Massachusetts and a direct abutter to the lot in question stated that Lot 1 is entirely open and the applicant could build on it now but hopefully not the mass they are proposing. He stated that the applicant is also adding a giant underground garage that will directly affect him. He also noted that every direct abutter will be looking at a massive building on stilts. Mr. Burke stated that the applicant is proposing to put trees on his property because it cannot put them up on their own lot due to the size of the underground garage. He noted that he had to agree to this proposal, otherwise he would be looking directly at the building. Mr. Burke stated that it is as if the hardship is being put on him and not the applicant. Finally, he stated that the massing of the building is a huge problem.

Lee Selwyn, a resident of 285 Reservoir Road and a Town Meeting Member from Precinct 13, stated that this Board has had several cases before it where the applicant created the non-conforming condition, through a sub-division, and the Board correctly determined, because the non-conformity was self-created, not to grant the relief sought. He stated that the FAR

when this particular building was built, was applicable to the entire parcel and not a hypothetical subdivided portion. He noted that in November 2010 the Town Meeting established a Moderator's Committee to study off-street parking of which he is the Chairman. He noted that here we have currently a parking lot with a capacity for 62 vehicles that is being converted to a lot with a capacity for 81 vehicles but which has to support condominium owners- resulting in a net loss. He also questioned what portion of the current 62 spaces support the medical office building. Mr. Selwyn stated that the Board has been clear about not sanctioning self-inflicted conditions and that it shouldn't change now.

There being no one else who wished to speak, Chairman Geller closed the public hearing and asked for a report from the Planning Board.

Planner Courtney Synowiec, for the Department of Planning and Community Development, stated that the Planning Board was unanimously in support of this proposal, she noted that they had concerns about the FAR but were leaving to the discretion of the Zoning Board of Appeals whether the applicant met the requirements for a variance. While sensitive to the neighborhood issues, the Planning Board is continuously disappointed about how massing issues are driven by the need to provide parking. She noted that the applicants could move the building back and that the Town of Brookline's parking standards are high and slightly out of context with the demand. She stated that the Planning Board was pleased that the applicant would continue to provide parking for the neighborhood and encouraged the applicant to construct meaningful open spaces that would also satisfy the counter-balancing amenities. Ms. Synowiec noted that Englewood Avenue does flood with sewage and not storm water. She stated that the Town Engineer is confident that the counter-balancing amenities offered by the developer will resolve the issues that lower Englewood Avenue is currently dealing with. The Planning Board also approved the offer of affordable housing on site believing that it would have a positive impact on the neighborhood. Finally, the Planning Board believed that the proposed building would have a positive impact on the neighborhood and the Town, particularly in comparison to the open-air parking lot that is currently sited. Ms. Synowiec stated that, should the Board of Appeals find the proposal meets the grounds for a variance, the Planning Board unanimously recommends approval of the proposal to subdivide the lot and construct a new residential building at 1842 Beacon Street and plans to prepared by RODE Architects dated 1/25/11 and Tetra Tech dated 1/25/11, subject to 15 conditions.

Attorney Allen stated the applicant is willing to waive the reading of the recommended conditions 1 through 15 from the Planning Board. Attorney Allen stated that the applicant has read the conditions studied them and is in agreement with them.

Zoning Board of Appeals Chairman Jesse Geller stated the Planning Board recommended conditions 1 through 15 are to be entered into the record and that Attorney Allen has waived the reading of these conditions.

The conditions are as follows:

1. Prior to the issuance of a building permit, final plans, indicating façade design, colors, materials, windows, rooftop details, walls, screening devices and placement of utilities

for HVAC and transformers for the new residential building, shall be submitted for the review and approval of the Planning Board. A mock-up of the finished details shall be provided [on site] for review and approval of the Planning Board.

2. Prior to the issuance of a building permit, final site and landscaping plans, indicating site design, landscaping, fencing, lighting, drainage details, garage parking layout, and limited landscaping on the abutting property at 38 Englewood Avenue agreed to by the property owner, shall be submitted for the review and approval of the Assistant Director for Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant to comply with the provision of counterbalancing amenities, shall submit plans for a handicap ramp to serve Lot 2 (the professional office building at 1842 Beacon Street), subject to the review and approval of the Assistant Director for Regulatory Planning.
4. Prior to the issuance of a building permit, the applicant shall submit final drainage and sewer improvement plans, subject to the review and approval of the Director of Engineering and Transportation.
5. Prior to the issuance of a building permit, a construction management plan, including parking locations for construction vehicles, information about additional parking opportunities for displaced parkers during construction, location of portable toilets, and a rodent control plan, shall be submitted for review and approval by the Transportation Director, with a copy of the approved plan submitted to the Planning Department.
6. Pursuant to the provisions of Section 4.08 Affordable Housing Requirements of the Zoning By-Law, the petitioner shall:
 - a. Provide three affordable units:
 - i. two, two-bedroom units and one, one-bedroom unit shall be designated as affordable in accordance with the preliminary Affordable Housing Plans dated 11/23/10 presented to the Housing Advisory Board;
 - ii. two units shall qualify as low and moderate income housing under the Comprehensive Permit Law (Chapter 40B), including that they shall be sold to households with incomes less than or equal to 80 percent of the area median income, and one unit shall be sold to a family with an income less than or equal to 100 percent of area median income;
 - b. Sales prices or, if necessary, rents shall be established in accordance with the Zoning By-Law and Guidelines;
 - c. Each affordable unit shall be sold or rented with the exclusive use of one parking space;

- d. Floor plans, finishes and appliances shall be the same as market rate units, except where the Director of Planning and Community Development specifically approves, in advance, a request for specific floor plans, finishes or appliances which differ;
 - e. No building permit shall be issued until the applicant has submitted, and the Director of Planning and Community Development and the Housing Advisory Board has approved, a final Affordable Housing Plan which shall include a final schedule of units, including locations, and references to specific floor plans for the affordable units, which Plan shall be legally binding as part of this special permit;
 - f. No certificate of occupancy shall be issued for any market rate unit until
 - i. the Town has approved initial sales prices or, if necessary, rents for the affordable units, condominium documents if any, and marketing and selection plan for the affordable units which provides that priority, as permitted by law or regulation (including Chapter 40B guidelines, for units listed in a.(ii) above) be given to Brookline residents, employees of the Town and the Brookline Housing Authority, and families with children in Brookline Public Schools, and
 - ii. all of the affordable units have obtained a certificate of occupancy, unless otherwise approved by the Director of Planning and Community Development; and
 - g. The affordable units shall be sold or rented, if necessary, subject to a restrictive covenant or affordable housing agreement with the Town of Brookline, permanently controlling the cost and turnover of units.
7. One Temporary construction and/or development sign, no greater than 20 square feet, may be erected on site during the construction and initial sale period, with the design subject to the review and approval of the Assistant Director for Regulatory Planning.
8. A certified as built foundation plan for the new residential building on Lot 1, to ensure conformance to the Board of Appeals decision, shall be submitted to the Building Commissioner for review and approval before the balance of the building permit shall issue.
9. Prior to the issuance of any occupancy permits, complete as-built plans for the new residential building on Lot 1 shall be prepared and certified by a registered professional engineer and/or registered architect to be in conformance with the approved plans and filed with the Building Commissioner.

10. Prior to the issuance of the final Certificate of Occupancy, the applicant shall install signage, no greater than one square foot per sign, indicating the dual-use, visitor and ADA accessible parking spaces, which shall be verified by the Assistant Director of Regulatory Planning.
11. Prior to the issuance of the final Certificate of Occupancy for the new residential building on Lot 1, all landscaping on the site, subject to seasonal planting conditions, shall be completed, subject to the review and approval of the Assistant Director of Regulatory Planning. If seasonal planting conditions do not allow completion of landscaping at the time of the Certificate of Occupancy is sought, the applicant shall issue a bond or deposit in accordance with Section 9.04 of the Zoning By-Law to assure such completion when seasonal conditions first permit such work.
12. Refuse facilities for the professional office building on Lot 2 shall be provided by the new residential building on Lot 1 in perpetuity, unless an alternative method to manage refuse is reviewed and approved by the Board of Appeals.
13. Prior to the issuance of a building permit, the applicant shall record a final parking plan for the new garage at the Registry of Deeds clearly delineating 44 parking spaces for the exclusive use of Lot 2, 17 dual parking spaces, 20 parking spaces for the exclusive use of Lot 1 and 3 visitor parking spaces, and show evidence of such to the Building Commissioner.
14. Prior to the issuance of a building permit, the applicant shall have received Planning Board endorsement of an ANR subdivision plan, delineating the two lots as shown to the Board of Appeals, shall record it at the Registry of Deeds, and provide evidence of such to the Building Commissioner.
15. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor, including landscaping, fencing, grading, and location of utilities; 2) building elevations and floor plans for the new residential building, stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Building Commissioner Michael Shepard, for the Building Department stated that the plan was to initially subdivide the lot. He stated that he cited them for a variance for Lot 2 because he believed they needed a variance for Lot 2. He stated that while he understands Attorney Allen's argument concerning Section 6, in the absence of any case law to that effect, it was wiser and more conservative to go the other way. He stated that he likes the idea of an accessible ramp for the medical office building which will be a vast improvement. He stated that the project is a good project, provided they meet the criteria for a variance.

Chairman Geller closed the public hearing and commenced deliberations.

Zoning Board of Appeals Chairman Jesse Geller stated that he believes that the counterbalancing conditions are significant and if the Board solely determined the application on these conditions alone, than the applicant has met the requirements, but the Board has to use other criteria as well. Chairman Geller then stated the Board must also consider requested relief related to useable open space. He stated that the applicant has offered far more greenery than exists now. Chairman Geller noted that issues related to private property rights were, as mentioned by Mr. Troyer, not before the Zoning Board.

Zoning Board of Appeals Member Lisa Serafin stated that the project as presented has significant counterbalancing amenities. She stated that the real issue is the variance. She noted that there is a shape issue. She stated that she believed the proposal is for the public good but is concerned whether or not there is a real hardship.

Zoning Board of Appeals Member Jonathan Book stated that he agrees with everything that has been said by the two other Board Members. He noted that it is a nice building and there are substantial counterbalancing conditions but the variance is the issue. Mr. Book stated that he does not believe the request for a variance is defensible. He added that he doesn't believe the argument for a variance has been sufficiently articulated. Mr. Book stated that the issue here is that there is not enough land and that is simply not the basis of granting a variance. He added that there is a way to do this project with a special permit under the public benefits section of the Zoning By-Law and that seems the way to go. He further added this is a great project but for this issue and that he does not believe the Board can support the request for a variance.

Zoning Board of Appeals Member Lisa Serafin added that she hasn't heard any hardship that can't be overcome.

Zoning Board of Appeals Member Jesse Geller stated that there hasn't been a compelling argument made for a variance. He stated that the Board should not confuse the size of the lot with the shape of the lot. He stated that he doesn't agree with Mr. Allen's analysis. Chairman Geller stated that it seems to be a well thought out project.

Attorney Jeffrey P. Allen stated, that in view of the fact that the direction of the Board's discussion is leaning towards not granting a variance, he requested the Board continue the hearing to allow the applicant the option to re-advertise the project, which would include keeping the lot as a single parcel and seeking a special permit under the public benefits bonus. Mr. Allen stated that he would like to give the developer that option.

Zoning Board of Appeals Chairman Jesse Geller stated that he is inclined to grant the request for a continued hearing.

Upon motion made and duly seconded it was UNANIMOUSLY

VOTED: To continue BOA#2011-0006 - 1842 Beacon Street to a date and time to be determined for the sole purpose of reviewing relief for the same project on a single lot.

Subsequent to the continuance granted by the Board, the petitioner submitted a new development plan to the Building Department. The new plan was identical to the first proposed but omitted the subdivision of the lot thus eliminating the necessity of any variances. On April 27, 2011 the Building Commissioner issued a new denial letter in response to the revised plan. On May 4, 2011 a request for a hearing was received by the Town Clerk's office. Notice of hearing was mailed to the Petitioners, their attorney (if any of record), to the owners of 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. On May 12, 2011 and May 19, 2011 the matter was advertised in the Brookline Tab, a newspaper published in Brookline. A copy of said notices is as follows:

NOTICE OF HEARING

Pursuant to M.G.L., C.39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **BENGLEWOOD LLC**
Owner: **BENGLEWOOD LLC**
Location of Premises: **1842 Beacon Street**
Date of Hearing: **June 02, 2011**
Time of Hearing: **07:15 PM**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor**

A public hearing will be held for a variance and/or a special permit from

5.20; Floor Area Ratio Regulations, Lots 1 and 2, variance required
4.08.4; Affordable Housing Requirements, special permit required
5.04.1; Residential Building on rear of a lot, special permit available for yard dimensions
**5.21.1; Exceptions to maximum floor area ratio regulations (Public benefit incentives),
Special Permit available**
5.43; Exceptions to yard and setback regulations, special permit required
5.09.2a, d & k; Design Review, special permit required
5.70; Rear Yard requirements, variance required
5.91.1 & 2; Minimum Usable open space, lot 1, variance required.
**6.02.1. c; Off-Street Parking Spaced Regulations (dual use), special permit required 8.02.2;
Alteration or Extension, special permit required**
5.01: Table if Dimensional Requirements, Landscape Open Space, Lot 2, variance required
6.02; Table of Off-Street Parking Space Requirements, Lot 2, variance required
Modification of the following prior Board of Appeals Cases:
1647 30 July 1970
1656 18 September 1970
1716 February 1972
#2365 February 1980

Of the Zoning By-Law to

subdivide the excising lot at 1842 Beacon Street and construct, on the existing parking lot, a four story, 20 unit residential building with three levels of residences above and two levels of parking below (one below grade) with a total of 81 parking

at **1842 Beacon Street**

Said Premise located in a Lot #2, is in a m-2.0 (apartment house) Lot #1, lies within a M-1.0 (apartment house) resident district.

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-730-2134 or check meeting calendar at:

<http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>

The Town of Brookline does not discriminate on the basis of disability to admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617-730-2327

**Enid Starr
Jesse Geller
Robert DeVries**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Jesse Geller and Board Members, Jonathan Book and Lisa Serafin. This is an application for a revised proposal to construct a 20 unit apartment building on the rear of a lot already containing a professional office building at 1842 Beacon Street.

Attorney Jeffrey Allen presented the case for the applicant. He stated that the project is almost identical to the project the Board reviewed at the prior hearing. Mr. Allen informed the Board that the applicant no longer proposes to subdivide the lot and is not seeking a variance. The applicant will keep it as one lot and build a new building on the same lot as the existing medical office building. Some different zoning relief is needed due to this change, but all relief can be granted by special permit. Mr. Allen noted that even though the same counterbalancing conditions are not needed, they are still being proposed. He stated that the handicap ramp, improvements to the sewer and drainage systems in the Englewood Street area and the landscaping are not changed in this new proposal. He continued that the affordable housing units remain as offered for the zoning relief and there has been no change in the design, which was the subject of design review. Mr. Allen stated that nothing has changed other than the status of the lot. The only new zoning relief triggered by the change is under **Section 5.04.1** of the Zoning By-Law, a residential building on the rear of a lot. Mr. Allen noted that the location of where the front and rear of the lot is is not certain but that he feels that the project will satisfy the

requirements of **Section 5.04.1** of the Zoning By-Law. He stated that the new structure can be constructed subject to special permit relief because the total gross floor area being proposed is 55,320, which is within the allowable FAR under the Zoning By-Law (with the 30% public benefit incentive they could have gone to 57,718). Mr. Allen, in response to a letter received from William DeBear of Marcus, Errico, Emmer and Brooks, P.C., the counsel for the neighboring condominium association at 1856 Beacon Street, mentioned that although the applicant is aware that under the applicable Section of the Zoning By-Law title to both buildings must remain in common ownership, the applicant will not transfer title (and change the Master Deed) until they have approval from the Zoning Board to construct the new building. He assured the Board that the applicant will comply with the two issues raised in that letter. Mr. Allen commented that the condominium association's opposition relates to a private property rights dispute. Attorney Allen then reviewed the public benefits of the project, such as open space, new trees, moving the transformer out of view, building for a 50 year storm and new drainage, all as previously presented to the Zoning Board.

The Chairman asked if anyone wished to speak in favor of the application. No one rose to speak.

The Chairman then asked if anyone wished to speak in opposition to the application. William Debear of Marcus, Errico, Emmer and Brooks, P.C. representing the abutter condominium association, 1856 Beacon Street Condo Trust, urged the Zoning Board Members to deny the revised application. Mr. DeBear continued that the applicant does not qualify for special permit relief under **Section 5.04.1** of the Zoning By-Law. **Section 5.04.1** of the Zoning By-Law requires that each of the buildings be under the same ownership and management. Mr. DeBear pointed out that the medical building is currently owned by the condominium association, which is distinct from the applicant. Mr. DeBear also noted that the entirety of the land vested in the condominium association and the unit owners when the condominium Master Deed was recorded on January 7, 2010 and questioned the authority of the applicant to act on behalf of the association and the unit owners. More specifically, Mr. DeBear questioned the authority of the applicant to apply for the requested relief without joinder by the condominium unit owners.

Yvonne Webster, a resident of 15 Orkney Rd, Brighton on behalf of Alex Burke and representing the Aberdeen Street Brighton Neighborhood Association, which abuts the project site, stated that she is unaware of any sewer or drainage problems in the area and knows no neighbor who has had flooding in their basement. She continued that she does not believe there is any big benefit to the community from the project.

Monique Richardson, Trustee of 1850 Beacon Street, mentioned she is concerned with property values and the consequences of owners on the back side of the building who will try to sell their units prior to the project, which will result in a decrease in property taxes. She stated that she did not believe that the applicant had proved that the neighborhood will not be adversely affected, which is needed for special permit. Ms. Richardson advised the Board that she believes that the intersection at Englewood and Beacon will be a hazard now, especially for her children.

Courtney Synowiec delivered the findings of the Planning Board. She stated that there were no additional comments from the original findings. Ms. Synowiec noted that the conditions remain the same from the first hearing, which conditions were incorporated into the present hearing.

Michael Shepard, Building Commissioner delivered the comments of the Building Department. Mr. Shepard stated that he would leave it to the Zoning Board to consider the questions raised by Mr. DeBear and what the implications are for the requested relief. Mr. Shepard suggested that the accessible ramp be built before any other construction on the lot so there will be no limited access for handicapped people during construction. Mr. Shepard recommended that prior to the issuance of the building permit, the applicant should be required to submit to the Building Department final drainage and sewer improvement plans (meeting the standard for a 50 year storm) as approved by the Director of Engineering and Transportation . He urged the Board to add this as a condition of its decision should the requested relief be granted. Mr. Shepard also suggested that the Board add as a condition that the Director of Engineering and Transportation approve the completed sewer improvements prior to issuance of Certificates of Use and Occupancy for any of the units within the new building.

Attorney Jeffrey P. Allen, in rebuttal, stated that he agreed with the Building Commissioner's additional conditions. He further stated that Mr. DeBear is correct in that the condominium Master Deed must be amended. He stated that the applicant will not proceed with amendment of the Master Deed and all of the other required legal documentation until the project is approved. Mr. Allen stated that the applicant remains in control of the lot until 100% of the units have been sold or March 31, 2015, whichever is earlier. He stated that the applicant will fully comply with the requirements of Section 5.04.1 of the Zoning By-Law. He stated that the sewerage problem in this neighborhood is well documented. Mr. Allen noted that none of the opposition presented was based on zoning criteria. He commented that the traffic study showed that the project will have zero impact on Beacon and Englewood.

Testimony closed and the Board then deliberated. Mr. Book stated that he is in favor of this project since the necessity of a variance had been eliminated. He noted that it is not uncommon for an applicant seeking zoning relief not to be the owner of the property but that only the owner can make use of the relief, should it be granted. Mr. Book stated that he feels that the applicant has met the requirements under Section 9.05 of the Zoning By-Law and he is in favor of granting the modified requested relief subject to the conditions of the Planning Board and the Building Commissioner. He noted that the conditions must additionally be changed by deletion of reference to subdivision of the lot and insertion of the requirement that the buildings remain in common ownership and management.

Ms. Serafin stated that she is also supportive of the relief requested. She discussed the ownership issue and stated that the usable open space benefit is reasonable.

Chairman Geller stated that he agrees with Mr. Book and Ms. Serafin and that the applicant has met the requirements for the special permit relief requested and is in favor of granting that relief. Mr. Geller noted that there is no requirement that each of the condominium unit owners join in the application nor that the common ownership precede the application or

grant of relief since Section 5.04.1 of the Zoning By-Law by its language seems to anticipate that transfers to establish common ownership may occur after the relief is granted. Mr. Geller noted that special permit relief under Section 9.05 of the Zoning By-Law is warranted for the specific reasons identified by Mr. Allen in his rebuttal.

The Board, having deliberated on this matter and having considered the foregoing testimony, concludes that all the modified requested relief could be granted by special permit. The Board found that the petitioner has satisfied the requirements for relief under Section 9.05 of the Zoning By-Law. The Board makes the following specific findings pursuant to Section 9.05 of the Zoning By-Law:

- a) The specific site is an appropriate location for such a use, structure or condition.
- b) The use as developed will not adversely affect the neighborhood.
- c) There will be no nuisance or serious hazard to vehicles of pedestrians.
- d) Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

Accordingly, the Board voted unanimously to grant the requested relief subject to the following conditions.

1. Prior to the issuance of a building permit, final plans, indicating façade design, colors, materials, windows, rooftop details, walls, screening devices and placement of utilities for HVAC and transformers for the new residential building, shall be submitted for the review and approval of the Planning Board. A mock up of the finished details shall be provided [on site] for review and approval of the Planning Board.
2. Prior to the issuance of a building permit, final site and landscaping plans, indicating site design, landscaping, fencing, lighting, drainage details, garage parking layout, and limited landscaping on the abutting property at 38 Englewood Avenue agreed to by the property owner, shall be submitted for the review and approval of the Assistant Director for Regulatory Planning.
3. Prior to the issuance of a building permit for the residential building, the applicant shall submit plans and construct an accessible ramp to serve the professional office building at 1842 Beacon Street. The design shall be subject to the review and approval of the Assistant Director for Regulatory Planning.
4. Prior to the issuance of a building permit, the applicant shall submit final drainage plans based upon a 50 year storm event and sewer improvement plans, subject to the review and approval of the Director of Engineering and Transportation.
5. Prior to the issuance of a Certificate of Occupancy for the residential building or any of the units, the applicant shall provide evidence that the proposed sewer improvements have been completed to the satisfaction of the Director of the Department of Engineering.

6. Prior to the issuance of a building permit, a construction management plan, including parking locations for construction vehicles, information about additional parking opportunities for displaced parkers during construction, location of portable toilets, and a rodent control plan, shall be submitted for review and approval by the Transportation Director, with a copy of the approved plan submitted to the Planning Department.
7. Pursuant to the provisions of Section 4.08 Affordable Housing Requirements of the Zoning By-Law, the petitioner shall:
 - a. Provide three affordable units:
 - (i) two, two-bedroom units and one, one-bedroom unit shall be designated as affordable in accordance with the preliminary Affordable Housing Plans dated 11/23/10 presented to the Housing Advisory Board;
 - (ii) two units shall qualify as low and moderate income housing under the Comprehensive Permit Law (Chapter 40B), including that they shall be sold to households with incomes less than or equal to 80 percent of area median income, and one unit shall be sold to a family with an income less than or equal to 100 percent of area median income;
 - b. Sales prices or, if necessary, rents shall be established in accordance with the Zoning By-Law and Guidelines;
 - c. Each affordable unit shall be sold or rented with the exclusive use of one parking space;
 - d. Floor plans, finishes and appliances shall be the same as market rate units, except where the Director of Planning and Community Development specifically approves, in advance, a request for specific floor plans, finishes or appliances which differ;
 - e. No building permit shall be issued until the applicant has submitted, and the Director of Planning and Community Development and the Housing Advisory Board has approved, a final Affordable Housing Plan which shall include a final schedule of units, including locations, and references to specific floor plans for the affordable units, which Plan shall be legally binding as part of this special permit;
 - f. No certificate of occupancy shall be issued for any market rate unit until
 - (i) the Town has approved initial sales prices or, if necessary, rents for the affordable units, condominium documents if any, and a marketing and selection plan for the affordable units which provides that priority, as permitted by law or regulation (including Chapter 40B guidelines, for units listed in a.(ii) above) be

given to Brookline residents, employees of the Town and the Brookline Housing Authority, and families with children in Brookline Public Schools, and

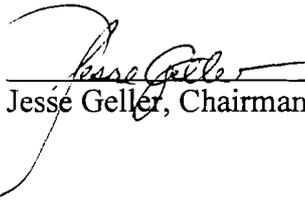
(ii) all of the affordable units have obtained a certificate of occupancy, unless otherwise approved by the Director of Planning and Community Development; and

- g. the affordable units shall be sold or rented, if necessary, subject to a restrictive covenant or affordable housing agreement with the Town of Brookline, permanently controlling the cost and turnover of units.
8. One temporary construction and/or development sign, no greater than 20 square feet, may be erected on site during the construction and initial sale period, with the design subject to the review and approval of the Assistant Director for Regulatory Planning.
 9. A certified as built foundation plan for the new residential building on the lot, to ensure conformance to the Board of Appeals decision, shall be submitted to the Building Commissioner for review and approval before the balance of the building permit shall issue.
 10. Prior to the issuance of any occupancy permits, complete as-built plans for the new residential building on the lot shall be prepared and certified by a registered professional engineer and/or registered architect to be in conformance with the approved plans and filed with the Building Commissioner.
 11. Prior to the issuance of the final Certificate of Occupancy, the applicant shall install signage, no greater than one square foot per sign, indicating the dual-use, visitor and ADA accessible parking spaces, which shall be verified by the Assistant Director of Regulatory Planning.
 12. Prior to the issuance of the final Certificate of Occupancy for the new residential building on the lot, all landscaping on the site, subject to seasonal planting conditions, shall be completed, subject to the review and approval of the Assistant Director of Regulatory Planning. If seasonal planting conditions do not allow completion of landscaping at the time the certificate of occupancy is sought, the applicant shall issue a bond or deposit in accordance with Section 9.04 of the Zoning Bylaw to assure such completion when seasonal conditions first permit such work.
 13. Refuse facilities for the professional office building shall be provided by the new residential building in perpetuity, unless an alternative method to manage refuse is reviewed and approved by the Board of Appeals.
 14. Prior to the issuance of a building permit, the applicant shall record a final parking plan for the new garage at the Registry of Deeds clearly delineating 44 parking spaces for the

exclusive use of 1842 Beacon Street, 17 dual parking spaces, 20 parking spaces for the exclusive use of the new residential building and 3 visitor parking spaces, and show evidence of such to the Building Commissioner.

15. At all times both buildings on the site shall remain in common ownership and management.
16. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor, including landscaping, fencing, grading, and location of utilities; 2) building elevations and floor plans for the new residential building, stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

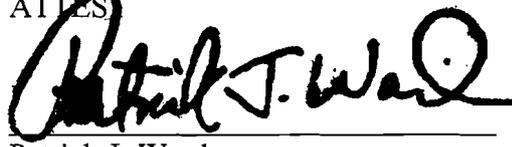
RECEIVED
TOWN OF BROOKLINE
TOWN CLERK
2011 AUG 12 A 8:03
Unanimous Decision of
The Board of Appeals



Jesse Geller, Chairman

Filing Date: August 12, 2011

A True Copy
ATTEST



Patrick J. Ward
Clerk, Board of Appeals