Town of Brookline
Massachusetts

BOARD OF APPEALS
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Jesse Geller, Co-Chair
Robert De Vries

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 090013

Petitioner, Harvard 111 Limited Partnership, owner of 111 Harvard Street, Brookline, Massachusetts, with an address c/o Intercontinental Real Estate Corporation, 1270 Soldiers Field Road, Boston, Massachusetts 02135, applied to the Building Commissioner for permission to convert an existing building into office and medical office space and to construct an addition for an elevator per plans at 111 Harvard Street. The application was denied and an appeal was taken to this Board.

On 26 March 2009, 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 23 April 2009, at 7:15 p.m. in the Selectmen's conference room, 6th floor, Town Hall as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to his attorney of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on 2 and 9 April 2009 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: **HARVARD 111 LIMITED PARTNERSHIP**
Location of Premises: **111 HARVARD ST BRKL**
Date of Hearing: **4/23/09**
Time of Hearing: **7:15 p.m.**
Place of Hearing: **Selectmen's Conference Room, 6th flr.**

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

1.) **5.09.2.a and 5.09.2.h; Design Review; Special Permit Required.**
2.) **6.02.1; Table of Off-Street Parking Space Requirements; Variance Required.**
3.) **6.02.1.b; Off-Street Parking Space Regulations; Special Permit Required.**
4.) **6.02.5.d; Off-Street Parking Space Regulations; Special Permit Required** of the Zoning By-Law to convert the building into medical office space and to construct an addition for an elevator per plans at **111 HARVARD ST BRKL.**

Said Premise located in a **L-1.0 (local business)** 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 617-734-2134 or check meeting calendar at:http://calendars.town.brookline.ma.us/MasterTownCalandar/?FormID=158.

*The Town of Brookline does not discriminate on the basis of disability in 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.***

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At the time and place specified in the notice, this Board held a public hearing. As provided below, the public hearing was continued to 7:00 p.m. on May 7, 2009 in the Selectmen's Conference Room and the public hearing was continued further to May 21,

2009. Due to a scheduling conflict the place of the hearing on May 21, 2009 was moved to Room 111, first floor, Town Hall. Present throughout the initial and continued hearing was Chairman, Jesse Geller, and Board Members, Jonathan Book and Mark Zuroff. Attorney Patrick C. Toomey of McCarter & English, LLP, 265 Franklin Street, Boston Massachusetts, presented the case before the Board. Mr. Toomey submitted to the Board Members a letter memorandum dated April 22, 2009 in support of the relief sought by the applicant (the "Memorandum in Support").

Mr. Toomey was accompanied at the initial hearing by Dr. Laurent C. Delli-Bovi, M.D., of Women's Health Services, P.C. ("WHS") and Sergio Modigliani, the Architect for the project.

Per the Memorandum in Support as supplemented by Mr. Toomey's presentation on behalf of the applicant, the current building (the "Building") and associated parking areas at 111 Harvard Street (with the Building, the "Property") is located at the corner of Harvard Street and Harvard Court, is in a local business district (L-1.0) that is on the edge of a residential area, contains ±7,038 square feet, is served by 26 parking spaces, and is currently vacant. Most recently, the Building, which has two stories and a basement, was the location of a Hollywood Video store. Previously, the Building was used as a restaurant and for medical offices, respectively. Two parking areas, currently containing a total of 26 parking spaces, are located at the Property. The larger parking lot, which currently has 20 spaces, is located at the first (ground) floor level and is accessed by Harvard Street and the smaller parking area located at the basement level and to the rear of the Building, which currently has 6 spaces, is accessed by Harvard Court. The applicant proposes to lease the Property to WHS, which will use the Building for general

and medical office uses.. The Building's first floor would be used for the main waiting and reception areas, and counseling and exam rooms and medical offices; the basement level would be used for procedure and recovery rooms; and the second floor, which would be off-limits to the public, would be used for records and supply storage, office space, and a call center.

Upon renovation of the Building, WHS will operate an outpatient clinic offering a full range of medical services for women, including gynecological services, minor outpatient surgical procedures, family planning services, abortions, contraception and counseling services. The surrounding properties to the Building are largely commercial in nature, including a Walgreen's pharmacy, a piano store and offices. An electrical substation is behind the Building and a day care center is across the street. There are also residences located across the street from the Walgreen's.

Mr. Toomey summarized the alterations to be made to the Building as consisting of the construction of an elevator at the rear of the Building, replacement of windows without any enlargement of the openings, replacement of some of the existing rooftop equipment and installation of an emergency generator on the roof.

On the first night of the hearing, April 23, 2009, Mr. Toomey stated that the Building may be used as-of-right for medical office and office uses and that the applicant was seeking a special permit to reduce required parking by 6 spaces. Per the Memorandum in Support, the Applicant seeks a special permit under Article V, **Sections 5.09.2.a** and **5.09.2.h** (Design Review) and under Article VI, **Sections 6.02.5.d and 6.02.1.b** (Off Street Parking Regulations) and a variance under Article VI, Section 6.02.1 (Off-Street Parking Regulations) of the Zoning By-Law. Relief by variance under Article VI,

Section 6.02.1 (Off-Street Parking Regulations) of the Zoning By-Law is requested only to the extent adequate relief is not available by special permit.

The Memorandum in Support provides and Mr. Toomey advised the Board: (i) that concerns about the presence of protesters exercising first amendment rights on account of abortion services being part of the services offered by WHS is a constitutional question rather than a question of zoning use because the use as a medical office is permitted and the Building has in the past been used for medical offices; (ii) the new location is similar to WHS' current location in the types of neighboring uses, access to public transit and surrounding roadway system; (iii) WHS has operated at its current location for eighteen years without any adverse effect on public safety and no evidence has been presented which indicates that WHS' new location will foster a different result; (iv) WHS has met with the Police Chief, and his staff to discuss the thirty five foot buffer zone established pursuant to Massachusetts General Laws Chapter 266, §120E ½, security precautions which WHS will establish at the Building, and contingency planning and that public safety is a fundamental governmental obligation; and (v) the presence of protesters should play no part in the analysis of whether the Board of Appeals should grant the special permits and variance requested, citing Framingham Clinic, Inc. v. Board of Selectman of Southborough, 373 Mass. 279 (1977) ("Framingham Clinic") in support. In conclusion, the Memorandum in Support provides and Mr. Toomey stated at the hearing that the "possible presence of members of the public exercising their first amendment rights in the vicinity of the Building is legally irrelevant in determining whether the requested zoning relief should be granted."

Mr. Toomey introduced Mr. Sergio Modigliani, the architect for the project, to present the building design and elevations, a site review and current parking conditions. Mr. Modigliani indicated that the entrances to the parking areas and the Building will remain unchanged, an elevator would be added at the rear of the building to improve accessibility, windows would be replaced, rooftop mechanical equipment would be replaced in kind, and a rooftop emergency generator and additional rear door would be added, all as shown on plans submitted to the Building Department. Mr. Modigliani reviewed photographs of the building and site submitted to the Board as part of the applications and he indicated that there were no changes proposed for the parking areas and there would be no new signage, other than a property address sign.

Mr. Toomey concluded that the materials presented to the Board, including the written materials, satisfy the criteria for special permits for design review, as well as a special permit for the reduction in required parking.

Jesse Geller, the Board Chairman, asked the Members of the Board if they had any questions. Jonathan Book, a Member of the Board, asked about screening and visibility of rooftop mechanicals. Mr. Modigliani indicated that no screening was proposed and that the existing rooftop equipment is not screened and is visible from Harvard Street. Mr. Book also asked about the location of any protesters. Mr. Toomey indicated that WHS has been in discussions with the Police Chief, Town Counsel and the Attorney General's office about the 35-foot buffer zone provided by Massachusetts law, but that the location of such zone was not up to the applicant or WHS.

Mark Zuroff, another Member of the Board, asked Attorney Toomey for a comparison of WHS' current location and the proposed location. Mr. Toomey indicated

that the current location is in a commercial district and on the edge of a residential district and that there was a daycare center, a church, medical offices and retail stores near WHS current facility and that the locations do not differ substantially. Mr. Zuroff also asked for a comparison of traffic. Mr. Toomey stated that traffic at the current location and the proposed location are probably similar although the speed limit is lower at the proposed location.

Chairman Geller stated that the relief sought under **Section 6.02.5.d** of the Zoning Bylaw requires a test of whether the proposed occupancy is substantially below the normal and average for retail or office uses, and he asked Attorney Toomey to speak to that issue. In response thereto, and using a pediatrician's office as a comparison, Attorney Toomey indicated that WHS would have at most 8 patients on the premises at any one time, and that at its current location, WHS averages 12 patients per day, which is expected to continue. Most surgical procedures will be performed between 7:30 a.m. and 11:00 a.m., which is when up to 12 staff members would be present. Mr. Toomey stated that only one doctor would be present at the clinic but that a resident might be on site for teaching purposes. Accordingly, the 26 parking spaces should accommodate the 8 patients and 12 staff members. Mr. Toomey also indicated that all patients undergoing surgical procedures will be accompanied by a driver, but the driver is not required to remain at the premises during a procedure. Based upon the lower number of patients at the WHS offices at any one time and throughout the day, Attorney Toomey stated that he expects parking demand to be much lower than a typical doctor's office.

Chairman Geller also asked Attorney Toomey to review the requirements for a special permit under **Section 9.05** of the Zoning Bylaw. Mr. Toomey indicated that the

site is an appropriate location for the principal uses, office and medical office, which are permitted as-of-right, the uses will not adversely affect the neighborhood, and the uses will not create serious hazards to vehicles or pedestrians. He noted that there would be less vehicular traffic than the past use of the site as a video rental store with associated parking.

Chairman Geller also asked Mr. Toomey about the presence of protesters and whether the adverse effect of the protesters should be considered under **Section 9.05** of the Zoning Bylaw. Mr. Toomey, citing the Framingham Clinic decision, which he provided to the Board, indicated that a woman has a fundamental constitutional right to terminate a pregnancy, that WHS had a correlative right to provide such services, and public sentiment concerning the effect on the neighborhood by protesters should not be taken into account in the legal analysis for the zoning relief sought. Attorney Toomey also cited an over 18-year history of WHS at its current location in Brookline and the absence of any serious incident. Attorney Toomey indicated that WHS would work closely with the police on public safety issues. In response to Chairman Geller's inquiry, Mr. Toomey indicated that WHS would continue its nonconfrontation policy for protesters in order to ameliorate safety concerns.

Capitan Morgan of the Brookline Police Department stated that the buffer zone was the subject of continuing discussion with Town Counsel and the Massachusetts Attorney General's office. Captain Morgan disagreed with Attorney Toomey's comparison of WHS' current and proposed locations because the proposed location has slower moving traffic, is not on a divided highway, has more pedestrian traffic, is less set back from the street and is more proximate to bus and trolley lines, and he indicated that

the Brookline Police Chief was concerned that the proposed location would attract protesters because of easier access. He indicated that the Police Chief would like to see a police detail when protesters are present and that the cost of the detail should be borne by WHS.

In response, Attorney Toomey reiterated the lack of incidents at WHS' current location, but noted that when a large number of protesters are present, WHS has engaged a police detail. He indicated that WHS does not want a police detail on a regular basis and that a police detail should not be a condition of the relief sought and WHS' operating at the location, and noted that WHS would have an armed guard inside the building on a regular basis.

Mr. Zuroff asked how WHS determines in advance when a large number of protesters will be present. Mr. Toomey indicated that WHS generally receives such information from police sources.

Dr. Delli-Bovi, on behalf of WHS, stated that her most significant concern was about the police detail and the atmosphere it created for her patients. She indicated that women seeking access to WHS medical services are vulnerable and an active police presence will criminalize her patients. She cited her eighteen year history in Brookline and the lack of any serious incident with protesters.

Chairman Geller then asked if anyone wished to speak in favor of the applications. Approximately seventeen members of the public, including patients of Dr. Delli-Bovi, spoke at the initial hearing in support of the services which WHS offers and the benefit to the neighborhood, despite the presence of protesters. Some of the comments included the following:

Sara Wunsch, who lives at 77 Brook Street in Brookline, also stated that those who are the subject of protesters should not have to pay for police details, and noted that although there is a right to free speech, there is also the right for women to have access to reproductive health services.

Chairman Geller reminded the audience that the Board has jurisdiction only over zoning matters as provided by Massachusetts General Laws, Chapter 40A and the Town's Zoning Bylaw and that comments should be confined to matters of zoning.

Lisa Coady of 12 Kenwood Street in Brookline stated her belief that the Applicant has presented a responsible plan, which addresses all of the zoning issues.

Chairman Geller stated that due to the lateness of the hour, the hearing would be continued and upon motion duly made and seconded by the Board, the hearing was continued to May 7, 2009 at 7:00 p.m.

On May 7, 2009 at 7:00 p.m. the hearing was re-opened. Chairman Geller again reviewed the hearing order and reminded those wishing to speak in favor or against the applications to limit their remarks to the zoning relief requested. Thereafter, the hearing continued with those people speaking in favor of the applications. Approximately thirty-three people spoke in favor of the proposed project. Some of the comments at the continued hearing in favor of the applications included the following:

Gary Gross stated that the constitutional issues concerning the location of a women's health services clinic providing abortion had been decided and that the Board must determine whether the proposed project satisfies zoning requirements.

Sally Boll stated that WHS will operate a legitimate business in a properly zoned area.

Lynn Stubblefield stated that she is not worried about traffic.

John Spence cautioned that we can not disapprove the applications using technical grounds of traffic and parking and the possible intimidation by demonstrators to block constitutional rights.

Melvin Stoler stated that 26 parking spaces would be more than adequate to satisfy WHS' parking needs.

Shruthi Mahalingaiah stated that twenty-six spaces are more than adequate for this clinic.

In addition, to the public comments, numerous letters expressing support were delivered and entered into the hearing record.

After hearing from all who wished to speak in favor of the applications, Chairman Geller asked if anyone wished to speak in opposition to the applications. Approximately twenty-seven people spoke against the applications. Some of the comments at the continued hearing opposed to the applications included the following:

Steven Ritter submitted into the hearing record, on his own behalf and on behalf of many nearby residents and business owners, a Memorandum in opposition to the applications for zoning relief (the "Ritter Memorandum in Opposition"). Mr. Ritter stated that he wished to speak about the zoning issues under **Section 9.05** of the Zoning Bylaw as set forth in the Ritter Memorandum in Opposition, particularly **Sections 9.05.1.b**. ("the use as developed will not adversely affect the neighborhood"), c. ("there will be no nuisance or serious hazard to vehicles or pedestrians") and d. ("adequate and appropriate facilities will be provided for the proper operation of the proposed use"). Mr. Ritter indicated that the protesters were an inherent part of the clinic, which presented

safety issues and would create an adverse impact on the neighborhood and a nuisance to vehicles and pedestrians. He also spoke about the police details, the opposition of neighbors, traffic circulation between the two parking areas at the property, a possible increase in the number of patients at WHS' new location, and alternative locations for WHS. Mr. Ritter submitted photographs and copies of press clippings evidencing protestor actions and stated that these actions, including, standing in front of neighboring businesses, circulation of graphic materials, blocking pedestrian passageways, all constituted a nuisance and creation of safety issues and were adverse to the neighborhood. Mr. Ritter also noted that many of the proponents of the applications were not residents of the neighborhood.

Attorney Rebecca Sipowicz, of Berlutti & McLaughlin, representing the Little Corner School House, located across Harvard Street from the Building, noted that no traffic study had been undertaken and stated that the design review process under the Zoning By-Law mandates that circulation and vehicular traffic, as well as pedestrian traffic, be studied. Ms. Sipowicz also noted that no study was done on how the protestors will affect traffic. Ms. Sipowicz cautioned the Board that any design review approval without a traffic study, especially considering the waiver of parking spaces, is inappropriate and violates the special permit requirements. Ms. Sipowicz asked that WHS provide a traffic study addressing the proposed circulation of vehicles, which will require a left turn out of the upper parking area and a left-hand turn into Harvard Court to the lower parking area. Ms. Sipowicz stated that the applicant's request to waive six parking spaces was inappropriate given that WHS' purported reason for moving to the new facility was to increase business and that the number of occupants of the Building

provided in the applicant's presentation did not include the patients that will visit for normal medical clinical use. Ms. Sipowicz also stated that Mr. Toomey's interpretation of Framingham Clinic was inaccurate.

Ina Brothers-Santosuosso, the owner of The Little Corner School House, a neighboring business, stated that this neighborhood is inappropriate for this clinic because it is an unsafe environment for the children (who walk by the protestors to the park at least twice a day) to walk by the protestors. Ms. Brothers-Santosuosso urged the Board not to grant the requested relief based upon the nuisance to the neighborhood.

A Member of the Town Transportation Board, Michael Sandman, asked to speak on behalf of the Transportation Board. Because of limited opportunity to hear from Mr. Sandman, the Chairman allowed Mr. Sandman to speak. Mr. Sandman emphasized that the Transportation Board has not looked at a formal parking study but that the Commission would consider the feasibility of eliminating parking spaces on both sides of Harvard Street and creating a no-parking drop-off zone for the school, thus providing some insulation for children heading into the school and for people coming in and out of the clinic. Mr. Sandman also noted that there has been some discussion about relocating crosswalks across Harvard Street at Harvard Avenue.

Kathy Kaplan, a business owner in the neighborhood, stated that over the last decade pedestrian traffic has dramatically increased and that the clinic and the protestors that will come with it will dramatically affect the neighborhood. Ms. Kaplan further stated that vehicular traffic has increased over the years and WHS' use of two driveways will result in more snarled traffic and increase safety hazards in an area "where she sees near misses every day." Ms. Kaplan concluded by stating that the impact of the proposed

move of WHS poses a real nuisance to a peaceful neighborhood and will have an adverse affect on her business and those around her.

Dan Williams, co-owner of a business abutting the Property noted that the addition of protestors will simply make it even more difficult to operate a successful business. Mr. Williams also stated that he doesn't believe the alleyway at Harvard Court is wide enough.

Mary Thomits noted in stating her opposition that this neighborhood has many pedestrians and that traffic on Harvard Street is one lane on each side.

Ira Heffan provided a Memorandum (the "Heffan Memorandum in Opposition") and plan to the Board concerning several parking issues, including the length and width of the existing parking spaces, the number of compact spaces, the width and grade of Harvard Court and the safety of children crossing Harvard Court and sight distances at the intersection of Harvard Court and Harvard Street, which Heffan Memorandum in Opposition was entered into the record of the hearing. Mr. Heffan stated with regard to Harvard Court that WHS will be activating the Harvard Court passageway in a way that it hasn't ever been used and, given the steep grade approaching the sidewalk on Harvard Street, he anticipates safety concerns for children because it is difficult to have any visibility.

Sandy Aronson also expressed concern with the traffic circulation to and from the Property created by WHS and stated that pulling out of the main parking area and then taking a left onto Harvard Court creates a dangerous situation for both cars and pedestrians, even without distractions from the protestors.

Alberto Chang also spoke in opposition and provided a Power Point presentation, also submitted in written format and which was entered into the record of the hearing. Mr. Chang stated that the site is not an appropriate location for such a use. His comments, as well as the comments of many other opponents, noted the presence of daycare centers and two schools in the vicinity of the Building as well as the high level of pedestrian and vehicular traffic, and the effect of protestors on children, residents and nearby businesses, fears for personal safety, and the possibility of alternate locations. Mr. Chang stated that WHS' current site and the proposed site are not the same and that the number of protestors will be greater at the proposed location, which will adversely affect the neighborhood. Mr. Chang also expressed concern about traffic circulation and the possibility that there would be a need for more parking if WHS' business grew at the new location.

In addition, to the public comments, numerous letters expressing opposition were delivered and entered into the hearing record.

At 10:30 p.m., after hearing from all who wished to speak in opposition to the applications, Chairman Geller indicated that the hearing would need to be continued and upon motion duly made and seconded, the Board voted to continue the hearing to May 21, 2009 at 7:30 p.m.

On May 21, 2009 at 7:30 p.m., Chairman Geller called the continued hearing to order. Several additional letters of support and opposition to the proposal, which were received by the Board prior to the continued hearing, were submitted into the hearing record. In response to traffic circulation and parking issues previously raised in the hearing, the applicant submitted a revised parking layout plan showing a total of 24 re-

delineated parking spaces, which includes the elimination of one handicap accessible space. Mr. Toomey stated that the revised parking spaces conform with all applicable requirements, and there is included a pick-up area for surgical patients in the lower parking area at the rear of the building with access thereto from Harvard Court. Mr. Toomey stated that, as confirmed by the Planning Board, 32 parking spaces are required by applicable zoning and that the applicant was now seeking a special permit for a reduction of 8 parking spaces based upon the revised parking layout plan, whereas the existing parking layout would only require a special permit for a reduction of 6 parking spaces. Attorney Toomey stated that the existing parking layout included 2 handicapped accessible parking spaces, but the size of these handicapped accessible spaces did not conform with applicable requirements. By reducing the number of parking spaces to 24, only one handicapped parking space is required, the size of which will conform with applicable requirements. The pick-up area in the lower parking lot will not be counted as a parking space, although it will be used by a vehicle for picking-up patients. Mr. Toomey noted that any vehicle using the pick-up area would otherwise be located in a parking space. Sergio Modigliani reviewed the changes evidenced by the revised parking plan, noting that all stall dimensions and parking lot aisle widths are in full compliance with the Zoning By-Law and stated that the revised plan was preferable since the applicant was able to fully comply with all zoning requirements.

Zoning Board Member Book asked Mr. Toomey whether the applicant was permitted to change the requested parking relief under **Section 6.02.1** of the Zoning By-Law from a reduction of six spaces to a reduction of eight spaces. Mr. Geller asked Building Commissioner Michael Shepard whether the applicant's request for relief under the

applicable Section specified a reduction of six parking spaces. Mr. Shepard responded that his denial letter never specified the number of spaces to be reduced and was not limited to a specified number of spaces. Assistant Director for Regulatory Planning Polly Selkoe added that it is typical that changes that do not amend an application for relief "move along" to the Zoning Board of Appeals with an amended plan only. Mr. Book asked Ms. Selkoe whether the amended request (for a reduction of two additional parking spaces) would change the Planning Board's recommendation. Ms. Selkoe stated that in her judgment the change is not significant because the Planning Board believed that more than adequate parking existed. Ms. Selkoe agreed that the revised parking plan was preferable to the existing parking layout.

Mr. Zuroff inquired about WHS' right to use Harvard Court in light of a letter submitted by an abutting property owner, NSTAR, questioning that right for the proposed purposes sought in the application. The NSTAR letter was entered into the record of the hearing. Mr. Toomey responded that the applicant's deed includes the right to use Harvard Court and that NSTAR does not dispute these rights. Mr. Toomey emphasized the limited use of Harvard Court by WHS and that the parking area accessed by Harvard Court has been in its current configuration since 1975 or 1976 without prior objection from NSTAR. Mr. Toomey also noted the use of Harvard Court by abutting properties without objection by NSTAR. Mr. Toomey concluded by noting that any dispute concerning the right to use Harvard Court was not a proper subject for determination before the Zoning Board of Appeals.

As the basis for the requested parking relief, Mr. Toomey reiterated that unlike many medical offices where several doctors and staff may see several patients per hour, use of

the building by WHS will result in an average of approximately 12 patients per day, with no more than 8 patients at any one time. Accordingly, Mr. Toomey indicated that the use of the building by WHS would be substantially below the normal or average for a medical office use and that 24 parking spaces would be more than sufficient to satisfy the expected traffic demand.

In response to questions and comments received on the prior hearing dates regarding traffic conditions, Mr. Toomey introduced Robbie Burgess, P.E. of Howard/Stein-Hudson Associates, Inc., which was engaged to undertake a traffic study related to the Property. Mr. Burgess provided a traffic report dated May 21, 2009 prepared by Howard/Stein-Hudson Associates, Inc., which was submitted to the Board and made a part of the record (the "Traffic Report"). The Traffic Report indicates that 37 vehicles per day would visit the property between the hours of 7:45 a.m. and 6:00 p.m., which is based upon the Institute of Transportation Engineer's Trip Generation, 8th edition.

As more fully set forth in the Traffic Report and in response to questions raised concerning traffic circulation for surgical patients, a gap study demonstrated that there would be more than adequate opportunities for drivers to safely make the left turn out of the upper parking area and a left-hand turn into Harvard Court during both morning (61 gaps of at least 7.5 seconds) and evening (35 gaps of at least 7.5 seconds) peak hour periods. The Traffic Report and Mr. Burgess' presentation also indicated that the existing sight distances for the Harvard Court / Harvard Street intersection are less than the recommended design values, but that this is an existing intersection for which no changes are proposed. Mr. Burgess also indicated that the elimination of parking spaces in front of the property would increase the available sight distance. Mr. Burgess

emphasized that it was his determination that there would be a minimal amount of traffic during the busiest one hour of this project. Attorney Toomey reiterated that use of the Building for a medical office is permitted as of right and its status as such does not change and is not affected by analysis of whether a special permit should be granted with respect to the reduction in parking. Mr. Toomey further noted that the use of the parking areas at the Property for accessory parking satisfies the requirements of **Section 9.05** of the Town of Brookline Zoning By-law. Records of the Brookline Building Department include plans as early as 1976 showing the two parking areas in their current location and memoranda from the then Brookline Building Commissioner that the parking areas conform to the then current parking requirements of the Zoning By-law. Accordingly, the parking areas at the Property have been and continue to be an appropriate location for the accessory parking use. Attorney Toomey also indicated that parking demand related to WHS' use of the building will be less than the number of parking spaces provided, and that no material change, other than restriping for 24 parking spaces, is proposed for the parking areas. Accordingly, Attorney Toomey stated that the continued use of the parking areas at the Property for accessory parking will not adversely affect the neighborhood or result in any nuisance or serious hazard to vehicles or pedestrians. Finally, Attorney Toomey stated that, based upon the parking layout plan submitted, aisle widths, size of parking spaces, number of handicapped parking spaces and number of compact spaces (6 of 24) are adequate and appropriate for the proper operation of the accessory parking use and will be in compliance with the requirements of the Zoning By-law.

Polly Selkoe, Assistant Director for Regulatory Planning, delivered the findings of the Planning Department.

Section 5.09.2.a, h: Design Review – A special permit is required for all exterior alterations and changes to structures with frontage on Harvard Street, or to non-residential uses in a non-residential district with 20 or more parking spaces. This special permit is subject to the design review standards listed under *Section 5.09.4(a-l)*. The most relevant sections of the design review standards are described below:

- *Preservation of Trees and Landscape:* The proposal is not expected to alter any of the existing landscaping on site.
- *Relation of Buildings to the Form of the Streetscape and Neighborhood:* The proposal will retain the site's existing features, and the proposed elevator shaft and new rooftop mechanical equipment will not affect the building's streetscape façade.
- *Circulation:* The vehicular circulation on site will not change. The proposal calls for a pick-up and drop-off parking spaces at the rear of the building along Harvard Court, a rarely used street.
- *Advertising Features:* The applicant does not expect to have any advertising features on site. The main identifying feature of the building will be an address number.
- *Safety and Security:* The site is easily accessed by emergency services, and the front entryway will have a secure vestibule and the presence of a security officer.

Section 6.02.1: Table of Off-Street Parking Space Requirements
Section 6.02.1.b: Off-Street Parking Space Regulations – Where the computed requirement for non-residential use in a business district is six spaces or less, the Board of Appeals by special permit may waive all or part of the requirement, considering the operation characteristics of the proposed use, the peak parking demand, the need for employee parking, and the availability of public parking and transit facilities.
Section 6.02.5.d: Off-Street Parking Space Regulations – Where a use is of such a kind that the occupancy of floor-space by customers, clients or employees is substantially below the normal or average for office uses, the Board of Appeals by special permit may waive up to half the number of required parking spaces. In this case, the basement level of the building is proposed to be used as treatment and recovery space for patients, a use that requires a significant amount of space but with a less intense level of use than a typical medical office.

PARKING ANALYSIS

	Floor Area	Required Parking	Proposed	Finding
Basement (medical office)	2,809 s.f.	14 spaces	8 spaces	Special Permit*
First Floor (medical office)	3,099 s.f.	15 spaces	15 spaces	Complies
Second Floor	1,175 s.f.	3 spaces	3 spaces	Complies

(office use)				

*Under *Section 6.02.5.d*, the Board of Appeals may by special permit waive up to half of the required number of parking spaces for an office use where the occupancy of floor space by clients or employees is substantially below the normal or average for office uses. In this case, the applicant is requesting a special permit for the parking required for the basement level of the building, which would be used for procedure and recovery space, rather than typical medical office use. Patients treated in this portion of the building would be present at the facility for an extended period of time, and are not permitted to drive themselves.

Ms. Selkoe reported that the Planning Board was not opposed to this proposal to establish a medical office use at this location. The existing parking on-site should be sufficient for the proposed use; the building's lower level would not have as intense a level of use as a typical medical office on the first floor since a significant amount of space would be used to support a limited number of patients. The other levels comply with parking requirements. Additionally, the location is near rapid transit and bus routes. The Board would like the applicant to carefully consider the vehicular circulation options for the pick-up of patients at the lower level in order to limit traffic conflicts with Harvard Street.

The alterations to the building needed to convert it into medical office space are minor; the most significant alteration, a new elevator, would be located at the rear of the building, would improve the building's accessibility, and would be minimally visible from the street. The Planning Board is fine with either a brick or stucco finish on the elevator's exterior. Additional alterations include replacing the existing windows and the installation of new mechanical equipment, but these would only slightly change the building's street appearance. No new window openings or building additions are proposed. The property is currently well maintained, even without a tenant, and this level

of maintenance is expected to continue. The Planning Board would like the applicant to hold a neighborhood meeting to review concerns from neighbors regarding possible protestors and security, to see if these concerns can be addressed.

Therefore, the Planning Board recommends approval of the proposal and the plans, prepared by Sergio Modigliani, last dated 3/19/09, subject to the following conditions:

1. **Prior to issuance of a building permit, final building elevations shall be submitted to the Assistant Director for Regulatory Planning for review and approval. These elevations shall indicate any window treatments or films, which shall not have a mirrored appearance.**

2. **The basement level of the building shall be restricted to procedure and recovery room space, rather than typical medical office use.**

3. **Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor; 2) final elevations, stamped and signed by a registered architect; and 3) evidence the Board of Appeals decision has been recorded at the registry of deeds.**

Michael Shepard, Building Commissioner, delivered the comments of the Building Department. He said that in his opinion the use as proposed was allowed as of right. He said that the only zoning relief needed was related to design review and the parking. He opined that the parking plan and other plans as proposed, met the dimensional requirements of the zoning by-law. He said that the Building Department supported the proposal and the conditions proposed by the Planning Board. However, he said that the Board may want to consider limiting use of the parking spaces in the lower parking lot to employees only and have access restricted to vehicles backing into the spaces.

During deliberations, Chairman Geller and other members of the Board indicated that the Board's jurisdiction was limited to that provided under the Zoning By-law and M.G.L.c. 40A and that their responsibility was to consider the applications for a special permit for design review and a special permit to reduce required parking in light of the Zoning By-law requirements. Mr. Book stated that it is not within the authority of the Zoning Board to consider matters such as the presence or non-presence of protestors or whether the abortion services provided are appropriate at this site. Mr. Book further stated that the late change in the requested reduction in the number of parking spaces concerns him but that after listening to the testimony in support of a reduction from six to eight spaces, the weight of the testimony supports that further reduction. Board members noted that no one raised any objections to the proposed changes to the building, that a reduction of 8 required parking spaces was appropriate, and that the applicant had demonstrated compliance with the conditions required to grant both special permits. Mr. Geller stated that he believed the location of the clinic to this Property was poorly chosen but that the Board was limited in its review to design review and the parking and other relief as requested. Mr. Geller further stated that he disagreed with Mr. Toomey's interpretation of the Framingham Clinic case and suggested that the case did not prevent legitimate zoning regulation if applied in a non-discriminatory manner. Mr. Geller noted that the use of the property for a medical office is an allowed use under the Zoning By-Law.

The Board, having deliberated on this matter and having considered the foregoing testimony and all materials submitted in connection with the applications, concludes that the requirements of **Section 5.09.2.a and 5.09.2h** (Design Review), **Section 6.02.5.d** (Off

Street Parking) and **Section 9.05** (Special Permit) of the Zoning By-law have been satisfied and it is desirable to grant the Special Permits under such Sections of the Zoning By-law in accordance with the relief requested.

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 or pedestrians.

d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people.

Accordingly, the Board voted unanimously to grant a Special Permit for Design Review and a Special Permit to reduce required parking by 8 parking spaces in accordance with the revised parking layout plan entitled "Parking Layout, Women's Health Services, 111 Harvard Street, Brookline, MA 02445" by Sergio Modigliani and dated May 18, 2009 showing 24 parking spaces submitted by the applicant subject to the following conditions:

1. **Prior to issuance of a building permit, final building elevations shall be submitted to the Assistant Director for Regulatory Planning for review and approval. These elevations shall indicate any window treatments or films, which shall not have a mirrored appearance.**

2. **The basement level of the building shall be restricted to procedure and recovery room space, rather than typical medical office use.**

3. **Parking spaces in the lower parking area will be reserved for employees only and they will be required to back into the spaces. Appropriate signage will be affixed to the retaining wall.**

4. **Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered engineer or land surveyor; 2) final elevations, stamped and signed by a registered architect; and 3) evidence the Board of Appeals decision has been recorded at the registry of deeds.**

Unanimous Decision of

The Board of Appeals

Jesse Geller, Chairman

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Filing Date: July 16, 2009

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ATTEST:

Patrick J. Ward
Clerk, Board of Appeals