

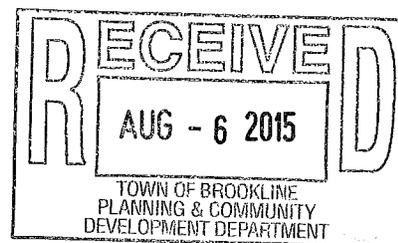
Holland & Knight

10 St James Avenue | Boston, MA 02116 | T 617 523 2700 | F 617 523.6850
Holland & Knight LLP | www.hklaw.com

August 6, 2015

Frank G. Stearns
(617) 854-1406
frank.stearns@hklaw.com

Jesse Geller
Chairman, Zoning Board of Appeals
Town of Brookline
Town Hall
333 Washington Street
Brookline, MA 02445



Re: Public Hearing Requests re: 160 Washington Street, Case #2015-0002

Dear Chairman Geller:

This request is sent on behalf of New England Treatment Access, Inc. (NETA), the petitioner for a use special permit for a Registered Marijuana Dispensary at 160 Washington Street. The public hearing on this petition was conducted on April 23, 2015. The hearing was closed and the ZBA voted to grant the special permit.

The final written decision for this special permit has not yet been filed with the Town Clerk. Pursuant to GL c. 40A, § 9, the special permit decision should be filed with the Town Clerk within 90 days of the close of the public hearing. On July 21, 2015 the ZBA voted at a public meeting to extend the 90 day deadline to September 15, 2015. (copy attached).

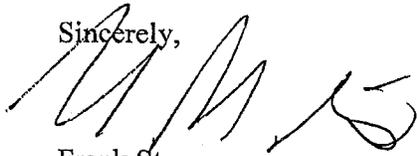
This letter requests that the ZBA schedule a public hearing prior to September 15, 2015 in order to consider the following five (5) requests by NETA: (i) a request to re-open the case to allow NETA to present a final site plan which has been modified from the site plan which was part of its public hearing presentation at the April 23, 2015 public hearing; (ii) a request to permit NETA to present the modified Site Plan to the Planning Board for its review and approval; (iii) a request to ask the ZBA to either make a finding that Section G. 7. of the Board Rules and Regulations is not applicable to this site plan modification request, or, in the alternative, to waive Section G. 7. of the Board's rules in this case; (iv) a request to have the ZBA announce at the public hearing the date, time and location of any continuation of the public hearing following the requested remand to the Planning Board; and (v) a request to further extend the date by which the final written decision should be filed with the Town Clerk through November 20, 2015.

August 6, 2015
Page 2

Since the written decision from the public hearing has not yet been filed with the Town Clerk, final action has not occurred. GL c. 40A §14 grants the ZBA authority to modify a decision. NETA is requesting this modification to be considered at a fully noticed and advertised public hearing. The ZBA may allow the public hearing to be re-opened to review the special permit application under the Bylaw criteria premised on the Site Plan presented herewith, which does not require any permissions or consents from the adjacent property. NETA is not requesting any new or different relief than the use special permit under Bylaw sections 4.12 and use item 20B.

NETA hereby agrees to an extension of the 90 day deadline under GL c. 40A §9 through November 20, 2015 for the ZBA to issue and file its written decision concerning NETA's special permit requests heard by the ZBA on April 23, 2015. It hereby confirms that it will not rely on the failure of the ZBA to issue and file a written decision by September 15, 2015 as the basis for any claim of a constructive grant of the special permit, and will consider the written decision issued and filed by the ZBA on or by November 20, 2015 to have the same force and effect as if the written decision were issued and filed by July 22, 2015, within the 90 days set forth in GL c. 40 §9.

Sincerely,



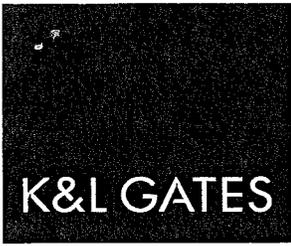
Frank Stearns
Counsel to NETA

FGS:dhb

2 Attachments:

1. ZBA Extension through September 15, 2015.
2. Site Plan by Joe Casali Engineering, Inc. dated August 2015 (stamped 8-5-15).

cc: Patty Correa, Town Counsel
Jay Rosa, Planning Department
Polly Selkoe, Planning Department
Dan Bennett, Building Commissioner



K&L GATES LLP
 STATE STREET FINANCIAL CENTER
 ONE LINCOLN STREET
 BOSTON, MA 02111-2950
 T 617.261.3100 F 617.261.3175

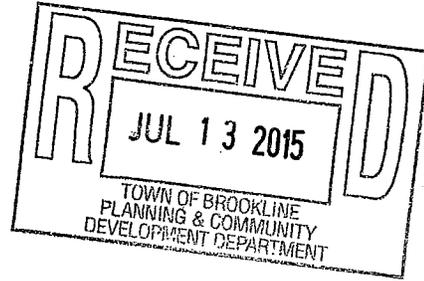
RECEIVED
 TOWN OF BROOKLINE
 TOWN CLERK

2015 JUL 22 P 12:27

Franklin G. Stearns
 D 617.951.9275
 F 617.261.3175
 franklin.stearns@klgates.com

July 8, 2015

Jesse Geller
 Chairman, Zoning Board of Appeals
 Town of Brookline
 Town Hall
 333 Washington Street
 Brookline, MA 02445



Re: Extension Request 160 Washington Street, Case #2015-0002

Dear Chairman Geller:

This request is sent on behalf of New England Treatment Access (NETA), the petitioner for a use special permit for a Registered Marijuana Dispensary at 160 Washington Street. The public hearing on this petition was conducted on April 23, 2015. The hearing was closed and the ZBA voted to grant the special permit.

The final written decision for this special permit has not yet been filed with the Town Clerk. Pursuant to GL c. 40A, sec 9, the special permit decision should be filed with the Town Clerk within 90 days of the close of the public hearing. Such 90 day deadline is July 22, 2015.

This letter requests that the ZBA schedule a public meeting prior to the lapse of the 90 day period in order to consider this request by NETA to extend the deadline for the filing of the written decision with the Town Clerk. The petitioner requests this extension to allow more time to finalize the best possible layout of the parking and access drives. In particular, as pointed out in the Planning Board's memorandum to the ZBA, a portion of the parking lot which could serve the RMD use is located on adjacent property owned by Eversource. This property is not part of the special permit application because no zoning relief is required or requested associated with the parking for the RMD use. In order to allow NETA more time to finalize the best possible layout of the parking and access drives, the petitioner requests the deadline for the issuance and filing of the final written decision be extended through September 15, 2015.

NETA hereby requests and agrees to an extension of the 90 day deadline under GL c 40A sec 9 through September 15, 2015 for the ZBA to issue and file its written decision concerning NETA's special permit requests heard by the ZBA on April 23, 2015. It hereby confirms that it will not rely on the failure of the ZBA to issue and file a written decision by July 22, 2015

July 8, 2015
Page 2

as the basis for any claim of a constructive grant of the special permit, and will consider the written decision issued and filed by the ZBA on or by September 15, 2015 to have the same force and effect as if the written decision were issued and filed by July 22, 2015, within the 90 days set forth in GL 40, sec 9. By counter signing below the Town ZBA consents and agrees to NETA's request and to this mutual extension.

Sincerely,

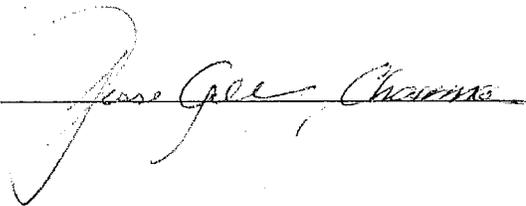


Frank Stearns
Counsel to NETA

Extension through September 15, 2015 agreed to:

Town of Brookline Zoning Board of Appeals

By: _____



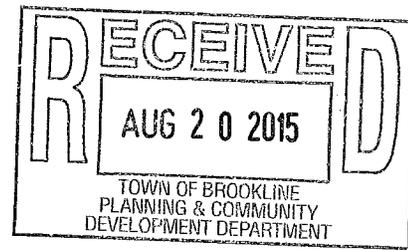
Rose Glee, Chairman

To: Jesse Geller, Chairman, Zoning Board of Appeals

From: Patty Correa, First Assistant Town Counsel

Date: August 20, 2015

Re: August 6, 2015 Request by Special Permit Applicant New England Treatment Access, Inc. (NETA)



On August 6, 2015, special permit applicant New England Treatment Access, Inc. (NETA) submitted a letter requesting, *inter alia*, that (1) the Zoning Board of Appeals (ZBA) reopen its public hearing on NETA's application for a special permit (which the ZBA had conducted and closed on April 23, 2015), in order for both the ZBA and Planning Board to consider a modified site plan as part of its special permit application in lieu of the site plan presented to and considered by the ZBA on April 23, 2015; and (2) make a finding that Section G.7 of the ZBA's Rules and Regulations is not applicable to this request, or in the alternative, to waive that section to permit the ZBA's consideration of the proposed substituted site plan as part of NETA's special permit application.¹ I am writing to provide a legal opinion regarding these matters. In sum, I believe that the ZBA has the authority to act favorably on each of these items if it deems it prudent to do, for the following reasons.

As a general principal, "[i]n the absence of express or perceived statutory limitations, administrative agencies possess an inherent power to reconsider their decisions." *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 615 (1992). "Administrative decisions, even if adjudicatory in the sense that they determine rights and duties of specifically named persons, frequently have a regulatory component that may warrant reexamination in light of changes in ... applicable on-the-ground facts." *Id.* at 616 (citing *Ramponi v. Selectmen of Weymouth*, 26 Mass. App. Ct. 826, 829-30 (1989)). Administrative agencies have broad discretion "in deciding whether to [reopen a record and hearing to present additional evidence]," *AJP Real Estate GBR LLC*, 81 Mass. App. Ct. 1134 at *2 (2012) [Memorandum and Order pursuant to Rule 1:28, 2012 WL 1623363] (quoting *Box Pond Assn. v. Energy Facilities Siting Bd.*, 435 Mass. 408, 420 (2001)), and "over procedural aspects of matters before them." *Id.* (quoting *Zachs v. Department of Pub. Utils.*, 406 Mass. 217, 227 (1989)). The provisions of Chapter 40A themselves do not raise any impediment to or impose any limitation on the ZBA's inherent authority to exercise its discretion to reopen the public hearing.² In addition, Section 14 of G.L. c. 40A specifically authorizes the

¹ NETA and the ZBA entered into an agreement to extend the 65-day deadline for public hearing set forth in G.L. c. 40A, ss. 9 and 15, to May 7, 2015. NETA and the ZBA also entered into an agreement to extend the ZBA's 90-day deadline set forth in Section 9 for taking "final action" on NETA's special permit application to September 15, 2015. See *Bd. Of Aldermen of Newton v. Mamace*, 429 Mass. 726, 731 (1999) ("final action" within the meaning of s. 9 "occur[s] when the board record[s] with the [town] clerk the result of its vote on the [] application"). The ZBA has not yet taken "final action" regarding NETA's special permit application as it has not yet filed a written decision with the Town Clerk.

² G.L. c. 40A, s. 16, is inapplicable, as it limits the granting of special permit applications that had been the subject of "final unfavorable action" within the previous two years to "material changes in the conditions upon which the previous unfavorable action was based," *inter alia*. Here, the ZBA voted to **approve** the application (with conditions) and has **not yet taken** "final action." See G.L. c. 40A, s. 16 ("No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of the proceedings, unless all but one of the members of the planning board consents

ZBA to, "in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision." Moreover, in *Lingerman v. 6 Mill Road, LLC*, Nos. 12 Misc. 470365(KCL), 12 Misc. 473875(KC) [2014 WL 1327891] (Land Ct. 2014), the Court specifically rejected a challenge to a special permit that had been issued after the special permit granting authority (SPGA) had come to a different vote upon reopening the hearing where the SPGA's re-vote preceded "final action," as is the case here.

Based on the above, I believe that the ZBA has the authority to reopen the public hearing to consider a modified site plan as part of NETA's special permit application if, in its discretion, it deems doing so necessary or advisable. I recommend that it state such reasons on the record for any such exercise of its discretion.

In the event the ZBA votes to approve this request, there should be a written agreement memorializing the agreement to extend the date for public hearing that should be filed with the Town Clerk's Office. I attach as Exhibit A hereto a proposed written agreement that Franklin Stearns, counsel for NETA, has reviewed and has agreed to in the form attached. There should also be a written agreement memorializing the agreement to extend the date for final action. I attach as Exhibit B hereto a proposed written agreement in a form that Attorney Stearns has agreed to.

NETA also asks the ZBA to make a finding that Section G.7 of the ZBA's Rules and Regulations is not applicable to this request, or in the alternative, to waive that section to permit the ZBA's consideration of the proposed substituted site plan as part of NETA's special permit application. That Section states: "When a hearing has been closed, and an appeal, petition or Application has been finally voted upon, there shall be no reconsideration of a decision by the Board, other than Section 8, Reapplication, as set forth below." Section 8 ("Reapplication") in turn states: "In order to have an appeal, application or petition for a variance or special permit, that has been unfavorably acted upon by the Board of Appeals reconsidered within two years, the applicant must request permission for such reconsideration from the Board of Appeals," and otherwise establishes procedures for obtaining reconsideration of unfavorable Board action within two years. Nothing in the nature of "legislative history" has been located that would explain these two provisions.³ However, it appears from Section 8's applicability to reconsideration "within two years", its title ("Reapplication"), and its use of terminology similar to that in G.L. c. 40A, s. 16 that Sections 7 and 8 should be read together with G.L. c. 40A, s. 16 (see n.2 *supra*), and were likely intended to supply specific local procedures for reconsideration of unfavorable final action **within** the two year time-frame beyond those contemplated by Section 16. In other words, it seems likely that both Sections 7 (which refers to Section 8) and 8 (which refers to reconsideration within two years as does G.L. c. 40A, s. 16) were intended to pertain to reconsideration following "final action" and therefore do not apply here.

Even if Section 7 does apply, in a 1970 decision from the Supreme Judicial Court regarding the rules of a zoning board of appeals promulgated pursuant to Section 18 of Chapter 40A (the language that is now found in Section 12 regarding the promulgation of rules, see Section A.1 of the ZBA's rules), the SJC held that while the board's departure from its rules in that case (failure to record an executive session and vote-taking by telephone) "raised uncertainties, invites challenges and needlessly leads to litigation," "the procedure was not so irregular as to invalidate the action of the board" where the substantive actions of the board complied with statute and the zoning by-law. *Zartrian v. Minkin*, 357

thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.").

³ The two provisions were part of the original version of the ZBA's rules voted on April 22, 2005.

Mass. 14, 17 (1970). It further stated that "[t]o the extent that there was a deviation from the board's rules relating to its internal procedures, it could be deemed to have permissibly and impliedly 'waived' [them] as the term is used in *Coleman v. Louison*, 296 Mass. 210, 213, 5 N.E. 2d 46." *Id.* This case suggests that the ZBA has the authority to waive a rule if it deems it necessary or advisable to do so.

Based on the above, I believe that the ZBA has a basis for voting, and the authority to vote, that Section 7 inapplicable, and if applicable, that it is waived. I recommend that the ZBA explicitly vote (a) whether Section 7 is applicable, and (b) if yes, whether or not to waive it, and state its reasons for its vote on the record.



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chair
Jonathan Book
Christopher Hussey

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2210 Fax (617) 730-2248
Patrick J. Ward, Secretary

AGREEMENT TO EXTEND TIME FOR PUBLIC HEARING

Re: Application of New England Treatment Access, Inc. (NETA) for Special Permit to Convert an Existing Bank Space to a Registered Marijuana Dispensary at 160 Washington St., Brookline, MA.

Pursuant to the authority provided by G.L. c. 40A, §§9 and 15, and as reflected in a vote of the Zoning Board of Appeals of the Town of Brookline (ZBA), the Applicant in the above-referenced matter and the ZBA mutually agree to extend the time limits for holding the public hearing in the above-referenced matter up to and including November 20, 2015. NETA hereby confirms that it will not rely on the failure of the ZBA to hold a public hearing after May 7, 2015, the extended deadline set forth in the parties' previous extension agreement dated March 13, 2015, as the basis for any claim of a constructive grant of the special permit or as the basis for any legal challenge to the ZBA's action on its special permit application as the ZBA may decide following any public hearing held after May 7, 2015, and prior to November 20, 2015. This agreement may be executed in counterpart originals.

As required by G.L. c. 40A, §9, a copy of this agreement shall be filed in the office of the Town Clerk.

New England Treatment Access, Inc.

Town of Brookline Zoning Board
of Appeals

By its attorney,

By its attorney,

Franklin G. Stearns
Holland & Knight
10 St. James Avenue
Boston, MA 02116

Patricia Correa
Associate Town Counsel
333 Washington Street, Sixth Floor
Brookline, MA 02445

Date:

Date:



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chair
Jonathan Book
Christopher Hussey

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2210 Fax (617) 730-2248
Patrick J. Ward, Secretary

AGREEMENT TO EXTEND TIME FOR FINAL ACTION

Re: Application of New England Treatment Access, Inc. (NETA) for Special Permit to Convert an Existing Bank Space to a Registered Marijuana Dispensary at 160 Washington St., Brookline, MA.

Pursuant to the authority provided by G.L. c. 40A, § 9, and as reflected in a vote of the Zoning Board of Appeals of the Town of Brookline (ZBA), the Applicant in the above-referenced matter and the ZBA mutually agree to extend the time limit for the ZBA to take final action on NETA's special permit application through November 20, 2015. NETA hereby confirms that it will not rely on the failure of the ZBA to take final action by September 15, 2015 (the extended time limit previously agreed to by the parties in an agreement dated July 8, 2015) as the basis for any claim of a constructive grant of the special permit or as the basis for any legal challenge to the ZBA's action on its special permit application, and will consider the written decision issued and filed by the ZBA on or by November 20, 2015 to have the same force and effect as if the written decision were issued and filed by July 22, 2015, within the 90 days set forth in G.L. c. 40A, § 9 of the ZBA's April 23, 2015 public hearing on the special permit application. This agreement may be executed in counterpart originals.

As required by G.L. c. 40A, §9, a copy of this agreement shall be filed in the office of the Town Clerk.

New England Treatment Access, Inc.

By its attorney,

Town of Brookline Zoning Board
of Appeals

By its attorney,

Franklin G. Stearns
Holland & Knight
10 St. James Avenue
Boston, MA 02116

Patricia Correa
Associate Town Counsel
333 Washington Street, Sixth Floor
Brookline, MA 02445

Date:

Date:

Site Plans for Proposed Site Improvements

NEW ENGLAND TREATMENT ACCESS DISPENSARY

160 WASHINGTON STREET
BROOKLINE, MASSACHUSETTS
IA 2, AP 185, LOTS 1, 2 & 3

ZONING: G-2.0 (GENERAL BUSINESS)

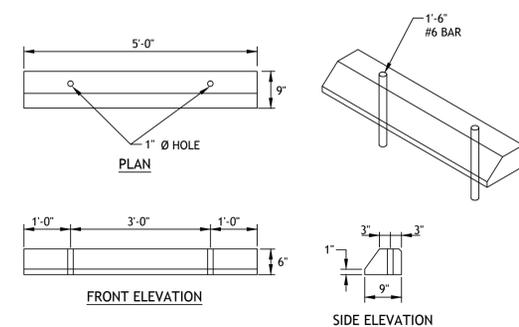
APPLICANT	ARCHITECT
NEW ENGLAND TREATMENT ACCESS, INC. 160 WASHINGTON STREET BROOKLINE, MA 02445	VISION 3 ARCHITECTS 225 CHAPMAN STREET #300 PROVIDENCE, RI 02905 (401) 461-7771 phone (401) 461-7772 fax
CIVIL ENGINEER	SURVEYOR
JOE CASALI ENGINEERING, INC. 300 POST ROAD WARWICK, RI 02888 (401) 944-1300 phone (401) 944-1313 fax	J.F. HENNESSY CO. P.O. BOX 909 BROOKLINE, MA 02446 (617) 566-3860 phone

GENERAL NOTES:

- BOUNDARY SURVEY AND EXISTING CONDITIONS SURVEY COMPLETED BY J.F. HENNESSY CO., P.O. BOX 909, BROOKLINE, MA IN SEPTEMBER 2014 (REFERENCE PLAN 1).
- THE LOCATION AND DEPTH OF EXISTING UTILITIES ARE APPROXIMATE AND HAVE BEEN PLOTTED FROM THE LATEST AVAILABLE INFORMATION. THE UTILITY LOCATIONS ARE APPROXIMATE AND MAY NOT BE ALL INCLUSIVE. THE CONTRACTOR SHALL CHECK AND VERIFY THE LOCATIONS OF ALL EXISTING UTILITIES, BOTH OVERHEAD AND UNDERGROUND, AND "DIG-SAFE" MUST BE NOTIFIED PRIOR TO COMMENCING ANY CONSTRUCTION OPERATIONS. RESTORATION AND REPAIR OF DAMAGE TO EXISTING UTILITIES SHALL BE THE RESPONSIBILITY OF THE CONTRACTOR WITH NO ADDITIONAL COST TO THE OWNER. NO EXCAVATION SHALL COMMENCE UNTIL ALL INVOLVED UTILITY COMPANIES AND/OR CITY WHOSE FACILITIES MIGHT BE AFFECTED BY ANY WORK TO BE PERFORMED BY THE CONTRACTOR ARE NOTIFIED AT LEAST 72 HOURS IN ADVANCE.
- THE SITE LIES IN ZONE X (AREAS DETERMINED TO BE OUTSIDE THE 0.2% ANNUAL CHANCE FLOODPLAIN) AS SHOWN ON THE FIRM PANEL NO. 28049C0307H FOR NORFOLK COUNTY, EFFECTIVE DATE JULY 17, 2012.
- THE LAYOUT SHOWN REPRESENTS A GRAPHICAL DESIGN, AND PRIOR TO THE CONSTRUCTION, THE CONTRACTOR SHALL ENGAGE A PROFESSIONAL LAND SURVEYOR (PLS) REGISTERED IN THE STATE OF MASSACHUSETTS TO SET AND VERIFY ALL LINES AND GRADES. ALL EXISTING UTILITY LOCATIONS AND ELEVATIONS ARE TO BE CONFIRMED BY THE CONTRACTOR PRIOR TO CONSTRUCTION. ANY ITEMS FOUND WHICH DO NOT MATCH THE PLANS MUST BE BROUGHT TO THE ENGINEER'S ATTENTION PRIOR TO CONSTRUCTION FOR REVIEW. NO WORK SHALL PROCEED UNTIL AUTHORIZED BY THE ENGINEER.

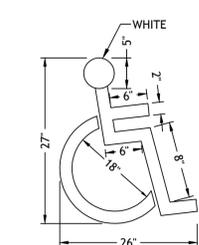
LEGEND:

- EXISTING PROPERTY LINE
- EXISTING STONE WALL
- EXISTING CURB
- EXISTING METAL FENCE
- CHAIN LINK FENCE
- EXISTING DRAIN LINE
- EXISTING DRAINAGE MANHOLE
- EXISTING CATCH BASIN
- WG --- WATER GATE
- S --- EXISTING SEWER LINE
- EXISTING SEWER MANHOLE
- N/F --- NOW OR FORMERLY



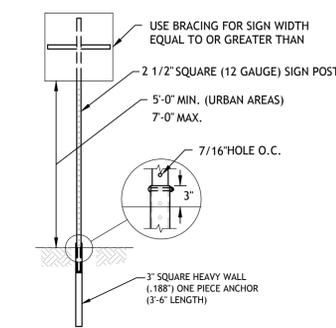
- NOTES:
- ALL EXPOSED EDGES TO HAVE A 3/4" CHAMFER.
 - ALL SURFACES TO HAVE A SPONGE FLOAT FINISH.

CAR STOP DETAIL



- NOTE:
- ALL HANDICAP SIGNAGE SHALL BE IN ACCORDANCE WITH THE MASSACHUSETTS STATE BUILDING CODE.

HANDICAP PAVEMENT MARKING

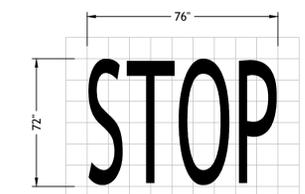


TRAFFIC SIGN INSTALLATION DETAIL



- SIGN NOTES:
- SIGNS ARE TO CONFORM TO THE MOST RECENT EDITION OF THE MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (MUTCD).
 - VAN ACCESSIBLE SIGNS ARE TO BE INSTALLED ADJACENT TO THE 8-FT STRIPED ISLE.

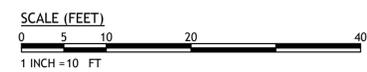
HANDICAP PARKING SIGN DETAIL



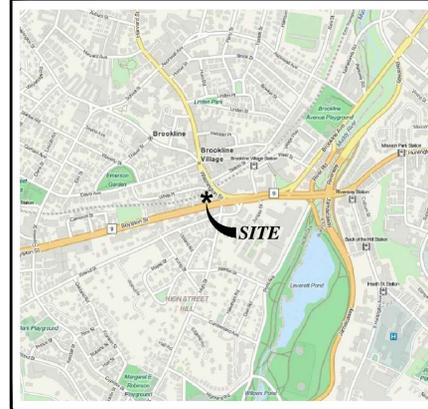
"STOP" PAVEMENT MARKING DETAIL

SIGN NUMBER		W3-1a
LEGEND		
COLOR	BACKGROUND	YELLOW
	COPY	BLACK
SIGN DIMENSION	WIDTH	24"
	HEIGHT	24"

TRAFFIC SIGN DETAIL



LOCUS MAP (NOT TO SCALE)

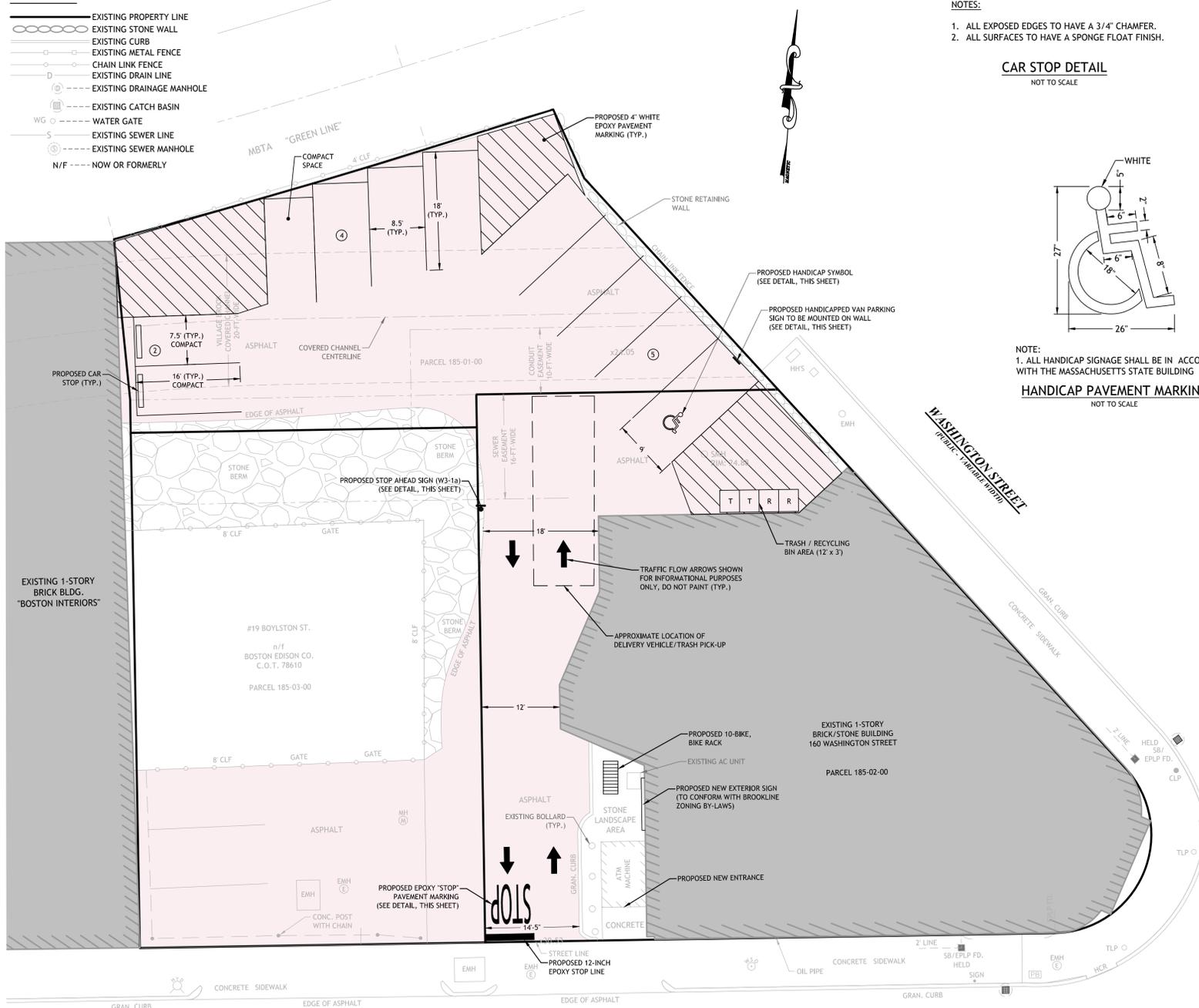


INDEX OF DRAWINGS

SHEET NO.	PLAN
1	SITE PLAN

REFERENCE PLANS

1	160 WASHINGTON STREET, PLOT OF LAND IN BROOKLINE, MASSACHUSETTS, NORFOLK COUNTY (PREPARED BY J.F. HENNESSY CO. IN SEPTEMBER 2014)
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BOLYSTON STREET (ROUTE 9)

SITE PLAN

SCALE: 1" = 10'



LOCATION OF EXISTING UTILITIES SHOWN, ARE FROM GATE LOCATION AND EXISTING DOCUMENTATION AND MAY NOT BE ACCURATE. EXACT LOCATION TO BE DONE BY THE APPROPRIATE UTILITY COMPANY OR MUNICIPALITY PRIOR TO ANY EXCAVATION CALL DIGSAFE AT: 1-888-DIG-SAFE 1-888-344-7233

JCE
JOE CASALI ENGINEERING, INC.
300 POST ROAD, WARWICK, RI 02888
(401) 944-1300 (401) 944-1313 FAX WWW.JOECASALI.COM



NEW ENGLAND TREATMENT ACCESS DISPENSARY
160 WASHINGTON STREET
BROOKLINE, MASSACHUSETTS
IA 2, AP 185, LOTS 1, 2 & 3

REVISIONS:	NO.	DATE	DESCRIPTION

DESIGNED BY: DRD
DRAWN BY: JMM
CHECKED BY: JAC
DATE: AUGUST 2015
PROJECT NO: 03-80ce

PRELIMINARY, NOT FOR CONSTRUCTION

SITE PLAN

SHEET 1 OF 1