



Town of Brookline Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Mark Zuroff

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2010
Fax (617) 730-2043
Patrick J. Ward, Clerk

RECEIVED
TOWN OF BROOKLINE
TOWN CLERK

2018 APR -6 A 8:11

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2017-0028
EEFORALL, LLC
127-131 HARVARD STREET, BROOKLINE, MA

Petitioner, EEFORALL, LLC, applied to the Building Commissioner for permission to remove the existing buildings on site and construct a new six-story early education facility. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed January 18, 2018 at 7:05 PM., in the Selectmen's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioners, to their 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 January 4, 2018 and January 11, 2018 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. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

127 Harvard Street, Brookline, MA 02445 - Construct Early Education Facility in a(n) L-1.0 LOCAL BUSINESS on 01/18/2018 at 7:05 PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Robert L. Allen, Jr.) Precinct 7

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law, and any additional zoning relief the Board deems necessary:

§5.08.1.B – EXCEPTION TO DIMENSIONAL REQUIREMENTS FOR USES 9 & 10

§5.08.2 – EXCEPTION TO DIMENSIONAL REQUIREMENTS FOR USES 9 & 10

§5.09.2.A – DESIGN REVIEW

§5.72 - ACCESSORY BUILDINGS OR STRUCTURES IN REAR YARDS

§6.02- Paragraph 1 - TABLE OF OFF-STREET PARKING SPACE REQUIREMENTS

§6.02.4.C – OFF-STREET PARKING SPACE REGULATIONS

Any additional relief the Board may find necessary.

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

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 Lloyd Gellineau, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone (617) 730-2328; TDD (617) 730-2327; or e-mail at llgellineau@brooklinema.gov

*Jesse Geller, Chair
Christopher Hussey
Mark Zuroff*

Publish: 01/04/2018 & 01/11/2018

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing were Chairman Jesse Geller and Board Members Lark Palermo and Mark Zuroff. Also present were Zoning Coordinator and Planner, Ashley Clark and Deputy Building Commissioner, Mike Yanovitch.

The case was presented by Robert L. Allen, Jr., Law Office of Robert L. Allen Jr. LLP, 300 Washington Street, Brookline, Massachusetts 02445. Also in attendance were Attorney Jennifer Dopazo Gilbert, Alfred Wojciechowski of CBT Architects, Giles Ham of Vanasse & Associates, Vicki Milstein, Principal of Brookline Early Education Program, and Helen Charlupski, School Committee Member and its Liaison for Early Education.

Chairman Geller called the hearing to order at 7:10 p.m. Attorney Allen waived the reading of the public notice.

Petitioner seeks to construct a six story building to be used by one hundred and thirteen Town of Brookline Early Education Program ("BEEP") students and twenty seven BEEP teachers. The proposal before the Board is to construct a fully furnished facility for BEEP and to grant it a 20-year lease for a nominal sum. No lease or letter of intent to enter into a lease with BEEP was presented to the Board. According to Attorney Allen the specific terms of the lease would be negotiated with the School Committee. The Board recognizes that the proposal would be an extremely generous gift to the Town and would provide a great benefit to the BEEP program. The Board's role in this matter is to ensure that the proposal meets the requirements of the Town of Brookline Zoning By-Law. Even a gift as generous as this one is required to comply with the Town's zoning regulations.

The site at issue is on Harvard Street between Brookline Village and Coolidge Corner, in front of a car wash and between a gas station and the Williams Piano Shop and was previously improved by a 19th century Victorian structure used for commercial purposes. The prior structure was subject to a

demolition delay for a period of one year and on expiration of that period was demolished. The Petitioner has participated in the following public meetings concerning the project: a meeting with Town Staff and Elected Officials on February 17, 2017; a presentation to the Capital Sub-Committee of the School Committee on April 27, 2017; a presentation to the School Committee on May 4, 2017; a presentation to the Select Board on May 9, 2017; a neighborhood meeting on May 30, 2017; a preliminary presentation to the Planning Board in early June; and a Planning Board Meeting in December. On December 7th the Planning Board unanimously approved the plans. Because Petitioner has proposed that the lease require the Town to clean, operate, repair and maintain the building, the Petitioner's representatives met with the Town's Director of Public Buildings to discuss building materials, systems, washrooms and custodial services. One goal of the meeting was to determine whether the building could be constructed using systems and materials that the Town is familiar with operating, maintaining and repairing.

Architect Alfred Wojciechowski presented the plans for the proposal, which are incorporated into this decision by reference. Using the plans, Mr. Wojciechowski described the limited setbacks, building coverage on the lot and parking, and illustrated how the student drop off zone on the site would function. He described the functions of the floors of the building as follows: entrances, elevators and resource center are on the ground level; classroom space, kitchen area and resource space are on level one; classrooms, break-out space, and prep kitchen are on level two; more classrooms, possibly specialized rooms for autistic students, and a sensory gym are on level three; indoor, under cover, and outdoor play space are on level four; and administrative offices and meeting areas are on level five. Elevations and three-dimensional views of the building from several viewpoints were presented to the Board.

Petitioner seeks approval under the Section 4.07 Use 10 of the Zoning By-Law as an educational use exempt from use regulations under G.L. Chapter 40A, §3 (the "Dover Amendment"). Petitioner also asserts that relief for this educational facility is available via special permit pursuant to Zoning By-Law Sections 5.08.2 (exceptions to dimensional requirements for uses 9 and 10) and 6.02.4.c (parking and loading dock requirements). Petitioner requested that the Board find that the Dover Amendment applies to its application.

Associate Town Counsel John Buchheit opined that Petitioner's proposal to construct an educational facility for use by the Town of Brookline's BEEP program does qualify for Dover Amendment protection. The relevant Dover Amendment language is as follows:

No zoning ordinance or by-law shall regulate or restrict ... the use of land or structures for ... educational purposes on land owned or leased by ... a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

According to *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759-760 (1993), regulations are deemed unreasonable if to apply them would substantially diminish or detract from the usefulness of the proposed structure or there is an excessive cost for compliance without significantly advancing the municipality's legitimate zoning concerns.

The proposal requires relief for FAR and height, front and rear yard setback, and the number of parking spaces and loading areas. According to Mr. Allen and Ms. Gilbert, this relief is necessary to fully accommodate the BEEP students intended to be served by this new facility as well as to provide adequate pick up and drop off on-site. According to Mr. Allen and Ms. Gilbert, strictly applying the requirements of the By-Law to the project would significantly limit the ability of BEEP to deliver its education services to the early education population of Brookline.

In response to the Board's concerns about traffic queuing on Harvard Street, Vicki Milstein, Director of BEEP, explained that rolling drop-off and pick-up had been successfully used at other BEEP locations. She explained that parents drop-off at different times so there is not one large rush like at most elementary schools. Many staff members are present to assist with the quick hand off. Petitioner's architect added that there is enough space for four cars on each segment of the drop-off circle. Ms. Milstein added that the four parking spaces next to the facility would not be used in the morning, so cars would be able to pass if necessary. She added that BEEP locations at the Lynch Center and Temple Ohabei Shalom use this rolling drop-off system and there is no back up onto streets. She stated that dismissal times range from 12:15PM to 5:45PM, which avoids one large pick up time. The site tenanted by BEEP is expected to have many walking students and parents and will have a stroller parking area. There will also be at least eight students dropped off by van. Petitioner's Traffic Consultant Giles Ham opined that many BEEP students would be walking, the BEEP at Lynch Center facilitates twenty cars an hour successfully, and the detailed, staggered method of drop-offs and pick-ups used by BEEP would avoid significant high traffic periods at the school. According to Mr. Ham, the key to success is having a drop off/pick up plan in place that BEEP staff and parents understand. Mr. Ham testified that that nine or ten cars could be in the drop off area at one time. Attorney Allen noted that the Planning Board proposed a condition requiring the Town/BEEP staff to monitor the traffic.

In response to the Board's inquiry and the Board Members' expression of concern over the limited term of the proposed lease, Mr. Allen noted there will be no separate legal restriction on the building (within the 20-year lease term or beyond). After the twenty year period the building would either continue to be used by BEEP or the Petitioner would seek zoning approval for another user. For an entity not protected by the Dover Amendment to use the building, the Petitioner or user would need to obtain a variance. He noted, however, a new Dover user taking BEEP's place, whether the Petitioner

directly or a new not-for-profit would be required to satisfy the same standards under the Dover Amendment and the Zoning By-Law to the Board as is now incumbent on the Petitioner, including how the Town's legitimate zoning interests are unreasonable as related to the Petitioner's or such new party's programmatic needs.

In response to question from the Board and the Board Members' expression that, absent an executed lease, request for relief was premature and use by the Town's BEEP program unassured, Petitioner, via Attorney Allen, stated it did not negotiate a lease with the Town before seeking zoning approval because negotiating a lease with the Town is not easy and it is better to have a permit in hand before negotiating a lease. Petitioner wants to be sure about what type of building they can build prior to negotiating the lease. Attorney Gilbert added that a 20-year lease is what the Petitioner has offered to donate to BEEP. If BEEP still needs the space after twenty years there could be a discussion with the owner to extend the lease term. However, the hope is that the BEEP program will be integrated back into the public schools. Attorney Allen added no one knows what the status of early education will be in twenty years and that the Petitioner as owner of the property, EEFORALL, LLC, is wholly owned by a philanthropic trust that supports early education.

The Board Members asked which of the current BEEP sites would be moved to the new facility and how many students were currently at those other sites. Ms. Milstein stated there are currently no BEEP programs at Devotion, Pierce, Lawrence, or Lincoln elementary schools. BEEP will get back two classrooms at the Devotion School in September 2018 and there are currently five classrooms at Temple Ohabei Shalom ranging from thirteen to seventeen students in each classroom. The plan would be to close the Temple Ohabei Shalom site and some of these children would go to Devotion, while the new building would create space for Pierce, Lawrence, and Lincoln School families. The hope is to cover the

North Brookline area and provide an opportunity to create community spirit by being centrally located in these neighborhoods with these school communities.

Chairman Geller requested that Attorney Allen review the special permit requirements under the Zoning By-Law. Attorney Allen described the standards under Section 9.05 of the Zoning By-Law stating: the specific site is an appropriate location for the use, given that it is readily accessible to mass transit, is located in a commercial neighborhood on a local town artery, and there are a number of people that could walk to the facility; the use developed will not adversely affect the neighborhood and, in particular, the building's design will activate the streetscape, provide an attractive, accessible entrance to the school and any shadow impacts will be limited to the neighboring gas station and the car wash behind; there will be no nuisance or serious hazard to vehicles or pedestrians, since the proposal is designed to have adequate drop-off and pick-up with queuing lanes on-site to avoid traffic on Harvard Street; adequate and appropriate facilities will be provided for the proper operation and proposed use, including proper office and educational program spaces; and finally, there will be no effect on the supply of housing available for low and moderate income people, because the prior building was commercial space. Mr. Allen suggested that the particular location was helpful for those in public housing in Brookline, because it is much more walkable than the current BEEP locations. Attorney Allen argued that the proposal meets the requirements for a special permit, but asked that the Board still consider the request for application of the Dover Amendment.

Chairman Geller then asked to hear from those in favor of the proposal who wished to testify. Helen Charlupski, School Committee member/Liaison for Early Childhood Education stated that she was thrilled about the opportunity of this gift and confident that there would be a lease with terms agreed to by the parties. She stated that there is good faith on both sides. She continued that there are police around all schools that have traffic issues, and while it has not been needed at early childhood sites,

police attendance would be provided if needed. She noted, however, that she did not think police details would be needed because many families will walk to the site. Finally, she relayed the unanimous support of the School Committee for the proposal of construction of the building with a 20-year lease to BEEP.

Ken Kaplan, 116 Harvard Street, stated that local daycares, including Sunshine and Bright Horizons, had drop-off plans that were very successful. He added that the facility would be a great addition to the neighborhood in value and in going forward.

Donald O'Neil, Sr., parent of a BEEP student at Putterham and resident of Brookline Village, stated that the 20-year gift should be accepted and that if there were to be an issue in twenty years people would be there again to speak up for BEEP.

Sandra Isaacs, 334 Clyde Street, PTO President noted that many of the parents could not come out this evening but are in support. She stated that classrooms in Brookline have increased, but the amount of BEEP classrooms has not increased. She continued that this central location would allow connection with the Pierce and Lawrence schools to visit the libraries and walk to other locations, which is not an option at the current Putterham and Temple sites. She further stated that the planned welcome center offers a place to create a community. She concluded that she's been dropping off her children at Putterham for years and has not had issues with backups onto the main street.

Chairman Geller asked to hear from those opposed to the proposal who wished to testify. Direct abutter Dan Williams, owner of Williams Piano Shop at 123 Harvard Street, stated his concern with the building's height and density, and with the number of people who would use the building. He has observed heavy traffic on Harvard Street and is concerned about adding more traffic to it. He is also concerned about the building's users parking in front of or in his business's driveway. He stated that the building was out of character with the neighborhood and out of place, noting the prior Victorian structure it was replacing.

Chairman Geller then called upon Ashley Clark, Zoning Coordinator and Planner, to deliver the findings of the Planning Board. Ms. Clark presented the Planning Board's recommendation as follows:

FINDINGS

§5.08.1.b & 2 – Exceptions for Uses 9 & 10 (M.G.L. Ch. 40a, Sec. 3, Dover Amendment)

§5.09.2.A – Design Review

Any structure or outdoor use located in an L-1.0 zone on Harvard Street is subject to the design review standards under §5.09.4(a-l). Relevant sections of the design review standards are described below:

Preservation of Trees and Landscape

The site has been completely covered with structure or hardscape. The applicant proposes to install landscaping at the front of the property facing Harvard Street.

Relation of Building to Environment, Streetscape and Neighborhood:

The first floor is setback on the north, south, and rear sides to allow for a loop drive around the building. This drive is covered by a second floor overhang. The north façade is broken up by glass elements set back from the main façade. On the fifth floor, the rear and south facades are set back to accommodate an outdoor playground, a portion of which is open to the sky. The rest of the playground is shaded by the sixth floor above, which is set back further than the lower levels on the Harvard Street side.

Circulation

At the ground floor and facing Harvard Street, there will be a glazed entry. Parents arriving by car to drop-off or pickup their children will queue along the loop drive around the building and the children will be accompanied by a staff person from the car into a glass vestibule at the rear of the building. To minimize queuing and the need for on-site parking, the applicant proposes to implement the following mitigation measures:

- Rolling drop off with three stations for drop-off and pick-up, so drivers will not need to exit their cars; staff will take each child into the building or out to the car. (A placard identifying which child is to be picked up will be displayed in the windshield.)
- Children will be dismissed at different times: 1 p.m., 3 p.m. and 5:45 p.m., Monday through Friday.
- Public transportation for teachers will be encouraged and T passes subsidized. Carpooling connections for staff will be provided.
- Some of parking spaces currently at the Webster Street offices and at our Marshal Street site will be used by BEEP staff. Some staff already have town-wide parking permits.
- BEEP Families within walking distance will be targeted for this pre-school location.

§5.72 - Accessory Buildings or Structures in Rear Yards

§6.02, Paragraph 1 & §6.02.4.C - Off-Street Parking Space Requirements

Dimensional Requirements	Required/Maximum	Proposed	Relief
FAR	1.00 (9,659 s.f.)	2.70 (24,969 s.f.)	Special Permit*
Height	40'	69.5'	Special Permit*
Height of Roof Top Equipmt.	10'	10'-15' (79.5'-84.5')	Special Permit*
Front Setbk. Roof Canopy Floors 1-5 Floor 6	10'	0' 3.6' 8.6'	Special Permit*
Rear Setbk. Floor 1 Floors 2-6	16.7 (10+L/10)	1.3 – 42' 12.1'	Special Permit*
Parking Spaces	20	4	Special Permit*
Loading Bays	1	0	Special Permit*
Width of Two Driveways	No more than 40% of facade	53% of facade	Special Permit*

* Under *Section 5.08.2*, the Board of Appeals may waive dimensional requirements by special permit for educational uses (Use 10) and under *Section 6.0.2.4.C* may waive parking and loading requirements for educational uses (Use 10).

Ms. Clark stated that the Planning Board is supportive of this proposal by the applicant to construct, and then lease to the Town, a building for the Town's existing Brookline Early Education Program (BEEP). The BEEP program has been in existence for over thirty years, and its classrooms have been scattered in different locations throughout the town from year to year. Some of the programs are in Brookline's public elementary schools; others in private leased spaces, such as Temple Emeth and buildings on Webster and Marshal Streets. The goal is to consolidate as many BEEP classes as possible at one site and to provide a central secular location appropriate for family intake and student evaluations. To that end, a donor has offered to support the program by constructing a pre-school building, and leasing it to the Town for one dollar a year for a twenty-year time period. The terms of the lease

agreement would be formalized with the Town, subject to the review and approval of the School Committee and Town Counsel. Town Counsel has made an initial determination that the intended use is educational and protected under the Dover Amendment.

Because BEEP is an educational non-profit use, zoning relief could be granted by special permit, rather than by variance, if the Board of Appeals finds that dimensional relief necessary to allow reasonable development of such a use is in general harmony with other uses permitted and regulated in the vicinity. For this project, significant relief is required for the size and height of the proposed building, setbacks from property lines, and parking. Although the building is taller than surrounding buildings it should have minimal impact on two of its abutting properties – a car washing facility to its rear and a gas station to its left. A piano store to its right is on its south side and therefore should not be impacted by shadows from the proposed building.

Only four on-site parking spaces are proposed; however, the applicant asserts that many of the families and staff will walk to the site or take public transportation, rapid transit on the C and D lines is not far away and bus service on Harvard Street is in front of the building. Also, there is staff that already has parking permits to park on Marshal Street, which will transfer and be useable near this site. In addition, the proposed timing of the opening of this BEEP facility coincides with the opening of the Devotion School and the termination of the lease of the building at 30 Webster Street, resulting in the availability of the many existing Webster Street parking permits for school staff. For those students who arrive by car, an organized and efficient drop-off/pick-up system would be implemented. There would be three stopping stations on the one-way driveway, which loops around the building. Cars would queue in the driveway, and drivers would not have to leave their cars, because teachers and staff would take the children from the car and into the building; conversely, at the end of school day, staff would accompany each child to the correct car. A placard identifying which child is to be picked up is placed on the dashboard so that teachers can rapidly identify which child is being picked up. There would be three staggered dismissal times, so that pick-up times would be spread out. In addition, parent meeting and student evaluations will only take place during non-pick-up or drop-off times. The four parking spaces on-site would be reserved for parents who must come into the building and for specialists who come to the school on a part-time basis. The applicant has also proposed several mitigation measures to reduce traffic and prevent any queuing on Harvard Street, including T- pass subsidies for staff, carpooling coordination, and off-site parking. A Transportation Impact Assessment by Eefforall LLC dated December, 2017, concludes that any traffic delays or queues can be addressed through mitigation measures.

Although the Planning Board would have liked the building to be smaller, it understands that the proposed amount of space is needed to accommodate all of the programs BEEP provides, especially to the one-third of its students who have special needs. The building has been attractively designed, and the applicant states that it will be LEED certifiable to reduce its energy needs.

Therefore, the Planning Board recommended approval of the site plan by Hancock Associates, dated 12/23/16, and architectural plans by CBT Architects, dated 10/17/17, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit an electronic copy and two 11x17 copies of final site plans; floor plans and elevations, indicating façade details, colors, materials, windows and rooftop equipment; and a signage plan with dimensions and colors subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, subject to the approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, a final construction management plan, including parking locations for construction vehicles, hours of construction and materials delivery, noise mitigation, staging areas, security fencing, location of portable toilets, rodent control, erosion and sediment control and emergency contact information, shall be submitted for review and approval by the Building Commissioner. A copy of the approved plan shall be submitted in an electronic form to the Planning and Community Development Department.
4. Prior to the issuance of a building permit, a Transportation Demand Management (TDM) Plan shall be submitted for review and approval to the Director of Engineering and Transportation and the Assistant Director of Regulatory Planning. There shall be a requirement to offer at least a 50% discount for MBTA passes and Hubway memberships for employees paid by BEEP, and the provision of 20 staff on-street parking permits within a quarter of a mile. Traffic monitoring and annual reporting to the Town shall be required for a three year period, including providing the transportation mode used by employees and parents and type of traveler, and an analysis of the drop-off/pick-up procedures with suggested improvements, if needed. The monitoring and reporting program shall commence six months after receipt of the final Certificate of Occupancy for the Project. If monitoring shows queuing on Harvard Street or other problems, then the BEEP shall reevaluate and change its drop-off and pick-up procedures and/or procedures for accepting deliveries, subject to the review and approval to the Director of Engineering and Transportation and the Assistant Director of Regulatory Planning. Alternatively, if a Transportation policy for all school and town properties is in place then that policy shall be applicable.
5. Prior to the issuance of a building permit, a drainage plan shall be submitted for review and approval of the Director of Engineering and Transportation.
6. One temporary construction and/or development sign(s), no greater than 30 square feet, may be erected on site during construction, with the design and location subject to the review and approval of the Assistant Director of Regulatory Planning.
7. Prior to the issuance of a Certificate of Occupancy, a lease agreement between the applicant and the Town shall be negotiated to the satisfaction of Town Counsel and executed by the School Committee and Town Counsel.
8. 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 fencing,

grading, and location of utilities; 2) final building elevations including exterior signage, stamped and signed by a registered architect; 3) final floor plans, stamped and signed by a registered architect; 4) a draft lease agreement between the applicant and Town; 5) an approved Transportation Demand Management (TDM) Plan; and 6) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

9. Prior to the issuance of the Certificate of Occupancy, complete as-built plans certified by a registered architect as in compliance with the approved plans shall be prepared and filed with the Building Commissioner.

Ms. Palermo asked whether there had been consideration to a condition requiring that the building be LEED Certifiable. Ms. Clark noted a difference in price between LEED Certified and LEED Certifiable. Michael Yanovitch, Deputy Building Commissioner, added that the Building Department ensures that the equipment installed will make the building LEED Certifiable. Chairman Geller noted that there was a request for a condition that the building be LEED Certifiable, which is not an allowable condition. Attorney Allen said that there was no discussion of such a condition and asked Mr. Yanovitch whether meeting the State Stretch Code complies. Mr. Yanovitch stated that the new Stretch Code, which builders are required to follow, is stringent and gets close to LEED Certifiable, but without going through the LEED Program it may only be deemed energy-efficient.

Attorney Allen requested that Planning Board condition four (above) be modified to include "on or off-street parking," as there may be a possibility to secure spots in nearby lots, such as the Stop and Shop lot. The Board was amenable to this change.

Chairman Geller then called upon Mike Yanovitch, Deputy Building Commissioner, to deliver the recommendation of the Building Department. Mr. Yanovitch stated that the Building Department has no objection to this request, and although this is not the typical G.L.c. 40A §3 application, after consulting with Town Counsel, the Building Department is satisfied that because it will be leased to BEEP it is a Dover Amendment case and the relief can be granted. He continued that it is a great opportunity for the Town and that there has been a significant vetting process. Mr. Yanovitch continued

that reasonable restrictions have already been imposed on the project: the building has been condensed, the setbacks have been increased, an entire story was removed, and overall the building has changed while still allowing for the proposed educational programs to be accommodated within the structure. He noted that there is adequate fire access. He concluded that the Building Department has no objection to this proposal and whether the Board finds that the proposal meets the criteria for the Dover Amendment or for a special permit, the Building Department will work with the Petitioner to ensure compliance and work with the abutters in the neighborhood to ensure compliance with the imposed conditions.

Board Member Zuroff asked whether the building was adequate for an evacuation. Mr. Yanovitch stated that in Massachusetts it has been deemed that children over the age of two years and nine months are capable of so-called self-preservation, which puts the facility at an E – Educational occupancy, for which the building meets the criteria.

The Board began its deliberations. Chairman Geller acknowledged the benefit of a single centrally located building that supports early education, but stated that the building was over-built. He questioned what amount of regulation is permitted under the Dover Amendment given that the building footprint appears to occupy the entire lot. Attorney Allen responded that the BEEP programming needs for the children and the staff drove the size of the building. Board Member Palermo indicated that although the building was large, she was appreciative of the gift. Her concern was that, without a lease, there is currently no guarantee that BEEP would occupy building. She suggested that Planning Board condition seven be changed to require the signing of a lease before the issuance of a building permit. Board Member Zuroff added that his support for this proposal would have to be under the condition that the permit is for only a Dover Amendment use. He suggested that if a lease cannot be negotiated before the issuance of a building permit, a letter of intent might suffice. In response to the Board Members' comments, Attorney Allen stated that the Devotion and Runkle Schools are oversized yet received

zoning relief from the Board. Board Member Zuroff responded by noting that these are public schools and there is more certainty that they will continue to be used as public schools.

Chairman Geller asked for an explanation of reasonable regulations in the Dover Amendment context. Attorney Gilbert stated that the case law in the area speaks to a reasonable regulation as one that does not impede or restrict the educational programmatic needs. She noted that Ms. Milstein and Ms. Charlupski have been involved in the planning process since day one. Attorney Gilbert further stated that there is no objection to a condition that this building be used for a Dover Amendment use, specifically early education. In fact, it is required by law that the use be educational.

Chairman Geller suggested continuing the hearing in order to give Counsel for the Petitioner the opportunity to address the Board Members' expressed concerns about the absence of a lease or any other expression of rights extended to the Town's BEEP program; for the Board to get a memo from Town Counsel regarding the Dover Amendment and the parameters of reasonable restrictions the Board might impose, and for the Board to get a memo from Counsel for the Petitioner outlining the programmatic needs of the Town's BEEP program and the Board's inquiry about the Dover Amendment. The hearing was continued to February 7, 2018 at 7:00 p.m. in the Selectmen's Hearing Room.

February 7, 2018. Second night of the public hearing.

Present at the continued public hearing were Chairman Jesse Geller and Board Members Mark Zuroff and Lark Palermo. After re-opening the Hearing on February 7, 2018, Chairman Geller reminded those in attendance that at the previous hearing, the Board heard and closed public testimony, heard the Planning Board's Report, heard the Building Department's Report, and began deliberation with many questions. He stated that the agenda for the continued hearing was to address the questions raised by the Board Members at the prior hearing and any additional questions of the Board Members and for the Board Members to conclude their deliberations and, hopefully, render their decision.

Attorney Allen spoke on behalf of the Petitioner. Also in attendance were Attorney Jennifer Dopazo Gilbert, Alfred Wojciechowski of CBT Architects, Giles Ham of Vanasse & Associates, Vicki Milstein, Principal of Brookline Early Education Program, Helen Charlupski, School Committee Member and Liaison for Early Education, and John Buchheit, Associate Town Counsel.

Chairman Geller asked Attorney Allen whether there were any project updates. Attorney Allen stated that the Petitioner and Town Counsel have been working on a letter of intent and are in agreement to have it drafted prior to the issuance of a building permit. He corrected that the number of employees previously mentioned would be thirty five rather than fifty; the number was not updated when the top floor of the proposed building was removed during the planning process. Attorney Allen added his opinion that Chairman Geller should not have limited the public comment at the last hearing to focus only on the zoning relief. Attorney Allen thought that many members of the public did not share their comments for fear that they would not be relevant. He said that if the Board had listened to more members of the public they would have heard what is missing from the current classrooms and how the proposed building would meet the needs of BEEP. Attorney Allen summarized these points as follows: BEEP has been the last program into a building and the first asked to leave because only kindergarten through eighth grade classes are required by the State to be inside the school buildings; BEEP went thirteen years with no playground built to accommodate children with special needs, while the proposed facility will have an ADA approved play structure in the building and two within walking distance; BEEP currently has classrooms without attached bathrooms for children who, due to developmental delays, come to school without being toilet trained, while the proposed facility will have adequate facilities in all classrooms; for a few years, BEEP has been at Temple Emeth, a religious institution with no adequate public transportation; the new facility will have adequate space for BEEP intake; the new building has rooms designed for one-on-one teaching and parent viewing of their children. He noted

that educators come from Newton, Canton and as far away as China and Singapore to visit BEEP classrooms and to see how BEEP is run. He concluded that this building is built around the programmatic needs of the BEEP.

Chairman Geller inquired as to why this lot was selected. Attorney Allen responded that the lot was selected for its central location, including the walking distance to many homes and nearness to the public transportation and housing authority buildings. Also, the lot was for sale. He argued that many of the schools are not located in ideal locations. Chairman Geller noted that Runkle School and Devotion School, which Attorney Allen brought up at the earlier hearing, were both school expansions of existing schools that were established before zoning in Brookline. He noted that in contrast to the proposed project both of these schools were in the specific neighborhoods they served and had play space on the ground, which this proposed school will not have even though it is new construction.

Chairman Geller asked Associate Town Counsel, John Buchheit to address his memo regarding the Dover Amendment. Attorney Buchheit first addressed the interplay between the special permit process for Dover Amendment users and the Dover Amendment. He referenced *Trustees of Boston College v. Board of Alderman of Newton* ("the Boston College Case") that provides that the special permit process in itself cannot be declared invalid when it involves educational use. He opined that the Board can make a Petitioner go through the special permit process, provided this process does not conflict with the Dover Amendment. He stated that in the case of the Devotion School, the relief that was needed was granted by special permit. Attorney Buchheit reiterated that per the Dover Amendment a Board may not restrict an educational or religious use, but land and structures may be subject to reasonable regulations concerning dimensional requirements and parking. Attorney Buchheit referenced the *Trustees of Tufts College v. City of Medford* ("the Tufts Case"), which provides that the reasonableness of a local zoning requirement will depend on the specific facts of the case and that the

local zoning requirements are unreasonable if compliance with those local requirements would substantially diminish or detract from the usefulness of the proposed structure without appreciatively advancing the municipality's legitimate local concerns. Restrictions are also unreasonable if there is an excessive cost of compliance without significant gain related to municipal concerns.

Board Member Palermo reiterated her concern that every letter of support is supportive of BEEP but there is nothing in writing evidencing that this building will be used for BEEP. Attorney Buchheit responded that, if the Board were to find that the proposal meets the special permit requirements, then there could be a condition imposed to that effect. He continued that *the Tufts Case* analysis requires a Board to look hard at the proposed use, and he concluded that if there were a use or user other than BEEP, the Petitioner would be required to return to the Zoning Board of Appeals for relief. He said that the relief that the Board would be granting in connection with the pending request, whether it be via the Dover Amendment or special permit, is specific to what has been presented to the Board. In this case, the proposal is clearly construction of the building for use by the Town's BEEP program for a 20-year lease term. With regard to Board Member Palermo's concerns about the absence of a lease, if a lease with BEEP could not be agreed upon and executed, it was his opinion that the Petitioner would have to return to the Board of Appeals with any other proposal for the site for relief.

Board Member Palermo asked whether there were any cases that included a proposal to lease a building to a municipality for an educational use. Attorney Buchheit referenced *Campbell v. City Council of Lynn* which involved an educational use, a group home. This case involved a lease to a non-profit of an existing structure and did not concern new construction on a vacant lot, which Ms. Palermo noted was an important distinction. The case did, however, involve a lease. The case did not consider the term of the lease, but the Court held that simple leasehold rights held by a Dover Amendment user without regard to the time period of the leasehold rights was still protected by the Dover Amendment.

Board Member Zuroff stated his concern about what happens to the building if it is not used by BEEP. Without a specific restriction on the ownership of the building, the Town may end up with a building that is out of place in the particular area. He questioned whether the Board could require a long-lasting provision for the use. In response, Attorney Buchheit acknowledged that he had not found any case with the same fact pattern presented by this application. He stated that if at the expiration of the lease a party sought to purchase or lease the property without a use set forth in the Dover Amendment, it would need a zoning variance from this Board of Appeals. He stated that the pool of potential users would be smaller and that even another early education program with Dover protection would need to appear before the Board of Appeals and satisfy the requirements under Dover and the Town's Zoning By-Law (as applicable), including, to demonstrate that the Town's zoning requirements were unreasonable as applied to this new user's operations and programmatic needs.

Chairman Geller noted that the Board Members' consideration of the Petitioner's request, including the size of the improvements and the reduced parking were wholly predicated on use by the Town's BEEP program and asked about the impact of a non-profit with a higher parking demand. Attorney Buchheit answered that this new Dover user would be required to return to the Board. Board Member Zuroff asked for clarification on what restrictions the Board could impose beyond the twenty year term and, certainly, during the twenty year term of the lease. Attorney Buchheit explained that if the Board granted a special permit they could include a condition requiring that the use be for the BEEP program specifically. Chairman Geller asked whether there was any case law that provides clarity as to whether the fact that a project is new construction rather than an existing structure is relevant. Attorney Buchheit responded that the *Boston College Case* involved new construction. There the Board took a hard look at the needs of Boston College and determined that the need for the new facilities, in general, outweighed the City of Newton's legitimate zoning concerns. Chairman Geller asked about the concept

of "harmony with the neighborhood" as referenced in Attorney Buchheit's memo. He opined that in the case of Devotion it served as a real neighborhood school, while here the distinction is that the proposal is for more of a general school for all of Brookline rather than a neighborhood school. Vicki Milstein, Principal of Brookline Early Education Program, stated that the proposed building is uniquely situated to become the early childhood programming center for both the Pierce and Lawrence Schools, as well as for overflow from the Devotion and Lincoln Schools. She continued that BEEP has been in both the Pierce and Lawrence schools previously, but does not currently have any classrooms in either location. Due to the location of the site, it is uniquely able to support the needs of those families in the Pierce and Devotion School catchment area.

Board Member Palermo asked whether children on the autism spectrum from South Brookline would be able to attend the new facility. Ms. Milstein stated that there are facilities in South Brookline that accept children on the autism spectrum. However, if that location was full and there was room at the new facility, that the child would be welcome at the proposed facility. Ms. Milstein noted that it is not the intention to have children from South Brookline coming to the proposed facility; the intention is, to the extent possible, to allow children to attend the childhood facility closest to their home.

Chairman Geller asked Attorney Buchheit to clarify whether the length of control or dedication to a Dover user mattered. Attorney Buchheit responded that in most situations, the Dover user was an institutional owner (e.g. the *Tufts Case* and the *Boston College Case*) and presumably would be in control of property for a long time. He noted, however, that ownership was not required and cited the *Campbell Case* as an example of a lessee obtaining Dover protections.

Board Member Palermo asked for clarification on why the term of the lease is only twenty years. Attorney Allen stated this was the gift and noted that the reason for the term is because of the unidentified future needs of early childhood education. He continued that the State may require that

early education be in all of the schools and stressed the importance to the Petitioner that this facility be used for early education only. Board Member Palermo stated a concern that approval of the proposal for a twenty year lease would not allow for the Town to use the facility for as long as necessary. Attorney Allen said that if the Board grants a special permit, the Board can impose conditions; if it is by the Dover Amendment, the Petitioner could agree to certain conditions. He continued that the Petitioner agrees that this be an early education facility. If for use by any other not-for-profit for educational purposes or by any other party for any use, the Petitioner would be required to come back to the Board for modifications or a variance.

Board Member Palermo asked for clarification regarding parking, referencing a memo from Mary Ellen Dunn which informed the Board that at this time the Brookline Transportation Board has in place a moratorium on considering all school parking plans. She asked whether consideration was given to an underground garage. Attorney Allen stated that it was considered, but the cost/ benefit analysis did not align. He stated that the School Committee was able to secure ten additional parking spots at the Stop and Shop lot, noting that the spots run with the tenant not the owner.

Board Member Zuroff asked whether there was a possibility that the lease contain a right of extension by the Town for BEEP at the Town's option at the same terms and rent as the first twenty years. Attorney Allen stated he believed the terms for an extension for BEEP could be agreed upon.

During discussion, Board Member Zuroff suggested keeping the relief under a special permit. The Board referenced the necessity of time to create the conditions for the special permit. Chairman Geller stated that he believes the proposal for use by the Town for its BEEP program meets the Dover standards as set forth by Attorney Buchheit and the case law. He agreed that this should be done by special permit with specific conditions. The Board determined that the conditions should be worked out with a Board representative, Town Counsel, and the representative for the Petitioner and discussed for

final approval at a continued hearing.

The Board Members then determined, by unanimous vote, that the proposal of construction of a facility for use by the Town's BEEP program and a lease of the property to the Town for use by BEEP, qualifies for relief under the Dover Amendment. It was specifically noted by the Board Members that their determination is based on use of the facility by the Town's BEEP program and lease of the property to the Town for use by BEEP and that the Board would otherwise not have made the findings below, granted the specified relief or conditioned the project in the manner specified below. The Board determined that the requirements have been met for the issuance of a special permit for an educational use under Sections 5.08.2, 6.02.4.c, 5.09.2 and 9.05 of the Zoning By-Law, because the relief is necessary to allow reasonable development of the proposed educational use in general harmony with other uses permitted and as regulated in the vicinity, and therefore granted the relief requested. The Board made the following specific findings pursuant to Sections 9.05, 5.08.2 and 6.02.4.c of the Zoning By-Law:

- a. The specific site is an appropriate location for BEEP as it is centrally located on Harvard Street, in a commercial area near existing day care facilities and other commercial uses, is very close to the Pierce and Lawrence Schools, both of which have no BEEP space, and is accessible by MBTA trains and buses. Additionally, testimony from the BEEP Director indicates that many of the students BEEP will serve are within walking distance to this central location;
- b. The use by the Town's BEEP program as developed will not adversely affect the neighborhood, because adequate design elements create stepped-back upper floors, minimal or no shadow impacts on abutters; and program space within the building to accommodate the proposed use;
- c. There will be no nuisance or serious hazard to vehicles or pedestrians; Traffic circulation and the pickup and drop off plan is adequate for the BEEP program and will prevent queuing on Harvard Street or will be addressed by monitoring and remediation. Adequate parking for will be provided by the 4 on-site parking spaces, the ten off-site spaces acquired by the School Committee, and the additional on-street parking spaces already allotted to some of the BEEP staff who will work at the proposed facility or will be addressed by monitoring and remediation. In addition, the site is centrally located in Brookline, and walkable and accessible via public transportation.

- d. Adequate and appropriate facilities will be provided for the proper operation of the Town's BEEP program; the Petitioner has demonstrated that the building will have adequate office and classroom space for the BEEP program, including related bathroom and kitchen facilities and outdoor space;
- e. The development will have no effect on the supply of housing available for low and moderate income people, because the prior building was used for commercial purposes; and
- f. Relief from the dimensional and parking requirements is necessary to allow reasonable development of the BEEP program for use is in general harmony with other uses permitted and as regulated in the vicinity, such as the several day cares, a shopping market, a fitness center, a drug store and various other commercial buildings in the area.

Accordingly based on the plans submitted at the hearing, the testimony and other materials provided and the findings provided above, the Board voted unanimously to grant the requested relief by special permit for the proposed project and educational use (Use 10) by the Town through its BEEP program, but voted to continue the hearing to approve the associated conditions. The hearing was continued to March 7, 2018 at 7:00 p.m. in the Select Board's Hearing Room.

March 7, 2018. Third night of Public Hearing.

Present at the continued public hearing was Chairman Jesse Geller who continued the hearing to March 12, 2018 at 7:00 p.m. in the Select Board's Hearing Room due to inclement weather.

March 12, 2018. Fourth night of Public Hearing.

Present at the continued public hearing were Chairman Jesse Geller and Board Members Mark Zuroff and Lark Palermo. After re-opening the hearing on March 12, 2018, Chairman Geller reminded those in attendance that the remainder of the hearing would relate to the conditions.

Chairman Geller inquired with the Board Members if they have had an opportunity to review the drafted decision. Board Members Zuroff and Palermo responded in the affirmative.

Upon inquiry from Mr. Zuroff, Chairman Geller stated that the Brookline Zoning By-Law is unique in that it provides a process which runs parallel to the Dover Amendment. Mr. Geller stated that while the Board could make a Dover finding, it would not allow any conditions to be placed on the grant of relief. Mr. Geller further stated that a Dover finding would limit the Board's authority to only impose reasonable restrictions. Chairman Geller stated that in this case, the Board has found that the proposal meets the requirements under Dover, while also finding that the proposal meets the criteria provided in the Zoning By-Law. Mr. Geller therefore stated that the Board may include conditions.

Board Member Palermo stated that she reviewed the decision and concurs with Chairman Geller's analysis that the proposal meets the requirements for the grant of relief pursuant to the Zoning By-Law. Ms. Palermo stated that the attached conditions are both appropriate and necessary for the project. Board Member Zuroff stated that he has reviewed the conditions and is comfortable with them. Accordingly, in connection with its findings and vote to unanimously approve the requested relief by way of special permit for the proposed educational use (Use 10) the Board imposes the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit an electronic copy and two 11x17" copies of final site plans; floor plans and elevations, indicating façade details, colors, materials, windows and rooftop equipment; and a signage plan with dimensions and colors subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, subject to the approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, a final construction management plan, including parking locations for construction vehicles, hours of construction and materials delivery, noise mitigation, staging areas, security fencing, location of portable toilets, rodent control, erosion and sediment control and emergency contact information, shall be submitted for review and approval by the Building Commissioner. A copy of the approved plan shall be submitted in an electronic form to the Planning and Community Development Department and the Director of Engineering and Transportation.

4. Prior to the issuance of a building permit, a Transportation Demand Management (TDM) Plan shall be submitted for review and approval to the Director of Engineering and Transportation and the Assistant Director of Regulatory Planning. There shall be a requirement to offer at least a 50% discount for MBTA passes and Hubway memberships for employees working at the site, and the provision of 20 staff on-street or off-street parking permits, 10 of which shall be within a quarter of a mile. Traffic monitoring and annual reporting to the Town shall be required for a three-year period, including providing the transportation mode used by employees and parents and type of traveler, and an analysis of the drop-off/pick-up procedures with suggested improvements, if needed. The monitoring and reporting program shall commence six months after receipt of the final Certificate of Occupancy for the Project. If monitoring shows queuing on Harvard Street or other problems, then the BEEP shall reevaluate and change its drop-off and pick-up procedures and/or procedures for accepting deliveries and off-street parking arrangements, subject to the review and approval to the Director of Engineering and Transportation and the Assistant Director of Regulatory Planning. Alternatively, if a Transportation policy for all school and town properties is in place then that policy shall be applicable.
5. Prior to the issuance of a building permit, a Traffic Impact Assessment shall be submitted in accordance with the Town of Brookline's Transportation Access Plan Guidelines effective January 1, 2018, or most recent adoption, to the Director of Engineering and Transportation.
6. Site driveway aprons should provide a sidewalk level concrete pedestrian route across site driveways. There shall be no crosswalk markings across site driveways.
7. Prior to the issuance of a building permit, a drainage plan shall be submitted for review and approval of the Director of Engineering and Transportation.
8. One temporary construction and/or development sign(s), no greater than 30 square feet, may be erected on site during construction, with the design and location subject to the review and approval of the Assistant Director of Regulatory Planning.
9. Prior to the issuance of a building permit, a valid and binding lease agreement for not less than a 20-year term by and between the Petitioner and BEEP shall be negotiated to the satisfaction of all parties, including Town counsel, and executed by the Petitioner and the School Committee or such other duly authorized party on behalf of the Town of Brookline.
10. Prior to the issuance of a building permit, the Petitioner 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 fencing, grading, and location of utilities; 2) final building elevations including exterior signage, stamped and signed by a registered architect; 3) final floor plans, stamped and signed by a registered architect; 4) an executed lease agreement between the Petitioner and the School Committee or such other duly authorized party on behalf of the Town of Brookline; 5) an approved Transportation Demand Management (TDM) Plan; and 6) evidence that the Board of Appeals

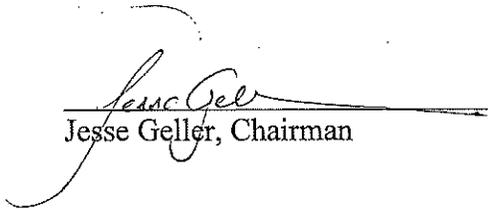
decision has been recorded at the Registry of Deeds.

11. Prior to the issuance of the Certificate of Occupancy, complete as-built plans certified by a registered architect as in compliance with the approved plans shall be prepared and filed with the Building Commissioner.

12. The relief granted is specific to the educational and programmatic needs of the Town's BEEP program. It has been granted because Petitioner has demonstrated that BEEP's programmatic needs outweigh the Town's legitimate zoning interests. It has also been granted because the Petitioner has demonstrated that BEEP's operations, including but not limited to its proposed parking plan and its drop off/pick up plan, will not create significant negative impacts for the neighborhood. If a Dover entity other than BEEP seeks to occupy or use the premises, it shall be subject to new review and approval by the Board and demonstrate to the Board that the Town's legitimate zoning interests, as applied to it, are unreasonable before it begins its use and occupancy of the premises. In such a case and as to a new Dover user, the Board may amend the special permit and impose any reasonable restrictions allowed by the Dover Amendment. Should an entity not protected by the Dover Amendment seek to use the premises, it shall obtain the necessary variances from the Board before it begins its use and occupancy of the premises.

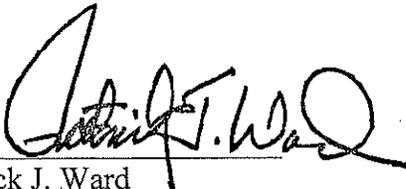
Unanimous Decision of
The Board of Appeals

Filing Date: 4-6-2018



Jesse Geller, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals