



BOARD OF APPEALS
Jesse Geller, Chair
Johanna Schneider
Lark Jurev Palermo

Town of Brookline Massachusetts

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2010 Fax (617) 730-2043
Benjamin Kaufman, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2022-0044
850 BOYLSTON STREET

Petitioner Brigham and Women's Hospital Inc. (BWH) applied to the Building Commissioner for permission to construct a new stairwell and make modifications to the exterior of the building at 850 Boylston Street. The application was denied, and an appeal was taken to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed October 13, 2022, at 7:00 p.m., virtually as the date, time, and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney (if any) 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 September 29, 2022, & October 6, 2022, in the Boston Globe, a newspaper in general circulation in Brookline. A copy of said notice is as follows:

TOWN OF BROOKLINE – Zoning Board of Appeals
NOTICE OF HEARING

The Brookline Zoning Board of Appeals will hold a public hearing on
Date/Time: Thursday, October 13, 2022

Location: Virtual Hearing

Virtual Registration Link: <https://bit.ly/3UIQBxi>

Petitioner: Brigham & Women's Hospital Inc.

Address: 850 Boylston Street

Subject: Construct stairwell and exterior renovations to front and side elevations

Nature of Action/Relief:

§5.09.2.A – DESIGN REVIEW

§5.20 - FLOOR AREA RATIO

§8.02 - ALTERATION OR EXTENSION

Plans and submissions may be viewed online at

<https://brooklinema.gov/DocumentCenter/Index/2352>

Interested persons may provide comments at the public hearing or by submitting written comments by email to manthony@brooklinema.gov.

Assistive Listening Devices are available upon request:

<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>

Publish: 9/29/2022 & 10/6/2022

On October 13, 2022, the Zoning Board of Appeals held a virtual public hearing. Present at the hearing were Chair Lark Palermo and Board Members Jesse Geller and Randolph Meiklejohn. The case was presented by the attorney for the Petitioner, Robert L. Allen, Jr., RLAW P.C., 300 Washington Street, Second Floor, Brookline, Massachusetts. Also in attendance was Long Nguyen, project planner at BWH.

Zoning Board of Appeals Chair Palermo called the virtual hearing to order at 7:00 pm. Chair Palermo reviewed the standard hearing procedure for virtual hearings and confirmed that all Board Members and staff could visually and auditorily engage in the hearing. Attorney Allen waived a reading of the published notice.

Attorney Allen presented the case for the Petitioner stating that 850 Boylston Street is located in the O-1.0 Office Zoning District. He described two prior ZBA decisions that related to banner signs and the conversion of the building from general office to medical use in 2004. Attorney Allen then reviewed a Board of Appeals decision from 1989 BOA#3005 that granted a

variance to increase the FAR to add approximately 7,000 square feet of lobby space and additional interior stairwells to the building.

This proposal is to construct a new exterior stairwell which would be located in an interior courtyard. It would not be visible from a public way. This project would increase the current FAR from approximately 1.17 to 1.18. Attorney Allen explained that the proposed construction also includes accessibility improvements along the Boylston Street façade of the building and relocation of a side entry door.

Attorney Allen noted that the building was constructed in 1968 and originally was used as office space. Since the early 2000s it has been used as a medical office building. He stated that none of the proposed modifications to the building are designed to increase its capacity, but are intended to improve life safety in the building.

The Petitioner, BWH, purchased the building in 2019 and hired Code Red, a building code consultant, to perform a code review. Code Red identified an egress deficiency for the building. It reported that the stairwells to the fourth and fifth floors do not meet current building code requirements.

Mr. Nguyen then reviewed the architectural drawings with the Board of Appeals and described the new proposed egress stair tower of approximately 2000 square feet. Upon inquiry from Board Member Meiklejohn, Mr. Nguyen confirmed that the addition of the exterior stair is a voluntary undertaking of BWH to improve the safety of the occupants. He clarified that it is not a required change and added it would be a significant financial and logistical hardship to construct the new egress stairs within the interior of the building, which would compromise existing clinical programming and disrupt building circulation.

Attorney Allen reviewed the Special Permit relief requested. He stated that since exterior work is proposed within 100 feet of Boylston Street, a special permit is sought under **Section 5.09.2.a** for Design Review. He added that the required impact statement was provided pursuant to **Section 5.09.4** Community and Environmental Impact Design Standards. He noted the proposed changes are minimal and would improve circulation and accessibility. The Planning Board voted unanimously to recommend approval.

Attorney Allen reviewed the standards enumerated in **Section 9.05** noting the following:

- 1) Specific site is an appropriate location for such use: The proposed minor exterior changes are designed to improve the functionality of the building and are appropriately located to serve that purpose;
- 2) Use will not adversely affect the neighborhood: The changes are not expected to have any impact on the neighborhood. Letters were sent to the abutters and there is no known opposition to the minor exterior changes proposed;
- 3) No nuisance or serious hazard to vehicles or pedestrians: The installation of a ramp at the front will have a positive impact for pedestrians accessing the building. No nuisance or serious hazard to vehicles or pedestrians would be created;
- 4) Adequate and appropriate facilities will be provided for the proper operation and proposed use;
- 5) Development will not have any effect on the supply on housing available for low and moderate income people.

Upon inquiry from Board Member Geller, Attorney Allen stated that Code Red found that the current building code would require a new stairwell for the fourth and fifth floors. He added that the code has evolved since the construction of the building and modifications to the code created nonconformities related to egress. Attorney Allen stated that the population of the building's staff has not increased.

Attorney Allen reviewed the variance criteria and stated the following: 1) There are circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located. The structure on 850 Boylston Street is a unique structure with an interior courtyard; it is built into a slope and is an odd shaped lot. In the 1989 ZBA decision, the Board of Appeals found that the “elevations slope from a low point on Boylston Street to a high point near the rear of the lot and some areas have very high-water table and irregular subsurface conditions of rock and other materials and found that these conditions are unique to the premises and not found generally in the neighborhood.” The zoning district consists of 4 parcels and 850 Boylston Street is the only building in this zoning district that is constructed this way. The original building was constructed around 1968, well before many of today’s safety codes. 2) A literal enforcement of the provisions of the by-law would involve substantial hardship. Substantial hardship has historically required the soil, shape of the land or topography be implicated, but a lesser showing is required for a dimensional (vs. use) variance. The courts have held that a safety concern, ameliorated by the granting of a variance, qualifies as a hardship. *Furlong v. Zoning Bd. of Appeals of Salem*, 90 Mass. App. Ct. 737, 64 N.E.3d 268 (2016). The Furlong court relied, in part, on the SJC decision in *Josephs v. Board of Appeals of Brookline* in which the Petitioner requested, and the Brookline Zoning Board granted, a variance for relief from the height requirement in the Brookline Zoning By-law for the construction of a loading bay. On appeal, the Supreme Judicial Court found that alternatives to the proposed height would present hazards to persons using the ramp or interfere with the use of the space, resulting in an economic loss, and held that in either case, substantial hardship would exist.

Code Red determined that levels four and five of the building do not provide sufficient egress capacity under the current building code for the population of the building and that the proposed stair tower would provide adequate egress capacity. The proposed stair tower would ameliorate the risk of an existing harm and create a safer environment for the population of the building, including the daycare center located near it. 3) Desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the by-law. The purpose of the Zoning By-Law includes the promotion of public health, safety, convenience, and welfare by reducing the hazards from fire and other danger. The requested increase of the FAR from 1.17 to 1.18 to construct a structure within the interior courtyard of the building would not nullify or substantially derogate from the intent of the zoning by-law. There will be no impact to the neighborhood or abutters: no trees removed, no new shadows or visual impacts, no increase of traffic or other impacts often associated with development. The variance would allow the safety of the building to be improved by providing egress that complies with the current building code. There has been no opposition to the proposal.

Chair Palermo called for public comments in support of or in opposition to the Proposal. No comments were submitted.

Chair Palermo then called upon Planner and Zoning Coordinator Madison Anthony to present the Planning Board report. She reported as follows:

PLANNING BOARD FINDINGS

Section 5.09.2.a — Community and Environmental Impact and Design Review

A special permit is required for exterior alterations on Boylston Street. All of the design standards have been met. (See submitted Impact Statement.)

Section 5.20 – Floor Area Ratio

	Allowed	Existing	Proposed	Finding
Floor Area Ratio	1.0	1.17	1.18	<u>Variance</u>

Section 8.02 --Alterations or Extensions of a Structure

PLANNING BOARD RECOMMENDATION

The Planning Board supports this proposal to make some minor façade renovations, add an exterior stair in the courtyard where it will not be visible to the surrounding neighborhood and upgrade some of the utility systems. The Planning Board found that improvements would improve accessibility and would make the building more energy efficient.

Therefore the Planning Board recommends approval of the proposed renovations per the site plan and architectural plans by Cannon Design, dated 5/20/22, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans and elevations, stamped and signed by a registered architect, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

At Chair Palermo's request, Mr. Campbell delivered the position of the Building Department, stating that the Building Department has no objections to the requested relief and should the Board grant the requested relief, the Building Department would work with the Petitioners to ensure conformance with the Board's decision and all applicable building codes.

In deliberation Board Member Geller stated that, based on the forgoing, the Petitioner sufficiently established that all the requirements for a variance under M.G.L. Ch. 40A Section 10 have been met. He added that the lot is unique and noted that the prior Board of Appeals variance

decision agreed that the uniqueness standard was satisfied. He continued that adequate testimony has been provided to allow the Board of Appeals to make the finding that the remaining variance standards were also met. Specifically, he noted that the grant of the variance would not result in substantial detriment nor derogate from the intent of the Zoning By-Law. Board Member Meiklejohn concurred in this analysis as did Chair Palermo, making the grant of the requested zoning relief unanimous.

The Board then determined by unanimous vote that the proposal met the requirements for a special permit under **Section 5.09.2.a** for Design Review and for a variance from the provisions of **Section 5.20** to increase the Floor Area Ratio from 1.17 to 1.18. In addition, the Board made the following specific findings under **Section 9.05** based on the evidence submitted at the hearing and the Board's deliberations:

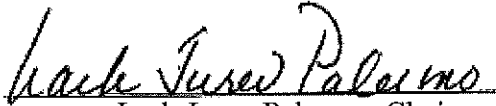
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- e. Development will not have any effect on the supply of housing available for low- and moderate-income people.

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

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans and elevations, stamped and signed by a registered architect, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and

elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

Unanimous Decision of
The Board of Appeals


Lark Jurev Palermo, Chair
Zoning Board of Appeals

Filing Date: 11/21/2022

A True Copy
ATTEST:


Benjamin Kaufman
Clerk, Board of Appeals