



BOARD OF APPEALS
Enid Starr, Co-Chair
Co-Chair Jesse Geller
Christopher Hussey

RECEIVED

2012-07-14

TOWN OF BROOKLINE

Town of Brookline
Massachusetts

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

Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2012-0066

Petitioner, Pine Manor College, applied to the Building Commissioner for permission to subdivide 5.243 Acres from the existing parcel at 400 Heath Street. The application was denied and an appeal was taken to this Board.

On November 29, 2012 the Board met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed February 21, 2013 at 7:15 p.m. in the Selectmen's hearing room as the time and place of a hearing on 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 January 3, 2013 and January 10, 2013 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

NOTICE OF HEARING

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

Petitioner: Pine Manor College

Owner: **Pine Manor College**
Location of Premises: **400 Heath Street**
Date of Hearing: **February 21, 2013**
Time of Hearing: **7:15 p.m.**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor**

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

1. **Modification, as necessary, of Board of Appeals Cases: #1076 (March 23, 1961), Clarification to #1076 (January 7, 1965), #2459 (May 22, 1981) and #1076B (August 2, 2001).**

of the Zoning By-Law to **subdivide 5.243 Acres from the existing parcel at 400 Heath Street**

Said premise located in an **S-40 Residential district.**

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

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

**Enid Starr
Jesse Geller
Christopher Hussey**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Enid Starr, and Board Members Mark Zuroff and Christopher Hussey. The case was presented by the attorney for the petitioner, Louis C. Miller with the law firm Rackermann, Sawyer, and Brewster, 160 Federal Street, Boston, Massachusetts. Also in attendance was Ellen Hurwitz, the acting president of Pine Manor College.

Chairman Starr called the hearing to order at 7:15 p.m. Attorney Miller stated that the petitioner comes before the Board to modify the special permit issued in 1961 (Case No. 1076), which allowed use

of the property as an educational institution when Pine Manor College relocated its campus to Brookline from Wellesley, Massachusetts. The petitioner proposes a subdivision of the property and requires relief relative to Floor Area Ratio (FAR).

400 Heath Street is the site of Pine Manor College (formerly the Dane Estate) and is bounded by Heath Street, Woodland Road, and The Country Club. The main entrance is off of Heath Street. The college is located in a residential neighborhood that predominantly consists of large single-family homes, Soule Recreation Center and a pre-school and playground at the former Baldwin School.

The Petitioner proposes to convey Lot A, as shown on a plot plan provided to the Board and consisting of 5.243 acres of land, to a third-party. Lot A would have access to a public way, Woodland Road, from a new proposed driveway, the creation of which will create a new lot, Lot B. Lot B will consist of 6.39 acres and include the existing soccer field and tennis courts for Pine Manor College. The remaining campus will consist of 43.59 acres of land, totaling 49.98 acres with the inclusion of Lot B.

The main modification relates to the allowed maximum FAR required in the 1961 Decision, which was an FAR of 0.1 for the school campus. The current zoning for the S-40 district allows an FAR of 0.15, which is more appropriate to use in the current FAR calculation for Pine Manor. In addition to the 0.15 FAR calculations, Pine Manor is eligible for an educational institution increase of FAR, which is based on increments of 2,000 square feet above the minimum lot size. The petitioner has 929 incremental units of 2,000 square feet, which would entitle Pine Manor to the full sixty-five (65%) percent increase in FAR. Calculating the permitted Far of 0.15 times the sixty-five (65%) percent increase, comes to .2475, which would be the permitted FAR for an educational institution on this lot. If the proposed subdivision is approved by the Board, the FAR on the 43.59 acre campus would be 0.22. If Lot B is included in the FAR calculation, the ratio would equal 0.177. This FAR calculation is less

than the maximum allowed for educational institutions as of right and is within the parameters of the Zoning Bylaw.

Attorney Miller discussed the legal requirements for special permit under **Section 9.05** of the Zoning By-Law. The specific site is an appropriate location for such use, structure, or condition. The college has been operating continuously at this site since 1961. The use as developed will not adversely affect the neighborhood. The proposed use will not change from the prior use and has not adversely impacted the neighborhood in the past. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. Finally, the development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people.

Mr. Miller stated that his client had addressed several concerns of the neighbors and requested that conditions number three (3) and four (4) proposed by the Planning Board be amended as follows:

Original Conditions No. 3 & 4:

3. Woodland Road shall not be used for direct vehicular or pedestrian access to or egress from any part of the Pine Manor campus, subject to the following exceptions: (1) emergency vehicles may use the existing gate from Woodland at Pine Road, and (2) Woodland Road may be used to access a single family residential use on Lot B, if Lot B is sold to and continues to be owned by a party unrelated to Pine Manor.
4. Pine Manor shall keep and maintain the existing fence (or repair and replace it, as need be) preventing pedestrian access to the campus from Woodland Road and shall not take any action to breach the current fence or in any other way construct, build, or otherwise facilitate pedestrian access from Woodland Road to the campus.

Proposed Conditions No. 3 & 4:

3. Woodland Road will never be used for direct vehicular or pedestrian access to or egress from any part of the Campus except (i) that the easements over Lot B or the Remaining Land as shown on the Plan may be used as a means of vehicular and pedestrian access to Lot A from Woodland Road, (ii) that emergency vehicles may use the existing gate at Pine Road, and (iii) that the land shown as Woodland Road on the Plan may be used to access a single family residential use on Lot B when and if Lot B is sold and conveyed in an arm's length transaction to a person or other entity unrelated to Pine Manor, so long as Lot B shall remain owned by a person unrelated to Pine Manor.

4. Pine Manor shall keep and maintain the existing fence (or repair and replace it, as need be) preventing pedestrian access to the Campus from Woodland Road and shall not take any action to breach the current fence or in any other way construct, build, or otherwise facilitate pedestrian access from Woodland Road to the Campus.

Board Member Hussey asked what accommodations have been made regarding student access to Lot B. Attorney Miller stated that several easements and cross-easements have been proposed and the petitioner is working towards finalizing the proposals.

Before taking public comment, the Chairman stated preliminarily that the petitioner is requesting to modify prior relief to expand FAR and whether it is authorized to sell a portion of its property to a third party. Pine Manor has protections as a public non-profit educational institution under Massachusetts General Laws Chapter 40A(3), which is commonly known as the Dover Amendment. Municipalities may impose certain reasonable zoning restricts on properties as to bulk, setback, parking, FAR, density, etc. Case law is clear that the restrictions have to be reasonable and the Land Court has been specific what constitutes "reasonable" restrictions. Any public comment should be limited to whether the petitioner's request is "reasonable." The Chairman asked whether anyone in attendance wished to speak in favor of or against the proposal. No one spoke in favor of or in opposition to the proposal.

Polly Selkoe, Planner for the Town of Brookline, delivered the findings of the Planning Board.

FINDINGS

Modification of Board of Appeals case #1076 (1961) and clarifications to Decision #1076 (1965), #2459 (1981) and 1076B (2001)

FAR

The main modification that would be required relates to the allowed maximum FAR required in the 1961 Decision, which was an FAR of 0.1 for the school campus. Attorney Louise Miller has stated that since current zoning for this S-40 zoned property allows an FAR of .15 (not 0.1), that

this is the applicable FAR for Pine Manor, and when applying the 65% bonus allowed for campuses, the FAR would be met. [See Sections 5.08.1a & b.]

PARKING

Since the parking plan required by Board of Appeals case # 090068 (1/4/10) showed parking on the parcel to be subdivided off, a new parking plan would need to be submitted for review and approval by the Assistant Director of Regulatory Planning per this condition, unless modified.

Ms. Selkoe stated that the Planning Board supports the request to subdivide off a 5.2 acre parcel for use as a single family house lot. It does not seem equitable to limit the FAR for this large college campus to 50% less than the allowed FAR for a single family home in the same zoning district. With an FAR of .15 and the additional 65% bonus allowed for large college campuses, Pine Manor would conform to the FAR that would be allowed by-right for any other college campus in this S-40 zoning district. In the 2010 Board of Appeals case, which allowed more dorm rooms, it was noted that Pine Manor has an excess of about 100 parking spaces except for rare events, such as graduation. However, it is important to document where parking is located on the campus, and a new parking plan showing adequate parking and shuttle bus spaces should be submitted for review and approval of the Planning and Community Development Department.

Therefore, the Planning Board recommends modification of the prior Board of Appeals cases as requested, subject to the following conditions, which include the proposed changes of the applicant:

1. Prior to Planning Board endorsement of an Approval Not Required subdivision plan, a parking plan showing adequate parking and space for shuttle busses shall be submitted for review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit for any construction on the single family house lot, evidence shall be submitted to the Building Commissioner that this Board of Appeals decision and the endorsed Approval Not Required Plan have been recorded at the Registry of Deeds.
3. Woodland Road will never be used for direct vehicular or pedestrian access to or egress from any part of the Campus except (i) that the easements over Lot B or the Remaining Land as shown on the Plan may be used as a means of vehicular and pedestrian access to Lot A from Woodland Road, (ii) that emergency vehicles may use the existing gate at Pine Road, and (iii) that the land

shown as Woodland Road on the Plan may be used to access a single family residential use on Lot B when and if Lot B is sold and conveyed in an arm's length transaction to a person or other entity unrelated to Pine Manor, so long as Lot B shall remain owned by a person unrelated to Pine Manor.

4. Pine Manor shall keep and maintain the existing fence (or repair and replace it, as need be) preventing pedestrian access to the Campus from Woodland Road and shall not take any action to breach the current fence or in any other way construct, build, or otherwise facilitate pedestrian access from Woodland Road to the Campus.
5. These special permits and modifications are being granted upon the agreement of Pine Manor that it would not appeal or seek to annul the special permits and all modifications issued to date, as they were reasonable conditions when issued and are reasonable now.

The Chairman then called upon Michael Yanovich, Head of the Building Department, to deliver the comments of the Building Department. Mr. Yanovich stated that he had no objections to the proposal and that he feels the proposal is reasonable and that the Building Department supports granting relief.

The Board, having heard all the testimony, deliberated on the merits of the application. Chairman Starr stated there is little question that the FAR is reasonable under the zoning bylaws, supporting case law and the Dover Amendment. Starr stated that all the elements for a special permit under Section 9.05 have been met. Chair members Zuroff and Hussey echoed the remarks of the Chairman and stated there is no reason to override the prior decisions, the relief is covered under Dover, and the request is reasonable.

Chairman Starr stated that there should be additional modifications to the conditions proposed by the Planning Board. Condition number two (2) should include the words "and any cross easements." The Chairman stated that she would not grant a special permit with condition number five (5) attached, as it is arbitrary, capricious, does not have to do with reasonableness of the FAR request, and the Board does not have jurisdiction over the issue. Board members Zuroff and Hussey concurred.

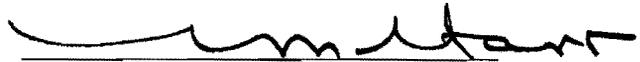
The Board then determined, by unanimous vote that relief by special permit under **Section 9.05** of the Zoning Bylaw is appropriate. The Board made the following specific findings pursuant to said **Section 9.05** of the Zoning By-Law:

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

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

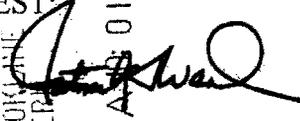
- 1. Prior to Planning Board endorsement of an Approval Not Required subdivision plan, a parking plan showing adequate parking and space for shuttle busses shall be submitted for review and approval of the Assistant Director of Regulatory Planning.**
- 2. Prior to the issuance of a building permit for any construction on the single family house lot, evidence shall be submitted to the Building Commissioner that this Board of Appeals decision and the endorsed Approval Not Required Plan have been recorded at the Registry of Deeds and any cross-easements.**
- 3. Woodland Road will never be used for direct vehicular or pedestrian access to or egress from any part of the Campus except (i) that the easements over Lot B or the Remaining Land as shown on the Plan may be used as a means of vehicular and pedestrian access to Lot A from Woodland Road, (ii) that emergency vehicles may use the existing gate at Pine Road, and (iii) that the land shown as Woodland Road on the Plan may be used to access a single family residential use on Lot B when and if Lot B is sold and conveyed in an arm's length transaction to a person or other entity unrelated to Pine Manor, so long as Lot B shall remain owned by a person unrelated to Pine Manor.**
- 4. Pine Manor shall keep and maintain the existing fence (or repair and replace it, as need be) preventing pedestrian access to the Campus from Woodland Road and shall not take any action to breach the current fence or in any other way construct, build, or otherwise facilitate pedestrian access from Woodland Road to the Campus**

Unanimous Decision of
The Board of Appeals


Enid Starr, Chairman

Filing Date: March 01, 2013

A True Copy
ATTEST:


TOWN OF BROOKFIELD
TOWN CLERK
MAY 1 10 41 AM '13

Patrick J. Ward
Clerk, Board of Appeals