



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

# *Town of Brookline*

## *Massachusetts*

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2011-0033

Petitioners, Chestnut Equity Partners, LLC, applied to the Building Commissioner for permission to construct a dental office of approximately 7,199sf on the second floor of 822 Boylston Street. The application was denied and an appeal was taken to this Board.

On June 9, 2011 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 July 7, 2011 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 June 16 and 23, 2011 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: Chestnut Equity Partners, LLC**  
**Location of Premises: 822-824-826 Boylston Street**

Date of Hearing: **July 07, 2011**

Time of Hearing: **7:15 p.m.**

Place of Hearing: **Selectmen's Hearing Room, 6<sup>th</sup> Floor**

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

1. **6.01.2; General Regulations Applying To Off-Street Parking Facilities, variance required.**
2. **6.02.1; Table of Off-Street Parking Requirements, variance required.**
3. **6.02.1.b; Off-Street Parking Space Regulations, special permit required.**
4. **6.02.1.c; Off-Street Parking Space Regulations, special permit required.**
5. **6.02.5.d; Off-Street Parking Space Regulations, special permit required.**
6. **6.04.2.e; Design of All Off-Street Parking Facilities, special permit required.**
7. **6.04.12; Design of All Off-Street Parking Facilities, special permit required.**
8. **8.02.2; Alteration or Extension, special permit required.**

of the Zoning By-Law to **Construct a dental office on the second floor of @ 7,199 sf at 822-824-826 Boylston Street.**

Said premise located in a **O-1.0 (business and professional office)** 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.*

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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 Lisa Serafin. The case was presented by the petitioner's attorney, Robert L. Allen Jr., 300 Washington Street, Brookline, MA 02445.

To provide background for the site, the Planning Board report gave a brief history related to zoning:

1959 – The two office buildings at 822 and 824/826 Boylston Street were constructed on separate lots in common ownership with a shared parking lot for 114 vehicles.

6/88 – ZBA Case #2917: The Board of Appeals granted relief to complete the second story and build a third story on the office building at 824 Boylston Street. At that time, the Board found the proposal would require 132 parking spaces and sought a waiver for two parking spaces for a total of 130 parking spaces.

11/89 – ZBA Case #2917-A: The Board of Appeals granted a one-year time extension for the relief to complete the second story and construct a third story at 824 Boylston Street.

11/90 – ZBA Case #2917-B: The Board of Appeals granted a second one-year time extension.

5/92 – ZBA Case #2917-C: The Board of Appeals granted a third one-year time extension. The project was never constructed and the relief subsequently lapsed.

Attorney Allen described 822 Boylston Street as a three-story office building on a lot with 56 parking spaces. The building is held in common ownership with the adjacent two-story office building at 824-826 Boylston and parking lot with 73 parking spaces. Both buildings were constructed in 1959 as a professional office building complex. The parking lots that serve both buildings are connected and can be used to access both buildings and have a total of 129 spaces. There currently are two medical tenants in the building at 822 Boylston Street, both of which appear to have located in the building without receiving parking relief. The building at 822 Boylston Street is currently 74% vacant while 824/826 Boylston Street is 100% leased.

Mr. Allen said that his client, Chestnut Equity Partners, is seeking relief for the Hammond Pond Dental practice to occupy a 7,199 square foot suite on the second floor of the building at 822 Boylston Street. The new medical space is considered an intensification of the use of the building at 822 Boylston Street and carries higher parking requirements than professional office space does, thereby requiring parking relief. As the use of the building is changing, the existing parking is no longer a pre-existing nonconforming condition and is held to the current parking standards as if this building were constructed today. With the existing two medical tenants on the first and third floor and the remainder of the building used as office space, 822 Boylston Street would require 94 parking spaces (824/826 Boylston

Street requires an additional 77 parking spaces). However, a new medical tenant occupying 7,199 square feet would require 36 parking spaces (a delta of 18 additional spaces than would be required if the space were used as a professional office) thereby bringing the total parking requirement for 822 Boylston Street to 116 parking spaces, with an additional 77 parking spaces required for the adjacent building and an overall parking requirement of 189 parking spaces. The applicant has 129 parking spaces and is deficient by 60 parking spaces.

Chairmen Starr asked whether anyone in attendance wished to speak in favor of or against the proposal. Gary Lilienthal, an attorney representing the owner of 850 Boylston Street, spoke on behalf of his client. Although, according to Mr. Lilienthal, there was no objection to the change of use to a dental office, there was concern about any waiver of parking requirements, for fear that any overcrowding at 822 Boylston would spill over to 850 Boylston Street; Mr. Lilienthal he also questioned the true number of parking spots and the calculations that were being used. Mr. Lilienthal submitted as an exhibit a parking analysis for 124, 126 and 128 parking spaces, which included the four additional spaces for the doctor on the top floor. Mr. Lilienthal further requested the following conditions be imposed if the Board decided to grant relief: a review of the parking when the building is at 80% occupancy; to require a variance if any additional medical use is requested within the building; assurances that adequate parking spaces exist on the property, and; that the handicap parking spaces be brought into compliance and the dumpster moved from its current location on existing parking spaces.

Mr. Allen, in rebuttal, stated that he concurred with the methodology of Mr. Lilienthal's parking analysis which bolstered the argument that the Petitioner was under the 15% increase allowed under Subsection 2 of §6.01 of the Code. Mr. Lebow, an engineer hired by the Petitioner, confirmed to the Board that there were indeed 129 parking spaces, that pursuant to §6.04.2 of the Code there is room to

create approximately 18 additional compact car parking spots, and that the dumpster could be moved from the existing parking spaces to another location on the property.

Courtney Synowiec, planner, delivered the findings of the Planning Board.

**Section 6.01.2 – General Regulations Applying to Off-Street Parking Facilities**

Whenever there is an alteration or change of use which increases the parking requirements by 15% or more, the total additional parking requirements for the alteration, change or extension shall be provided in accordance with *Sections 6.02 & 6.05* of the Zoning By-Law. As the buildings and lots are commonly owned, the applicant can use the total parking requirements for both buildings in their consideration. However, there are questions as to how this regulation should be applied and will need an interpretation from the Board of Appeals to determine whether or not the applicant is within the 15% threshold.

**Section 6.02.1 – General Regulations Applying to Off-Street Parking Requirements**

**Section 6.02.1.b** – The Board of Appeals, by special permit, may waive up to ten spaces or 50% (whichever is greater) of any increased parking requirement. The applicant is seeking a waiver of 67 parking spaces. *Variance May Be Required Depending On Interpretation of 6.01.2*

**Section 6.02.1.c** – Two or more uses may provide for required parking in a common parking lot if the total space provided is not less than the sum of the spaces required for each use individually. The number of spaces required in a common parking facility may be reduced below this total by special permit if the applicant can demonstrate that peak hours for the uses are so different that a lower parking total would be adequate. As all uses in the building are daytime office uses, it appears a special permit would not be available under this provision. *Non-applicable*

**Section 6.02.5.d** – The Board of Appeals, by special permit, may waive up to 50% of the number of parking spaces for uses that demonstrate an occupancy substantially below the average for retail or office uses. While much of 822 Boylston Street is currently unoccupied, should the applicant seek a waiver under this permit, a modification to the Board of Appeals decision and additional parking relief would likely be required for any future tenants with “average” occupancy to locate in the building. *Non-applicable*

**Section 6.04.2.e** – No more than 25% of the total parking spaces provided may be dedicated for the usage of compact cards. There are currently 14 spaces out of 129 that are designated compact parking spaces for a total of 11%. *Complies*

Parking Calculations for 822 Boylston Street				
Floor	Use	Square Footage	Multiplier	# of Spaces
Basement	Vacant	1,409	1 per 400 s.f.	4 spaces
1 <sup>ST</sup> Floor	Vacant, Office, Medical	10,209	1 per 200 s.f.	51 spaces
2 <sup>ND</sup> Floor	Vacant, Office	10,309	1 per 400 s.f.	26 spaces
3 <sup>RD</sup> Floor	Vacant	2,570	1 per 400 s.f.	6 spaces
	Medical	1,366	1 per 200 s.f.	7 spaces
<b>Total Required for 822 Boylston (Current):</b>				<b>94 spaces</b>
Proposed 2 <sup>ND</sup> Floor	Vacant, Office	3,110	1 per 400 s.f.	8 spaces
	Medical	7,199	1 per 200 s.f.	36 spaces
<b>Total Required for 822 Boylston (Proposed):</b>				<b>112 spaces</b>

Parking Calculations for 824/826 Boylston Street				
Floor	Use	Square Footage	Multiplier	# of Spaces
1 <sup>ST</sup> Floor	Office	10,000	1 per 200 s.f.	50 spaces
2 <sup>ND</sup> Floor	Office	10,943	1 per 400 s.f.	27 spaces
<b>Total Parking Required for 824/926 Boylston:</b>				<b>77 spaces</b>

Parking Summary					
Building	Existing	Proposed	Required (As-Is)	Required (Proposed)	Relief
822 Boylston St.	56	56	94	112	<b>Complies/ Variance*</b>
824/826 Boylston St.	73	73	77	77	
<b>TOTAL</b>	<b>129</b>	<b>129</b>	<b>171</b>	<b>189</b>	

\* The relief required depends upon the interpretation of 6.01.2, and whether the number of existing parking spaces [129], number of required parking spaces if the building were built today (and used as-is) [171] or if the number of required parking spaces for the building if it were built today with the proposed use [189] should be used in the determination of the 15% threshold.

**Section 8.02.2 – Alteration or Extension**

A special permit is required to alter a pre-existing non-conforming structure.

Ms. Synowiec reported that the Planning Board was generally supportive of this proposal to construct a dentist office on the second floor of 822 Boylston Street. The office is relocating from 850 Boylston Street and therefore already exists in the neighborhood. However, in the event the building becomes fully leased with office tenants (by-right), the Planning Board is concerned that a dental practice of this size and scale could create a shortage of parking on this site in the future. In the event of a parking

shortage, the Planning Board encourages the applicant to return to the Board of Appeals to request a special permit for attended parking to increase the parking capacity on site.

With respect to the requested relief, the Planning Board felt that Section 6.01.2 is intended to be interpreted that a change of use representing a delta in required parking under 15% can be allowed by-right and the legislative intent was to allow for a reasonable amount of modification to the occupancy of a building without triggering review. The Planning Board noted that the 15% threshold is cumulative for all alterations occurring after 1962 and that should the applicant choose to use their 15%, so to speak, for this dentist office any future modifications to the use of the building with an increased parking requirement will require a variance. The Planning Board also notes this proposal is right on the cusp of meeting the 15% threshold depending on how the regulation is interpreted and calculated, and although they cannot be certain what level of relief this project requires, they are supportive of the change of use. Therefore, the Planning Board recommends approval of the relief and the plans by FSL Associates, dated 6/30/11, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site and parking layout plan 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 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; and 2) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

The Chairman then called upon Michael Shepard, Building Commissioner, for the report from the Building Department. Mr. Sheppard gave a brief history of how this matter came before the Board and explained the reason behind his citing so many violations of the parking provisions within the Code was that the new parking plan was not submitted as part of the application. Mr. Sheppard went through the calculations of Section 6.01.2 and felt that based on the parking plan submitted by FSL Associates he was comfortable that Petitioner could remain under the 15% allowable increase.

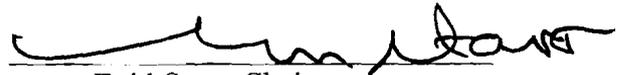
The Board, having deliberated on this matter and having considered the foregoing testimony, found that based on the plan dated 6-30-2011, by FSL Associates, there were 129 parking spaces for the combined 822 Boylston Street and 824-826 Boylston Street which is held in common ownership. The Board was unsure whether the parking requirements for the doctor tenant located on the third floor should be counted – as no one is clear whether his presence pre-dated the Zoning Code; however, the Petitioner has demonstrated the ability to satisfy Section 6.01.2 of the Code by either removing said doctor from the third floor office, or in the alternative adding compact parking spaces to ensure that it remains under the 15% increase. The Board felt that Mr. Sheppard would be in a good position to ensure compliance with this request, and concluded that it was desirable to grant special permit relief from **Section 8.02.2** of the Town of Brookline Zoning By-Law and made the following specific findings pursuant to **Section 9.05** of the Zoning By-Law:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

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 submit a final site and parking layout plan 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 to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan with parking, stamped and signed by a registered engineer or land surveyor to ensure that it complies with Section 6.01.2 of the Code; and 2) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

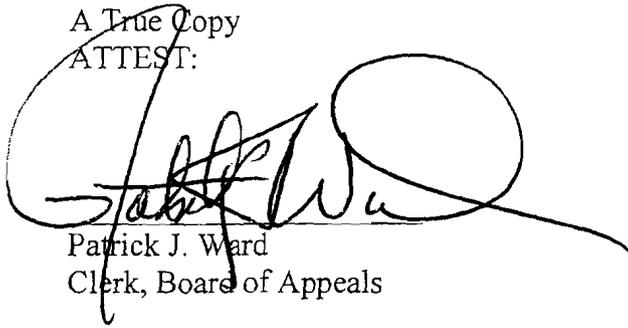
Unanimous Decision of  
The Board of Appeals



Enid Starr, Chairman

Filing Date: August 1, 2011

A True Copy  
ATTEST:



Patrick J. Ward  
Clerk, Board of Appeals

 **COPY**

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