

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

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. 090074

Petitioner, Friendly Ice Cream Corp. applied to the Building Commissioner for permission to modify the hours of operation specified in Board of Appeals decision #060059 for the business located at 289 Harvard Street. The application was denied and an appeal was taken to this Board.

On December 3, 2009, 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 January 14, 2010, at 7:00 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 its 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 December 31, 2009 and January 7, 2010, 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: FRIENDLY ICE CREAM CORP.
Location of Premises: 289 HARVARD ST BRKL
Date of Hearing: 01/14/2010
Time of Hearing: 7:00 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:

Modify and change hours of operation

of the Zoning By-Law to request a modification of Board of Appeal Case #BOA060059 to change hours of operation to 6 a.m. to 11 p.m. Sunday through Thursday and 6 a.m. to 12 midnight on Friday and Saturday at **289 HARVARD ST BRKL.**

Said Premise located in a **G-1.75 (CC)** 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 Jesse Geller. The petitioner was represented by John Ineson, AIA, of edm Architecture, 45 South Main Street, Unionville, CT 06085.

Mr. Ineson advised the Board that on November 16, 2006, in case #060059, the Board of Appeals granted parking relief to allow for a Qdoba restaurant with seating for 60 people. The decision stipulated hours of operation as well.

Mr. Ineson said the property at 289 Harvard Street is the corner storefront of a one-story brick building at the intersection of Harvard and Green Streets in the heart of Coolidge Corner. The storefront was previously used for a Qdoba restaurant, and to its north are a Citibank and a Panera restaurant. The building has wide windows framed with brick arches, and a three-brick-high soldier course at the roofline. Primarily commercial uses surround the property, the Kabbalah Center abuts the site to the rear, and no parking exists on site. His client, Friendly Ice Cream Corp., is proposing to establish a Friendly's Express restaurant at the site, keeping the same number of seats, 60, as Qdoba. When Qdoba obtained zoning relief to establish the restaurant, condition #1 attached to the decision limited the hours of operation from 11 a.m. to 11 p.m. Sunday through Thursday, and from 11 a.m. to midnight Friday and Saturday. The applicant would like to either remove this condition or modify it so the allowed opening time is 6 a.m.; the restaurant proposes to serve breakfast as part of its menu.

Chairman Starr asked whether anyone wished to speak in support or in opposition to the proposal. No one rose to speak.

Lara Curtis, Senior Planner, delivered the findings of the planning department staff.

Modification of BOA case #060059: The following conditions were attached to the original decision allowing the establishment of a 60-seat restaurant and the installation of a new door at the building's corner:

1. The restaurant's hours of operation shall be from 11 a.m. to 11 p.m. Sunday through Thursday, and from 11 a.m. to midnight Friday and Saturday.
2. Any and all signage and façade renovations for the restaurant shall be approved by the Planning Board, with the concept that putting a door in the building's corner archway, shown on the plans titled "Floor Plan & Equipment Schedule – Qdoba

Mexican Grill – 289 Harvard Street, Brookline, MA 02446,” dated June 23, 2006, and prepared by Lingle Design Group Inc., are approved.

3. The restaurant’s management shall implement an employee T-pass program, where management subsidizes at least 50 percent of the cost of monthly subway and bus T-passes for all of the restaurant’s employees.

This proposal would require removing or modifying condition #1 to allow for morning operating hours beginning at 6 a.m.

Ms. Curtis reported that the Planning Board had no objection to this proposal to allow for earlier operating hours for a new restaurant. This site is in the center of a commercial area, and earlier hours should not have a negative impact on the neighborhood. It is not common practice to include operating hours as a condition in Board of Appeals decisions, and the Planning Board recommended removing the condition restricting the hours in this case. The applicant will still need to seek approval of the restaurant’s hours from the Board of Selectmen. Otherwise, the use is not changing and the number of seats will remain the same, which has worked well for this location. Some slight modifications in the wording of the conditions are suggested for clarity. Therefore, the Planning Board recommended approval of the proposed decision modification, subject to the following revised conditions:

1. Any and all signage and façade renovations for the restaurant shall be approved by the Planning Board prior to issuance of a building permit for their installation or construction.
2. The restaurant’s management shall implement an employee T-pass program, where management subsidizes at least 50 percent of the cost of monthly subway and bus T-passes for all of the restaurant’s employees.
3. Prior to obtaining a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Michael Shepard, Building Commissioner, delivered the comments from the Building Department. Mr. Shepard also stated that it is not the general practice of the Board of Appeals to

stipulate hours of operation for retail uses in its decisions. He said the Board of Selectmen, at a public hearing, normally considers this issue. Mr. Shepard suggested that since the Planning Department recommended the implementation of an employee T-pass program, arguably a fine recommendation; due to enforcement issues, Planning staff should, in his opinion, actually oversee whether it is done and perhaps more importantly, maintained. Mr. Shepard reported that the Building Department is in support of the applicant's request.

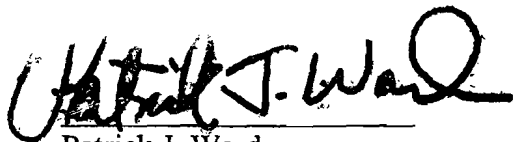
After deliberation, Board Members voted unanimously to grant the relief requested by the applicant in the form of a modification to Board of Appeals case #060059 with the following conditions:

1. **Any and all signage and façade renovations for the restaurant shall be approved by the Planning Board prior to issuance of a building permit for their installation or construction.**
2. **The restaurant's management shall implement an employee T-pass program, where management subsidizes at least 50 percent of the cost of monthly subway and bus T-passes for all of the restaurant's employees. Prior to issuance of a Certificate of Occupancy and annually thereafter, management shall submit to the Planning Department an affidavit attesting to implementation and maintenance of the program.**
3. **Prior to obtaining a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) 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

RECEIVED
TOWN OF BROOKLINE
TOWN CLERK
2011 JAN 26 12:03
Date: January 26, 2010
True copy

A handwritten signature in black ink, appearing to read "Patrick J. Ward". The signature is written in a cursive, somewhat stylized font. The name "Patrick" is written in a larger, more prominent script, while "J. Ward" is written in a smaller, more compact script. The signature is positioned above a horizontal line.

Patrick J. Ward
Clerk, Board of Appeals