



**TOWN OF BROOKLINE
MASSACHUSETTS**

**REPORTS OF SELECTMEN
AND ADVISORY COMMITTEE**

on the

Articles in the Warrant

for the

SPECIAL TOWN MEETING

to be held in the High School Auditorium

Tuesday, November 18, 2003

at

7:00 P.M.

(Please retain this copy for use at the Town Meeting)

Town of Brookline

BOARD OF SELECTMEN

Deborah B. Goldberg, Chairman

Joseph T. Geller

Gilbert R. Hoy, Jr.

Robert L. Allen

Michael S. Sher

Richard J. Kelliher, Town Administrator

"The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operation of its programs, services or activities. Persons with disabilities who need auxiliary aids and services for effective communication in programs, services and activities of the Town of Brookline are invited to make their needs and preferences known to: C. Stephen Bressler, ADA Coordinator and Director of the Human Relations-Youth Resources Commission, 11 Pierce Street, Brookline, Ma. 02445, 730-2300 Voice, 730-2327 TDD, 730-2296 FAX."

MODERATOR

Edward N. Gadsby, Jr.

ADVISORY COMMITTEE

Harry K. Bohrs, Chair, 97 Toxteth Street.	566-3556
Neil Wishinsky, Vice-Chair 20 Henry Street.	739-0181
Carla Wyman Benka, 26 Circuit Road.	277-6102
Michael Berger, 112 Wolcott Road.	734-6139
Kenneth W. Chin, 200 St. Paul Street #3.	739-2519
David James Cotney, 79 University Road	739-6995
Nancy Daly, Chair, 161 Rawson Road.	232-0728
Nadine Gerdts, 56 Linden Place.	731-0420
L. Branch Harding IV, 145 Woodland Road.	738-0716
Gerard J. Hayes, 49 Gorham Road	277-0002
Sytske V. Humphrey, 46 Gardner Road.	277-1493
Mary F. Johnson, 286 Warren Street	566-7899
Jonathan A. Karon, 94 Naples Road	232-2558
Estelle Katz, 41 Park Street.	566-3457
Frederick Lebow, 71 Colchester Street.	739-1930
Roger R. Lipson, 622 Chestnut Hill Avenue.	232-0408
Pamela Lodish, 195 Fisher Avenue.	566-5533
Sean M. Lynn-Jones, 53 Monmouth Street	738-6228
Shaari S. Mittel, 309 Buckminster Road.	277-0043
Charles Moo, 1853 Beacon Street.	232-8796
William B. Powell, 16 Columbia Street.	731-0013
Stanley L. Spiegel, 39 Stetson Street.	739-0448
Ronny M. Sydney, 1443 Beacon Street.	232-8986
Leonard A. Weiss, 46 Hawthorn Road	277-8403
Karen Wenc, 84 Summit Avenue.	232-4983
Robin E. Coyne, Budget Analyst, Town Hall	730-2115

NOVEMBER 18, 2003

SPECIAL TOWN MEETING

INDEX

<u>ARTICLE NO.</u>	<u>TITLE</u>
1.	Approval of unpaid bills. (Selectmen)
2.	Approval of collective bargaining agreements. (Human Resources Board)
3.	Legislation authorizing the transfer of the former Fisher Hill Reservoir. (Department of Planning and Community Development)
4.	Legislation to establish reasonable Fire Department permit fees. (Fire Chief)
5.	Legislation to allow the Treasurer of Brookline to invest trust funds in accordance with the Prudent Man Rule. (Finance Director)
6.	Legislation to grant Town Meeting the authority to approve the issuance of Pension Obligation Bonds. (Finance Director)
7.	Acceptance of GL Chapter 60 Section 2 -- Abatement of unpaid taxes. (Finance Director)
8.	Amendment to Chapter 534 of the Acts of 1973 relative to the Office of the Chief of the Fire Department of the Town of Brookline. (Selectmen)
9.	Amendment to Article 4.00 of the Town's Zoning By-Law -- Use Regulations -- add Section 4.11, Land Disturbing Activities and Stormwater Management. (Department of Planning and Community Development)
10.	Amendment to Section 4.07 of the Town's Zoning By-Law -- Table of Use Regulations -- 38C, Open Air Use (Outdoor Seating). (Department of Planning and Community Development)
11.	Amendment to the Town's By-Laws -- Section 8.10.8, Use of Sidewalks (Outdoor Seating). (Planning and Community Development)
12.	Amendment to Section 7.00 of the Town's Zoning By-Law -- Signs, Illumination, & Regulated Facade Alterations. (Department of Planning and Community Development)
13.	Amendment to Section 4.07 of the Town's Zoning By-Law -- Table of Use Regulations -- amend Principal Use 6. (Department of Planning and Community Development)

14. Amendment to Section 4.07 of the Town's Zoning By-Law – Table of Use Regulations -- amend 33 and add 33A. (Department of Planning and Community Development)
15. Amendment to Section 5.09 of the Town's Zoning By-Law – Design Review. (Department of Planning and Community Development)
16. Amendment to Section 6.05 of the Town's Zoning By-Law – Bicycle Space and Design Regulations. (Petition of Andrew Fischer)
17. Amendment to the Town's Zoning By-Law – With Respect to the Village Square General Business District G-2.0 (VS). (Department of Planning and Community Development)
18. Elderly Tax Relief (Selectmen)
19. Abolition of the Refuse Fee. (Petition of Stanley Wayne)
20. Appropriation of funds for an exhaust fume removal system at all fire station apparatus bays. (Petition of Paul Canney)
21. Amendment to the Town's By-Laws – Article 5.6, Preservation Commission and Historic Districts By-Law. (Petition of Arshag Mazmanian)
22. Amendment to the Town's By-Laws – Section 4.2.9, Selectmen's Report. (Petition of Martin Rosenthal)
23. Amendment to the Town's By-Laws Part VIII -- new Article 8.17 focused residence picketing. (Town Counsel)
24. Request to have the Preservation Commission write a Local Historic District designating the property located at 158 Pleasant Street and 207 Freeman Street as a Local Historic District. (Petition of Ann Stitt)
25. Resolution regarding former Selectman acting as attorney or receiving compensation. (Petition of Ronald Goldman)
26. Resolution regarding conflicts based on prior pecuniary benefits. (Petition of Ronald Goldman)
27. Resolution regarding voluntary spending and contribution limits for Selectman campaigns. (Petition of Ronald Goldman)
28. Reports of Town Officers and Committees. (Selectmen)

2003 SPECIAL TOWN MEETING WARRANT REPORT

The Board of Selectmen and Advisory Committee respectfully submit the following report on Articles in the Warrant to be acted upon at the 2003 Special Town Meeting to be held on Tuesday, November 18, 2003 at 7:00 p.m.

Note: The following pages of this report are numbered consecutively under each article.

ARTICLE 1

FIRST ARTICLE

To see if the Town will, in accordance with General Laws, Chapter 44, Section 64, authorize the payment of one or more of the bills of the previous years, which may be legally unenforceable due to the insufficiency of the appropriations therefore, and appropriate from available funds, a sum or sums of money therefore, or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

State statutes provide that unpaid bills from previous fiscal years may not be paid from the current year's appropriations without the specific approval of Town Meeting. There is one unpaid bill before Town Meeting, a \$1,029.48 bill for electricity at the Public Safety Headquarters facility. The unpaid bill is the result of billing errors and uncertainty about actual amounts owed. Once the actual amount owed was determined by the Police Department, working in conjunction with the Building Department, it was determined that there were insufficient funds remaining in the Police Department's budget and the fiscal year had concluded, so a Reserve Fund transfer could not be requested.

The Selectmen recommend **FAVORABLE ACTION**, by a 5-0 vote taken October 21, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

The Police Department has requested approval for an unpaid electricity bill in the amount of \$1,029.48 from Fiscal Year 2003.

DISCUSSION

Since the Public Safety building only became operational in Fiscal Year 2003, there had been no experience with the costs associated with the new building. In addition, all costs for the Public Safety building, including the former Fire Department building, are now included in the budget for the Police Department. After moving into the new building, the Police Department examined the electricity bill which appeared to be much higher than what had been contracted for. The Police Department and the Building Department therefore disputed the bill with the utility company. Despite the fact that the utility company ultimately lowered the amount owed, a balance of \$1,029.48 remained due.

This amount represents a legitimate expense from a previous fiscal year for which the Town is liable.

RECOMMENDATION

The Advisory Committee by a vote of 17 to 0 unanimously recommends **FAVORABLE ACTION** on the following vote:

VOTED: To authorize the payment of the following unpaid bill of a previous fiscal year from the FY2004 Police Department budget:

TransCanada Power	\$1,029.48
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ARTICLE 2

SECOND ARTICLE

To see if the Town will raise and appropriate, or appropriate from available funds, a sum or sums of money to fund the FY2004 cost items in collective bargaining agreements between the Town and various employee unions; fund wage and salary increases for employees not included in the collective bargaining agreements; and amend the Classification and Pay Plans of the Town; or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

As of the writing of this recommendation, there have been no settlements with any of the Town's unions. The contracts of the Police and Fire unions expired on June 30, 2003 and all remaining contracts expire on June 30, 2004.

Therefore, the Selectmen recommend **NO ACTION**, by a vote of 5-0 taken on October 21, 2003.

ADVISORY COMMITTEE'S RECOMMENDATION

RECOMMENDATION

The Personnel Board has indicated that there are no collective bargaining agreements to act upon at this Town Meeting. Accordingly, the Advisory Committee recommends **NO ACTION**.

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ARTICLE 3

THIRD ARTICLE

To see if the Town will authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AUTHORIZING THE TRANSFER OF THE FORMER FISHER HILL RESERVOIR IN THE TOWN OF BROOKLINE.

SECTION 1. The commissioner of the division of capital asset management and maintenance (the commissioner) may, notwithstanding the provisions of sections 40E to 40H, inclusive, of chapter 7 of the General Laws, convey by deed a certain parcel of land in the town of Brookline to the town of Brookline. The parcel, known as the “former Fisher Hill Reservoir” is located on the southwest side of Fisher Avenue. The boundaries of the parcel shall be established by a survey commissioned by the commissioner.

SECTION 2. The parcel is currently open space and after conveyance, the parcel shall be used for open space or active or passive recreation purposes.

SECTION 3. The sale price paid by the town of Brookline for the parcel described in section 1 shall be not less than the full and fair market value of the parcel determined by the commissioner based on an independent appraisal and based on its use as described in this act. The inspector general shall review and approve the appraisal and the review shall include an examination of the methodology utilized for the appraisal. The inspector general shall have thirty days to prepare a report of his review and file the report with the commissioner of the division of capital asset management and maintenance for submission within fifteen days thereafter to the house and senate committees on ways and means and to the joint committee on state administration.

SECTION 4. The town of Brookline shall be responsible for any costs for appraisals, surveys and other expenses relating to the transfer of the parcel. Upon completion of the transfer of the parcel, the town shall be solely responsible for all costs, liabilities and expenses of any nature and kind for the development, maintenance, use and operation of the parcel. In the event the parcel ceases at any time to be substantially used for the purposes set forth in section 2 or for municipal use, the commissioner shall give written notice to the town of the unauthorized use. The town shall upon receipt of the notice have thirty days to respond and a reasonable time to establish an authorized use of the parcel. If an authorized use of the parcel is not thereafter established, the title to the parcel shall, upon the recording of a notice thereof by the commissioner in the appropriate registry of deeds, revert to the commonwealth with the parcel to be under the care and control of the division of capital asset management and maintenance. Any further disposition of the parcel shall be subject to sections 40E to 40J, inclusive, of chapter 7 of the General Laws.

SECTION 5. The sale price paid under section 3 shall be deposited in the General Fund of the commonwealth.

SECTION 6. This act shall take effect upon its passage.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 2 is a Home Rule petition that authorizes Town Meeting to file legislation with the State authorizing the Division of Capital Asset Management (DCAM) to transfer the State-owned former MWRA reservoir on Fisher Avenue to the Town of Brookline. This 10-acre property, located on the top of Fisher Hill, was identified over a decade ago by Dan Ford, former Chair of the Park and Recreation Commission, as a rare opportunity to increase public open space in Brookline. Purchase of this property offers the Town a unique opportunity to create a park that provides passive walking areas, natural wildlife habitat and an active playing field. DCAM will appraise the property only after legislation approving a sale is passed and signed by the Governor. Once the site appraisal is complete, Town Meeting will be asked to review and authorize funds for the purchase of the property.

Background:

- In June of 2001, the State Division of Capital Management (DCAM) notified the Town that the State-owned former reservoir property on Fisher Avenue had been declared surplus property. The Town was offered the property for a direct municipal use. The Town requested and was granted permission to review use alternatives for the site.
- In the Spring of 2001 a Master Planning Committee was established by the Board of Selectmen to evaluate the reuse potential of the 10-acre State-owned site on Fisher Avenue as well as the 4.8 acre Town-owned underground reservoir site immediately across the street from the state site.
- The Committee evaluated several types of municipal uses for both sites, including affordable housing, active recreation, passive recreation, open space, and public amenities such as a skating rink or public pool.
- In December, 2002 a presentation was made to the Board of Selectmen with the Committee's recommended uses for both properties. The recommended use for the State-owned site was a scenic amenity and public park that incorporates an athletic field, passive recreation, and open space. The design was to be compatible with the character of the neighborhood, be handicap accessible, provide a reasonable amount of parking, provide wooded areas and habitat, protect the historic gatehouse, and provide pedestrian access.

- On January 7, 2003 the Board of Selectmen established a Design Review Committee to work within the guidelines set by the Master Planning Committee to develop a plan and program for the park with associated costs.
- The Design Review Committee held public meetings over a period of nine months and developed a preliminary plan and cost estimate for a design that incorporates all of the required elements. The total estimated budget for land acquisition, improvements, and playing field development is \$4.6 million. (This article does not request funding nor does it mandate that the Town appropriate funds for the stated purposes.)

If Town Meeting authorizes the Town to file legislation with the State, the following will take place:

- Legislation will be filed by the Town's local legislative delegation;
- If approved by the Legislature, it will move on to the Governor to be signed;
- DCAM would then be authorized to begin the appraisal process;
- DCAM would draft documents for the transfer of land to the Town;
- At a future date, Town Meeting would be requested to appropriate funding for the purchase of the property;
- The sale would be finalized.

The time frame for the legislation to pass and for development of the sale documents can be anywhere from 6 to 12 months, or more.

This Board recognizes the great opportunity to expand the Town's existing inventory of parks and open space and fully supports all of the efforts of the Master Planning Committee and the Design Review Committee. Therefore, the Selectmen recommend **FAVORABLE ACTION**, by a vote of 3-0 taken on October 14, 2003, on the following vote:

VOTED: That the Town authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AUTHORIZING THE TRANSFER OF THE FORMER FISHER HILL RESERVOIR IN THE TOWN OF BROOKLINE.

SECTION 1. The commissioner of the division of capital asset management and maintenance (the commissioner) may, notwithstanding the provisions of sections 40E to 40H, inclusive, of chapter 7 of the General Laws, convey by deed a certain parcel of land in the town of Brookline to the town of Brookline. The parcel, known as the "former Fisher Hill Reservoir" is located on the southwest side of Fisher Avenue. The boundaries of the parcel shall be established by a survey commissioned by the commissioner.

SECTION 2. The parcel is currently open space and after conveyance, the parcel shall be used for open space or active or passive recreation purposes.

SECTION 3. The sale price paid by the town of Brookline for the parcel described in section 1 shall be not less than the full and fair market value of the parcel determined by the commissioner

based on an independent appraisal and based on its use as described in this act. The inspector general shall review and approve the appraisal and the review shall include an examination of the methodology utilized for the appraisal. The inspector general shall have thirty days to prepare a report of his review and file the report with the commissioner of the division of capital asset management and maintenance for submission within fifteen days thereafter to the house and senate committees on ways and means and to the joint committee on state administration.

SECTION 4. The town of Brookline shall be responsible for any costs for appraisals, surveys and other expenses relating to the transfer of the parcel. Upon completion of the transfer of the parcel, the town shall be solely responsible for all costs, liabilities and expenses of any nature and kind for the development, maintenance, use and operation of the parcel. In the event the parcel ceases at any time to be substantially used for the purposes set forth in section 2 or for municipal use, the commissioner shall give written notice to the town of the unauthorized use. The town shall upon receipt of the notice have thirty days to respond and a reasonable time to establish an authorized use of the parcel. If an authorized use of the parcel is not thereafter established, the title to the parcel shall, upon the recording of a notice thereof by the commissioner in the appropriate registry of deeds, revert to the commonwealth with the parcel to be under the care and control of the division of capital asset management and maintenance. Any further disposition of the parcel shall be subject to sections 40E to 40J, inclusive, of chapter 7 of the General Laws.

SECTION 5. The sale price paid under section 3 shall be deposited in the General Fund of the commonwealth.

SECTION 6. This act shall take effect upon its passage.

ROLL CALL VOTE:

Favorable Action

Goldberg

Hoy

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 3 asks that Town Meeting authorize the Board of Selectmen to file a petition with the General Court to transfer the former Fisher Hill Reservoir to the Town of Brookline. The reservoir site, consisting of almost 10 acres, is located on the west side of Fisher Avenue. A Master Plan for its future use (as well as the Town-owned reservoir on the east side of Fisher Avenue) has been developed by Halvorson Design Partnership. The Master Plan Committee, by a vote of 13-1, has recommended the plan with conditions to the Board of Selectmen.

DISCUSSION

If Article 3 is approved and the Legislature authorizes transfer of the land, the Commonwealth's Department of Capital Assets Management will be permitted to sell the parcel for not less than full and fair market price, based on an independent appraisal of its value for public use. Based on the experience of other municipalities, the estimate for acquisition is \$500,000. Funds totaling \$1,350,000 for the purchase and preliminary development of the site, including \$500,000 to acquire the property, \$800,000 to make it safe and accessible to the public for open space use and \$50,000 to cover the costs of design and construction documents, were allocated in the FY 04 CIP. At a later date, a separate vote of Town Meeting will be needed to appropriate these funds. Mechanisms to finance further improvements to the site, currently estimated at \$4,485,000, will continue to be explored.

A committee formed by the Board of Selectmen with representation from Town boards and commissions as well as from the Fisher Hill Neighborhood Association has overseen the planning process to determine the future use of the property. The Master Plan calls for a combination of active and passive recreational uses, but additional time will be needed to explore options for the precise configuration of the future park. An early plan called for a larger playing field, but in a concession to the neighborhood, the currently proposed field will be smaller yet still be able to accommodate high school sports. Based on the current proposal, annual maintenance costs have been estimated at \$40,000-\$50,000 by the Director of Parks and Open Space.

There has been public participation in the Master Planning process, and additional public input is anticipated in the design review process for the park's final plan. Preliminary sub-surface and soil analyses for the site have been completed with satisfactory results. The purchase of the former reservoir site will add to Brookline's inventory of public open space, and the designation of part of the land for a playing field will address the current shortage of recreational fields in the Town.

RECOMMENDATION

By a unanimous vote (14-0), the Advisory Committee recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

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ARTICLE 4

FOURTH ARTICLE

To see if the Town will authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AUTHORIZING THE TOWN OF BROOKLINE TO FIX
REASONABLE FEES FOR PERMITS GRANTED BY THE CHIEF OF ITS
FIRE DEPARTMENT

Be It Enacted, etc., as follows:

Section 1. Notwithstanding the provisions of any general or special law to the contrary, the chief of the fire department in the town of Brookline may, with the approval of the board of selectmen, establish reasonable fees, to be charged for permits granted under section 10A in general laws, chapter 148, in excess of those authorized in section 10A.

Section 2. This act shall take effect upon its passage, or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 4 is Home Rule legislation that would enable the Fire Chief to exceed the current \$50 cap on certain permit fees, as allowed under regulations promulgated by the Massachusetts Board of Fire Prevention. This article is the result of a comprehensive review of all Fire Department fees performed by the Fire Chief and his staff.

After the review, the Fire Chief determined that the existing structure for certain fees, namely Certificate of Occupancy Inspection fees and Plan Review fees, are not equitable, nor do they cover much of the cost of these functions. Current regulations allow for a \$50 fee whether a building being inspected or a building for which the plans are being reviewed is a single-family home, a hotel, or a multi-unit facility. This is not equitable, as it takes firefighters longer to perform these functions for a larger structure than for a single-family home. Larger structures should pay incrementally larger amounts for these very important tasks, which benefit everyone since they result in safer structures.

The current \$50 flat fee also does not require larger facilities to compensate the Town for the longer periods of time that firefighters are performing these tasks. While the plan is not to cover 100% of the costs of these services through the fee, it is clear that the fees should better reflect the costs of providing these required inspections. If approved by Town Meeting and the State, the Fire Chief would propose to the Selectmen for approval a three-tiered structure for these fees in the following manner:

1 – 5 Units = \$50 / building
6-12 Units = \$100 / building
13+ Units = \$200 / building

This Board fully supports the efforts of the Fire Chief and his staff on this matter and agrees that the current fee structure should be amended as requested. The Selectmen also appreciate the fact that the Fire Chief made certain that any increases in these fees would not impact individual homeowners.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 23, 2003, on the following vote:

VOTED: That the Town authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AUTHORIZING THE TOWN OF BROOKLINE TO FIX REASONABLE FEES FOR PERMITS GRANTED BY THE CHIEF OF ITS FIRE DEPARTMENT

Be It Enacted, etc., as follows:

Section 1. Notwithstanding the provisions of any general or special law to the contrary, the chief of the fire department in the town of Brookline may, with the approval of the board of selectmen, establish reasonable fees, to be charged for permits granted under section 10A in general laws, chapter 148, in excess of those authorized in section 10A.

Section 2. This act shall take effect upon its passage.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Section 10A in General Laws, Chapter 148, allows the Selectmen to set various fees up to a maximum of \$50. The Fire Chief would like to see the fee schedule for a number of permits, which do not apply to individual homeowners, changed to better reflect the amount of work and associated costs involved in having the Fire Department performs these inspections.

These permits include:

- 1) Ammunition – License to Store
- 2) Fuel Oil Equipment – Installer/Alter
- 3) Oxygen/Acetylene
- 4) LP Gas Use/Storage

- 5) Tar Kettles
- 6) Fire Protection Systems/Permit to Shut Down

Article 4 asks for home-rule legislation to permit the establishment of “reasonable fees” that are beyond the \$50 maximum.

DISCUSSION

As an example, for a building to receive a Certificate of Occupancy there must be an inspection performed by the Fire Department. Inspecting a single unit or a three-unit building is far different than inspecting a 20-unit building or hotel. However, the fee for each of these is the same: \$50. The inappropriateness of this is clear when you consider the inspection of a single unit by a Fire Officer takes less than a half-hour, while a hotel may require the effort of two Officers over two days. A higher maximum fee and a tiered structure for this service appear to be in order.

The Fire Chief has proposed the following fee schedule:

1-5 units	\$50
6-12 units	\$100
13+ units	\$200

While these proposed fees still may not fully cover the costs of performing the work, it is a start at addressing a fee structure that has not seen an increase in 10 years.

Even if home-rule legislation were to be granted, any fee increases would still require a vote of the Selectmen.

RECOMMENDATION

The Advisory Committee unanimously (12-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

ARTICLE 5

FIFTH ARTICLE

To see if the town will authorize and approve the filing of a petition, by the Board of Selectmen, with the General Court in substantially the following form:

AN ACT AUTHORIZING THE TREASURER OF THE TOWN OF
BROOKLINE TO INVEST THE TRUST FUNDS OF SAID TOWN IN
ACCORDANCE WITH THE PRUDENT MAN RULE

Be It Enacted, etc., as follows:

Section 1. Notwithstanding any general or special law to the contrary, the treasurer of the town of Brookline is hereby authorized to invest the funds of said town in the custody of the treasurer in accordance with the Prudent Man Rule.

Section 2. Section 54 in general laws, chapter 44, shall not apply to the town of Brookline.

Section 3. This act shall take effect upon its passage.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 5 is a Home Rule petition that would allow the Treasurer to invest trust fund assets outside of the so-called Commonwealth of Massachusetts List of Legal Investments, as set forth in MGL Ch. 44, Sec. 54, thereby expanding the number of potential investment opportunities the Town may have in its investment of trust fund assets. The proposed warrant article would change only the existing rules on how the Town could invest the assets of public trust funds; it would not alter the manner in which assets within the general fund, which support on-going government services, could be invested.

Current laws allow communities to invest trust fund assets in the market. However, investments can be made only from a limited list of investments, included in the Commonwealth of Massachusetts List of Legal Investments. The Legal List was created many years ago, and has been updated from time to time. Unfortunately, the list contains

only 25 common stocks, a small selection of railroad bonds, and a small selection of bank stocks. (Please see the appendix at the end of the report on this article for the current Legal List.)

The limited selection has a negative effect upon diversification and does not allow opportunities to invest in established, solid companies. Acceptance of the proposed warrant article by Town Meeting and, subsequently by the State Legislature, would expand the "Legal List" selection of investments to that which is available to all investors, provided that the custodian of the funds utilizes prudent behavior in investment practices.

The "Prudent Man" rule of asset investment resembles the "Reasonable Person" rule of tort law. That is, a prudent person responsible for the investment of public trust funds should behave as other trustees in similar situations would behave. This rule contains the following standards:

1. A trustee would invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust;
2. A trustee shall diversify the investments of the trusts;
3. Within a reasonable time, a trustee shall review the trust assets and make and implement decisions concerning retention and disposition of the assets in order to bring the portfolio into compliance with the purposes, terms, and distribution requirements of the trust;
4. A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries; and
5. In investing and managing the trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purpose of the trust, and the skills of the trustee.

In order to meet the requirements of the "Prudent Man" rule, the Town has implemented the following:

1. The Town, utilizing the Chapter 30B Procurement Act, is in the process of selecting professional fund managers. These managers will have the minimum requirements of currently managing at least \$500 million in assets and have clients in the government or non-profit sectors. Once the minimum requirements are met, the final selection will be made based upon historical returns, investment strategies, and administrative cost.
2. The Town has adopted an investment policy that includes balancing a portfolio in a 65% equity / 35% income mix. The manager would have some discretion of +/-

10% from the established portfolio mix, depending on the current condition of the market. The policy establishes benchmarks in which to measure the performance of the fund manager, establishes limits on investments to any single security or any single sector of the market, and restricts the manager from investments in derivatives.

The City of Boston was excluded from the Legal List when the law was authorized and the Town of Concord has a legal opinion from Palmer and Dodge stating that the Town can invest trust fund assets outside of the legal list of investments. Both communities now follow the "Prudent Man" standard.

The Finance Director believes that this change will preserve the assets of the funds by enhancing diversification of investments. In addition, he believes that adoption of the Prudent Man Rule should, over a period of time, increase returns.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article, if enacted, will seek home rule legislation to change the rules under which the town invests its trust funds. Generally, the trust funds in question are funds gifted to the town for specific purposes such as scholarships or special purpose funds such as the Retiree Health Trust Fund. This would have no effect on how the general assets of the town are invested.

DISCUSSION

Currently, town trust funds which are invested in vehicles other than bank accounts must be invested in investments listed in the Commonwealth of Massachusetts List of Legal Investments. This list was created many years ago and is updated from time to time. It currently contains the common stock of 24 or 25 companies (large cap, well known companies such as IBM, Coca Cola, General Mills and General Motors), a small selection of railroad bonds and a small selection of bank stocks. The town treasurer would like to have a broader range of investment options available which will give the town the ability to truly diversify and invest in sectors and companies not covered by the list. The lack of investment options hampers the town treasurer and perhaps exposes the town to investment risks less restricted investors can ameliorate through diversification.

The Prudent Man rule is a widely accepted standard applied to various types of fiduciaries. The rule was first articulated here in Massachusetts in 1830 in the case

Harvard College v. Amory, 26 Mass. (9 Pick.) 446, 460-61 (1830). Since that time, a broad body of law has developed further defining the standard. Additionally, the Prudent Man Rule has been codified in law in many jurisdictions including here in Massachusetts in General Laws section 203C. There is also a federal prudent man rule for employee benefit fiduciaries in the Employee Retirement Income Security Act (ERISA)

The main tenets of the rule are:

1. Fiduciaries shall conduct themselves and managing assets with the care, skill, prudence and diligence then prevailing that a prudent man acting in a like capacity and familiar with such matters would use.
2. Diversification of investments.
3. Investing and managing assets in the sole interests of the beneficiaries of the fund.

The town now has about \$3.4 million of trust funds under professional management exposed to the stock market. Currently there is a procurement to place another \$3 million under professional management. These are the funds that would be immediately affected by this bylaw.

The Advisory Committee suggested that a specific version of the prudent man rule be referenced in the bylaw. In response, town counsel is suggesting that Mass General Laws Chapter 203C be that standard. Chapter 203C codifies the main tenets in detail. The text of those the sections referenced in the bylaw follows:

CHAPTER 203C. PRUDENT INVESTMENT

Section 3. (a) A trustee shall invest and manage trust assets as a prudent investor would, considering the purposes, terms, and other circumstances of the trust, including those set forth in subsection (c). In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets shall be considered in the context of the trust portfolio as a part of an overall investment strategy reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;
- (3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has such special skills or expertise, shall have a duty to use such special skills or expertise.

Section 4. A trustee shall reasonably diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Section 5. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, and the other circumstances of the trust, and with the requirements of this chapter.

Section 8. In investing and managing trust assets, a trustee shall incur only costs that are appropriate and reasonable in relation to the assets, the purpose of the trust, and the skills of the trustee.

Section 9. Compliance with the prudent investor rule shall be determined in light of the facts and circumstances existing at the time of a trustee's decision or action

Note that M.G.L. Section 54, Chapter 44 referenced in section 2 of the proposed by law is the section which restricts trust fund investments. That section already has an exclusion for Boston.

RECOMMENDATION

The Advisory Committee believes that the town should have the tools available to other fiduciaries to diversify trust funds and otherwise manage those funds in a prudent manner.

The Advisory Committee by a 17 to 0 (one abstention) vote recommends **FAVORABLE ACTION** on the following vote: (The underlined text is a change from what is in the warrant.)

VOTED: That the town authorize and approve the filing of a petition, by the Board of Selectmen, with the General Court in substantially the following form:

AN ACT AUTHORIZING THE TREASURER OF THE TOWN OF BROOKLINE TO INVEST THE TRUST FUNDS OF SAID TOWN IN ACCORDANCE WITH THE PRUDENT MAN RULE

Be It Enacted, etc., as follows:

Section 1. Notwithstanding any general or special law to the contrary, the treasurer of the town of Brookline is hereby authorized to invest the funds of said town in the custody of the treasurer in accordance with the Prudent Man Rule, and General Laws, Chapter 203C, Sections 3, 4, 5, 8, and 9.

Section 2. Section 54 in general laws, chapter 44, shall not apply to the town of Brookline.

Section 3. This act shall take effect upon its passage.

XXX

**Massachusetts Division Of Banks**

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List Of Legal Investments

Pursuant to

GENERAL LAWS

CHAPTER 167

SECTION 15A

As of July 1, 2003

The following is a list of stocks, bonds, notes, railroad equipment trust certificates and other interest-bearing obligations which, in the opinion of the Division of Banks, are now legal investments, under the provisions of **Massachusetts General Laws chapter 167, section 15A**.

"Legal" Investments, under section 15A, consist, as specified in that statute, of those issues which meet the requirements under any of the provisions of sections 42 to 48, inclusive, and paragraph 6 of section 49 of chapter 168 of the General Laws in effect on June 30, 1983.

The investments authorized under those sections of law, as well as those securities added under the authority of **section 15B of chapter 167**, now constitute the List of Legal Investments for the Commonwealth of Massachusetts.

Investments meeting the criteria set forth above but not yet on the List, including mutual funds investing solely in such legal investments, will be considered for addition to this List upon petition to the Commissioner of Banks, provided, however, that investments governed by said Section 15B must follow the process for inclusion on the List set out in that statute.

Approval of any security by the Commissioner of Banks for addition to the List should not in any way be construed as a recommendation by this Office for investment. Each investor has the responsibility of evaluating the merits of a particular investment for the individual institution as well as determining whether that investment meets the investor's financial objectives.

NOTE:

Prior to making investments in banks and other corporations which have loans to or produce armaments for use in specified countries, General Laws chapter 32 § 23 should be reviewed.

For more information contact:

Eleanor Ericson, Chief Director
Commonwealth of Massachusetts Division of Banks
One South Station, Third Floor

Boston, Massachusetts 02110
(617) 956-1532

FEDERAL, STATE, AND INTERNATIONAL OBLIGATIONS

Statutory Requirements: (formerly General Laws chapter 168, section 42)

Any such corporations may invest in bonds, notes or other interest-bearing obligations of the following classes:

1. United States: Direct obligations of the United States, or in such obligations as are unconditionally guaranteed as to the payment of principal and interest by the United States.
2. Massachusetts: Legally issued, assumed or unconditionally guaranteed bonds, notes or other interest-bearing obligations of this commonwealth.
3. Other States: Legally issued, assumed or unconditionally guaranteed bonds, notes or other interest-bearing obligations of any state of the United States other than this commonwealth, which has not, within the twenty years prior to the making of such investment, defaulted for a period of more than one hundred and twenty days in the payment of any part of either principal or interest of any legally issued or assumed obligation; provided that the full faith and credit of such state is pledged for the payment of the principal and interest of such obligations.
4. Canada: Bonds, notes or other obligations issued, or guaranteed as to both principal and interest, by the Dominion of Canada; provided (a) that such bonds, notes or obligations shall be payable in United States funds either unconditionally or at the option of the holder thereof; and (b) that at the date of investment the said Dominion of Canada shall not have been in default in the payment of interest or principal of any of its obligations for a period in excess of thirty-one days at any time within the twenty years preceding such date of investment. Not more than five percent of the deposits of any such corporation may be invested in obligations authorized under this paragraph.
5. Other International Obligations: Bonds, notes or obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank or the Asian Development Bank containing an unconditional promise to pay, or an unconditional guarantee of the payment of, the interest thereon regularly, and the principal thereof on or before a specified date, in lawful currency of the United States; provided that not more than three percent of the deposits of any such corporation shall be invested in such bonds, notes or obligations; and provided, further, that the commissioner may at any time on his own initiative, or shall, upon the written request of the directors of the Mutual Savings Central Fund, Inc., suspend the authorization granted by this paragraph for such period or periods as he may determine.
6. Federal Agency Obligations:
 - a. Obligations of, or instruments issued by, and fully guaranteed as to principal and interest by the Federal National Mortgage Association, established under the National Housing Act, as amended;
 - b. Debentures, bonds or other obligations issued by any federal home loan bank or consolidated federal home loan bank debentures or bonds issued by the federal home loan bank board under the Federal Home Loan Bank Act, as amended;
 - c. Debentures issued by the central bank for co-operatives or consolidated debentures issued by said central bank and the twelve regional banks for co-operatives under the Farm Credit Act of 1933, as amended;
 - d. Collateral trust debentures or other similar obligations issued by any federal intermediate credit bank or consolidated debentures or other similar obligations issued by the twelve federal intermediate credit banks under the Federal Farm Loan Act, as amended;
 - e. Farm loan bonds issued by any federal land bank under the Federal Farm Loan Act, as amended;

- f. Promissory notes representing domestic farm labor housing loans authorized by section five hundred and fourteen of the Federal Housing Act of nineteen hundred and forty-nine, as amended by the Federal Housing Act of nineteen hundred and sixty-one, when such notes are fully guaranteed as to principal and interest by the Farmers Home Administration of the United States Department of Agriculture;
- g. Bonds, notes or obligations issued, assumed or guaranteed by the Export-Import Bank of the United States;
- h. Obligations of any person, including any form of mortgage-backed security, as to which the payment of principal and interest according to the terms of such obligations is guaranteed by the Government National Mortgage Association under the provisions of the National Housing Act, as amended;
- i. Certificates issued by the Federal Home Loan Mortgage Corporation representing interests in mortgage loans made, acquired or participated in by said Federal Home Loan Mortgage Corporation;
- j. System-wide obligations issued under the provisions of the Farm Credit Act of 1971 (Public Law 92-181 Sec. 4.2) by institutions included in the Federal Farm Credit System.

MUNICIPAL OBLIGATIONS

Statutory Requirements: (formerly General Laws chapter 168, section 43)

Any such corporation may invest in bonds, notes or other interest-bearing obligations of the following classes:

1. Massachusetts: Legally issued or assumed bonds, notes or other interest bearing obligations of a county, city, town or legally established district of this commonwealth.
2. Other States: Legally issued or assumed bonds, notes or other interest-bearing obligations of any city or town of any other state of the United States, which was incorporated as such at least ten years prior to the date of such investment; provided (a) that the population of such city or town at the date of such investment is not less than thirty thousand nor more than one hundred thousand, and the net indebtedness thereof does not exceed six per cent of the last preceding assessed valuation of the taxable real property therein, or (b) that the population of such city or town at the date of such investment is more than one hundred thousand, and the net indebtedness thereof does not exceed eight per cent of such assessed valuation. Said population shall be as established by the last national or state census or city or town census, taken in the same manner as the national or state census and certified by the clerk of said city or town. As used in this paragraph the words "net indebtedness" shall mean the indebtedness of a city or town, omitting debts created for supplying the inhabitants with water or electricity, or both, and debts created in anticipation of taxes to be paid within one year from date of issue, and deducting the amount of sinking funds available for the payment of the indebtedness included. The provisions of this paragraph shall not authorize investments in obligations of any city or town situated outside the commonwealth which has been in default for more than one hundred and twenty days in the payment of any part of principal or interest of such obligations within ten years immediately preceding the making of such investment.
3. Full Faith and Credit Requirement: The full faith and credit of the county, city, town or district shall be pledged for the full payment of principal and interest of all bonds, notes or other interest-bearing obligations legal for investment under any provision of this section.

RAILROAD OBLIGATIONS

Statutory Requirements: (formerly General Laws chapter 168, section 44)

Bonds, notes or other interest-bearing obligations of railroad corporations subject to the conditions, limitations and requirements of section 44.

RAILROAD EQUIPMENT TRUST CERTIFICATES

The outstanding Philadelphia Plan Equipment Trust Certificates of the following companies are legal.

Burlington Northern, Santa Fe
Norfolk Southern Railway Company
Union Pacific Railroad Company

RAILROAD BONDS

MISSOURI PACIFIC CORP.

First Mortgage, "C" 4.25 1 Jan. 2005

TELEPHONE COMPANY OBLIGATIONS

Statutory Requirements: (formerly General Laws chapter 168, section 45)

Bonds, notes or other obligations of telephone companies subject to the conditions, limitations and statutory requirements of section 45.

All outstanding issues, which meet statutory requirements, of the following companies:

American Telephone and Telegraph Company (AT&T)
Bell Atlantic PA
Bell South
Carolina Telephone & Telegraph Company
Chesapeake & Potomac Telephone Company of Virginia
Chesapeake & Potomac Telephone Company (Washington, D.C.)
General Telephone Company of Florida (GTE Service Corp.)
General Telephone Company of Illinois (GTE Service Corp.)
General Telephone Company of Michigan
General Telephone Company of the Northwest, Inc.
General Telephone Company of Pennsylvania
General Telephone Company of Wisconsin
Hawaiian Telephone Company
Illinois Bell Telephone Company
Indiana Bell Telephone Company
New England Telephone & Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Ohio Bell Telephone Company
Southern New England Telephone Company
Southwestern Bell Telephone Company
United Telephone Company of Ohio
United Telephone Company of Pennsylvania

Holders of obligations of companies affected by the mergers or acquisitions noted below should contact the appropriate service representative office of the company for further direction:

- (1) The merger of Bell Atlantic and GTE was finalized on June 30, 2000 under the new name Verizon Communications.
- (2) SBC Communications completed the acquisition of Ameritech Corporation on October 8, 1999.
- (3) The merger of Qwest and U.S. West was finalized on June 30, 2000.

PUBLIC SERVICE COMPANY OBLIGATIONS

Statutory Requirements: (formerly General Laws chapter 168, section 46)

A. Massachusetts Public Service Companies

Bonds, notes or other interest-bearing obligations of a gas, electric light or water company incorporated or doing business in this commonwealth and subject to the control and supervision thereof; provided, that the net earnings of such company, after payment of all operating expenses, taxes and interest as reported to, and according to the requirements of the proper authorities of the commonwealth, have been, in each of the three fiscal years preceding the making or renewing of such investment, equal to not less than four per cent on all its capital stock outstanding in each of said years; and provided, further, that the gross earnings of said company in the fiscal year preceding the making or renewing of such investment have been not less than one hundred thousand dollars. A list of the companies, the securities of which *prima facie* comply with the requirements of this subdivision A shall be furnished annually by the proper authorities of the commonwealth having supervision over such companies to the commissioner at such time after June sixteen in each year as he shall designate.

B. Other Public Service Companies

Bonds of a gas, electric light or water company, maturing not later than 40 years subsequent to the date of such investment, issued or assumed by any company incorporated under the laws of the United States or any state thereof subject to the conditions, limitations and requirements of the former Massachusetts General Laws chapter 168, § 46, subdivision B.

Alliant Energy (formerly Interstate Power Company)
Atlantic City Electric Company
Carolina Power & Light Company
Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
CLECO (formerly Central Louisiana Electric Company)
Constellation Energy Group (formerly Baltimore Gas & Electric)
Delmarva Power & Light Company
Duke Energy Corporation
Empire District Electric Company
Florida Power and Light Company
Florida Power Corporation
Gulf Power Company
Hawaiian Electric Company
Idaho Power Company
Iowa Southern Utilities Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas & Electric Company
Midwest Power Systems, Inc.
Minnesota Power and Light Company (a Division of Allete Inc.)
Mississippi Power Company
Narragansett Electric Company
New England Power Company
Northern States Power Company (Minnesota)
Northern States Power Company (Wisconsin)
OGE Energy (formerly Oklahoma Gas and Electric Company)
Pennsylvania Power & Light Company
Potomac Electric Power Company
Public Service Company of Oklahoma
Public Service Electric & Gas Company
South Carolina Electric & Gas Company
Southern Indiana Gas & Electric Company
Southwestern Electric Power Company
Southwestern Public Service Company
Virginia Electric & Power Company
West Texas Utilities Company

Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation

BANK STOCKS

Statutory Requirements: (formerly General Laws chapter 168, section 47)

Bank and Bank Holding Company common stock subject to the conditions, limitations and requirements of section 47.

BANK STOCKS IN MASSACHUSETTS

Cambridge Trust Company, Cambridge
Millbury National Bank, Millbury
Slade's Ferry Trust Co., Somerset

BANK HOLDING COMPANIES - MASSACHUSETTS

State Street Corp.

**BANKS AND HOLDING COMPANY COMMON STOCKS
LOCATED OUTSIDE OF MASSACHUSETTS**

AmSouth Bancorporation, Alabama
Fifth Third Bancorp, Ohio
Wachovia Corp., North Carolina
Wilmington Trust Company, Delaware

INSURANCE COMPANY STOCKS

Statutory Requirements: (formerly General Laws chapter 168, section 48)

Fire and Casualty Insurance Companies capital stock subject to the conditions, limitations and requirements of section 48.

BANK DEBENTURES AND NOTES

Statutory Requirements: (formerly General Laws chapter 168, section 49, paragraph 6)

Bank debentures, convertibles, notes or other evidences of indebtedness (e.g., Federal Funds) subject to the conditions, limitations and requirements of former Massachusetts General Laws chapter 168, section 49, paragraph 6.

MASSACHUSETTS

Cambridge Trust Company
Fleet National Bank
Slade's Ferry Trust Company
State Street Bank and Trust Company

OTHER OBLIGATIONS

Legal under former section 50
(Now legal under provisions of chapter 167, section 15B)

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY: Various Issues

MASSACHUSETTS PORT AUTHORITY: Various Issues

MASSACHUSETTS TURNPIKE AUTHORITY: Various Issues

TENNESSEE VALLEY AUTHORITY: Various Issues

WASHINGTON D.C. METROPOLITAN AREA TRANSIT AUTHORITY

7.35 due July 1, 2012

COMMON AND PREFERRED STOCKS

Eligible under the provisions and limitations of former section 50
(Now legal pursuant to General Laws chapter 167, section 15B, paragraph 2)

Abbott Laboratories
Altria Group (formerly Philip Morris Companies)
American International Group, Inc.
Bristol Myers Squibb Co.
Coca Cola Co.
Consolidated Edison
Emerson Electric Co.
FleetBoston Financial Corporation
General Electric Co.
General Mills, Inc.
Gillette Co.
Hewlett-Packard Co.
Johnson & Johnson
Kellogg Co.
Kimberly-Clark Corp.
Lilly Eli & Co.
McDonalds Corp.
Merck & Co., Inc.
PepsiCo, Inc.
Pfizer, Inc.
Procter & Gamble Co.
Rockwell Automation (formerly Rockwell International Corp.)
Schering-Plough Corp.
Southern Co.
Unilever N. V.

INVESTMENT FUNDS

As provided under General Laws chapter 167, section 15A, such list shall include the name of any investment fund, approved by the commissioner, which invests only in such stocks, bonds, notes and other interest-bearing obligations which are legal investments as provided herein. The shares of any such investment fund so approved shall be legal investments pursuant to this section to the same extent as any such stocks, bonds, notes and other interest bearing obligations.

BBH TRUST (formerly "The 59 Wall Street Trust"):

BBH U. S. Treasury Money Fund

CONCORDIA CAPITAL ASSOCIATES

Concordia Legal List Enhanced Cash Portfolio

Concordia Legal List Equity Portfolio

DREYFUS:

Government Cash Management

Treasury Cash Management

Treasury Prime Cash Management

FEDERATED INVESTORS FUNDS:

GNMA Trust

FIDELITY:

Fidelity U. S. Government Reserves

Spartan U.S. Treasury Money Market Fund

FRANKLIN TEMPLETON:

Franklin Federal Money Fund

INSTITUTIONAL DAILY INCOME FUND:

U.S. Treasury Portfolio

ISI

ISI Total Return US Treasury

MERRILL LYNCH:

U.S.A. Government Reserves

U.S. Treasury Money Fund

MORGAN STANLEY

Limited Duration U.S. Treasury Trust

OVERLAND EXPRESS:

Variable Rate Government Fund

PIONEER FUNDS:

America Income Trust

PROVIDENT INSTITUTIONAL FUNDS:

T-Fund

RESERVE FUND (THE):

U.S. Government Institutional Fund

TRUST FOR CREDIT UNIONS:

Government Securities Portfolio

UBS LIQUID INSTITUTIONAL RESERVES:

UBS LIR Treasury Securities Fund

WRIGHT INVESTORS' SERVICES:

U.S. Treasury Money Market Fund

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ARTICLE 6

SIXTH ARTICLE

To see if the Town will authorize and approve the filing of a petition with the General Court to grant Town Meeting the authority to approve the issuance of pension obligation bonds for the purpose of funding the unfunded pension liability of the town's retirement system, or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

This article calls for Home Rule legislation to provide Town Meeting with the necessary legislative authority to approve the issuance of pension obligation bonds (POBs). Whether this authority is ever exercised by Town Meeting in the future will be dependent upon the economic and market conditions at that time. For now, however, this legislation simply allows Town Meeting the option to approve the issuance of POBs should it decide at some point in the future that it is in the Town's financial interest to do so.

As part of the 1998 Special Town Meeting in November, Town Meeting approved Article 16, which provided the same authority as this article. Unfortunately, it was not approved by the State.

POBs are long-term general obligation bonds issued to fund all or part of the unfunded accrued liability (known as the "unfunded actuarial accrued liability" or "UAAL") of the issuer's employee pension plan. The UAAL is the difference between the actuarially calculated accrued liability (i.e. the amount of pension benefits earned on an accrued basis by members of the pension system) and the actuarial value of the pension system's assets. Brookline's UAAL as of January 1, 2002 amounted to approximately \$79 million.

In some respects POBs are like refinancing a mortgage. The objective of POBs is to finance some or all of the UAAL by selling taxable municipal bonds at a lower interest rate than the rate of return that can be earned by investment of the proceeds from the sale of the bond. This is known as arbitrage. If all goes according to plan, the rate of return on the pension fund's assets will exceed the POBs' interest cost, yielding arbitrage savings and lowering total annual expenditures. Because POBs are structured to rely on arbitrage to produce their intended benefit, they are issued as taxable obligations.

POBs have been in existence since 1985. They have been issued by a number of governmental bodies throughout the country including the States of New York, New Jersey, California and several cities, including San Diego, Pittsburgh, Miami, Buffalo, Portland (OR), and Columbus, and several Connecticut and New Jersey municipalities. The first issuance in Massachusetts

was done by the City of Worcester. POBs continue to be of interest at this time because of the low interest rate environment. At least a dozen Massachusetts communities, including Hingham, Springfield, and Everett, are exploring their feasibility at this time.

The major rating agencies view POBs as a legitimate means of reducing unfunded pension liabilities. The main benefit is that they can be structured to reduce the annual amount required to be appropriated for pension benefit obligations over a long period of time. A preliminary model that was presented to the Town in July showed a potential savings, under a modestly conservative set of assumptions (including 5.2% (AIC) POBs and 8% long term investment earnings), of over \$34 million over the life of the POBs. This savings would result in a current dollar (or present value) savings of over \$20 million.

In preparation for Town Meeting, the Town had these figures re-run and the savings dropped to \$25M (\$13M PV) due to an increase in the interest rate. While it is a decrease in savings, the savings figures are still large enough to maintain the Town's interest in POBs. The Town would not be acting in the best interest of the taxpayers if it ignored a potential annual savings of approximately \$1.2 M.

This change from a total savings of \$34M to \$25M clearly shows the impact the market has on POBs, and it is this uncertainty that creates the risk involved in POBs. However, it should be clearly stated again that this article does not authorize the issuance of POBs; it simply gives the Town (assuming State passage) the ability to come back to Town Meeting and ask for POBs to be issued. The Town's financial team, including the Town's financial advisor from First Southwest Company, would carefully monitor interest rates and make a determination of whether savings would be generated, at which point a decision would be made to seek Town Meeting approval. (Even if Town Meeting granted the authority to issue the POBs at a future Town Meeting, the Town would still make sure it made financial sense to do so before issuing them; if the interest rates changed between Town Meeting approval and time for issuance, the Town would not issue the POBs.)

The Board has placed a great deal of emphasis over the last several years on long-range and strategic financial planning. A key component of this effort has been minimizing long-term fixed costs. POBs are an innovative financing technique that has the potential for reducing a significant long-term fixed cost.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on October 7, 2003, on the following vote:

VOTED: That the Town authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AUTHORIZING THE TOWN OF BROOKLINE TO ISSUE PENSION OBLIGATION BONDS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The town of Brookline is hereby authorized to issue, at one time or from time to time, bonds or notes for the purpose of funding the unfunded pension liability, so-called, of the retirement system of the town. The proceeds of any such issuance shall be transferred by the town to said retirement system. The term of any such bonds or notes shall not exceed thirty years from the date of issuance and the amount of any such bonds or notes shall be considered as outside the limit of indebtedness prescribed in section 10 of chapter 44 of the General Laws. No such bonds or notes shall be issued without a two-thirds vote of the town meeting of the town of Brookline. Upon the authorization of the issuance of pension obligation bonds by the town meeting, the town shall submit said vote and a plan demonstrating how the town will finance and allocate the debt service associated with said bonds or notes to the executive office for administration and finance, and no bonds or notes authorized to be issued by this act shall be issued until the secretary for administration and finance has approved said plan and the issuance of such bonds or notes. Except as otherwise provided herein such bonds or notes shall be subject to the provisions of said chapter 44.

SECTION 2. The aggregate principal amount of the bonds or notes issued under authority hereof shall not be greater than the amount sufficient to extinguish the unfunded pension liability of the retirement system of the town of Brookline as determined in accordance with this section. The retirement board of said town shall first determine the amount sufficient to extinguish the unfunded pension liability of the retirement system of said town in accordance with the report of a nationally recognized independent consulting firm, which may be the consulting actuary generally retained by said retirement board, and with the approval of the public employee retirement administration commission. Such report shall also set forth the present value savings to the town reasonably expected to be achieved as a result of the issuance of such bonds or notes.

SECTION 3. The maturities of such bonds or notes shall be scheduled such that the annual combined payments of principal and interest for each issue shall be as nearly equal as practicable in the opinion of the selectmen, in any manner that shall provide for a more rapid amortization of principal, or in accordance with any other manner consistent with the town's approved funding schedule, as the secretary for administration and finance shall approve.

SECTION 4. Every governmental unit the employees of which are members of the retirement system of the town of Brookline shall be responsible in accordance with this section for paying such proportion of the annual debt service expense paid by the town for bonds issued under authority of this act as is equal to the proportion of the total unfunded pension liability of said retirement system allocated to such member under section 2. Notwithstanding the provision of any general or special law to the contrary, the public employee retirement administration commission shall increase the annual amount to be certified under section 22 of chapter 32 of the General Laws as the amount necessary to be paid by each governmental unit in said retirement system other than said town by each such governmental unit's proportionate share of the annual debt service expense as determined herein and shall decrease the amount to be paid by said town by an equal amount. The town shall have the same legal rights and authority as the retirement

board of the town to collect any amount so assessed by the retirement board to any such governmental unit.

SECTION 5. Notwithstanding chapter 70 of the General Laws or the provisions of any other general or special law to the contrary, the portion of the annual debt service paid by the town of Brookline for bonds or notes issued under this act applicable to school department personnel who are members of the town's retirement system shall be included in the computation of net school spending for the purposes of said chapter 70 or any other provision of law.

SECTION 6. This act shall take effect upon its passage.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article requests the Town to authorize and approve the filing of a petition with the General Court to grant Town Meeting the authority to approve the issuance of pension obligation bonds for the purpose of funding the unfunded pension liability of the town's retirement system. This article came before Town Meeting at the Spring 1999 meeting, and passed with a majority vote, however the petition never was granted. This article reintroduces the petition.

DISCUSSION

The Town has an unfunded pension liability of about \$85 million. Every year there is a line item in the budget for about \$9 million to fund this deficit. This obligation will continue until it is paid in full. The actual liability, however, is not an exact amount, but is subject to both financial market fluctuations and actuarial adjustments. It may be noted that over the past four years since Town Meeting looked at this subject the stock market has made some large moves, and interest rates have changed significantly. Each of these events has impacted the value of the pension fund, and adjustments have been made by the actuarial calculations to determine the necessary current contribution to fund the shortfall. This shows the annual funding is a variable "best guess" subject to significant risk and change.

In an effort to add more predictability to the Town's annual budget, and allow for more careful planning, "pension obligation bonds" could create a specifically defined liability and a clear schedule of annual funding costs. Rather than suffering the slings and arrows of outrageous market fortune, the annual funding would be replaced with a clear schedule of paying off a Town issued debt obligation.

To illustrate the advantage of issuing "pension obligation bonds" the Town invited a financial advisor to calculate the cost of paying a maturing debt obligation as against our current policy of making an actuarially derived amount. It was shown there could be a savings of almost \$1.5

million a year. The calculation was done during the summer of 2003, and the assumptions included interest rates that were available at the time. Although that opportunity has passed, another window could open; and these “pension obligation” bonds could provide a tool the Town might want to consider using. But there is no tool without the passage of this article.

RECOMMENDATION

The Advisory Committee voted favorable action on a similar article four years ago. There are risks associated with issuing “pension obligation” bonds; and there would need to be careful study before any such bonds were recommended to Town Meeting in the future. But the first step is to get the permission from the General Court. The Advisory Committee unanimously (18-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

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ARTICLE 7

SEVENTH ARTICLE

To see if the Town will accept the provisions of General Laws, Chapter 60, Section 2, that allows the assessors to abate an unpaid tax of less than ten (\$10.00) dollars upon the request of the Collector and provides that if the actual tax due is less than ten (\$10.00) dollars it shall not be collected, or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 7 asks Town Meeting to adopt the provisions of MGL Chapter 60, Section 2, which allows the Collector of the Town to abate unpaid taxes of less than \$10. The objective is to create a method of abating the small remaining balances on accounts receivable, which is desirable due to the fact that the cost of legal action exceeds the amount owed to the Town.

Occasionally, a taxpayer may pay a bill a few days after the due date. This action usually generates an interest penalty of less than \$10. The Treasurer/Collector's office does attempt to collect all outstanding balances. There is presently no authorization which allows the Town to classify these small outstanding amounts as uncollectible. In the end, the Town must either pursue the collection of small amounts through costly legal action, or leave the accounts receivable open and on the Town balance sheet.

The Board recommends **FAVORABLE ACTION**, by a vote of 5-0 taken on September 23, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

General Laws Chapter 60, Section 2 allows a city or town, if it so chooses, to permit the tax collector to request from the assessor an abatement of unpaid taxes of less than ten dollars. This

article would allow the Town to request an abatement of personal property taxes at the option of the Tax Collector.

DISCUSSION

While the Town has enforcement procedures for the collection of unpaid real estate taxes or trash/refuse fees, it is not possible for the Town to attach a lien for unpaid personal property taxes. In addition, there is currently no means to abate personal property taxes. Therefore, the Town must carry unpaid personal property taxes on its books regardless of how small or how long ago they were incurred. Excluding the most recent fiscal year (2003), there are currently only 34 taxpayers who have unpaid personal property taxes with a total outstanding balance of less than \$6,000 over the last nine years. In most cases, the Town is able to collect unpaid personal property taxes through usual collection methods. However, for very small unpaid personal property taxes, the cost of going to small claims court far exceeds the amount collected.

There was concern that if the Town adopts this option as an alternative to strict collection, some covered taxpayers might perceive a loophole or weakness in tax enforcement. However, the Finance Director indicated that the Town would consider this option on a case-by-case basis only after it has exhausted normal collection methods.

RECOMMENDATION

The Advisory Committee by a vote of 17 to 1 recommends **FAVORABLE ACTION** on the following vote:

VOTED: That the Town accept the provisions of General Laws, Chapter 60, Section 2, that allows the assessors to abate an unpaid tax of less than ten (\$10.00) dollars upon the request of the Collector and provides that if the actual tax due is less than ten (\$10.00) dollars it shall not be collected.

XXX

ARTICLE 8

EIGHTH ARTICLE

To see if the Town will authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AMENDING CHAPTER 534 OF THE ACTS OF 1973 RELATIVE TO THE OFFICE OF CHIEF OF THE FIRE DEPARTMENT OF THE TOWN OF BROOKLINE.

Be It Enacted, etc., as follows:

Section 1. The first, second and third sentences in SECTION 5 in Chapter 534 of the Acts of 1973, are hereby deleted and replaced with the following:

SECTION 5. The board of selectmen shall appoint a chief of the fire department for a term of one year, unless a different term is otherwise determined in an employment contract established under the provisions of Section 108O in chapter 41 of the general laws.

Section 2. This act shall take effect upon its passage.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 8 is an amendment to Chapter 534 of the Acts of 1973, which is a Special Act that established the position of Fire Chief in the Town of Brookline. The effect of this amendment, if adopted, would be to lift the restriction on candidates for the position of Fire Chief only to the incumbent Deputies and Captains of the Brookline Fire Department.

Changing the Special Act as proposed would place the appointment process for Fire Chief on the same basis as that for the Town Administrator and all other Department Heads, including the Police Chief. None of the Town's senior administrative positions, including the Superintendent of Schools, have a similar restriction. Appointments to these positions, whether ultimately with internal or outside applicants, is premised on choice from the widest, deepest, and most competitive candidate pool possible.

The nature of the position of Fire Chief has changed dramatically over the three decades since Chapter 534 was enacted. Labor relations, emergency medical services, HazMat response, command and control technology, now Homeland Security, and many other demands have dramatically changed the position requirements. For example, in 1973, when the Special Act took effect, binding arbitration procedures for fire labor contract disputes did not even exist. Many of the other subsequent developments in the profession were also unheard of at that time.

As has been learned in the Town's experience with appointing Department Heads from openly competitive candidate pools, there can be a greater degree of confidence that the screening process will be as fully informed as possible. Opening up the recruitment process can bring fresh perspective along with validation of traditional practices. When Police Chief O'Leary was appointed from within the ranks of the Brookline Police Department, out of a candidate pool of 109 applicants, both the community and Chief O'Leary himself had a greater level of confidence that he was the best possible choice to lead the Brookline Police Department in the 21st Century.

Recent experience with the hiring restriction for Fire Chief has not produced satisfactory results. In the last two rounds of Fire Chief appointments – in 1986 and in 2000 – there were just a handful of candidates for the position. In 2000 only 7 of the 16 eligible internal officers applied for the job, consistent with the number in the previous round in the mid 80's. These numbers stand in stark contrast to the recent experience with other Department Head positions – Planning Director - 55 candidates, Human Resources Director - 140 candidates, Chief Information Officer - 400 candidates.

A survey of nine comparable communities found that none have a bylaw or ordinance restriction similar to Brookline's. However, all nine currently have Chiefs who were appointed from within their Departments. Of the nine, Arlington, Cambridge, and Weymouth appoint the Chief off a civil service list. The other six – Belmont, Braintree, Framingham, Needham and Wellesley – like Brookline do not utilize Civil Service. But again, none have a statutory restriction like that included in Chapter 534 of the Acts of 1973.

The timing of this change is also opportune. At the moment there is an Interim Fire Chief. Those responsibilities are being most ably carried out by Deputy Chief Peter Skerry, who, regrettably, has indicated that he will not seek the permanent appointment. Interim Chief Skerry voluntarily limited his interest to the interim position only well before Article 8 was filed. He has made it very clear that the changed procedure proposed Article 8 has absolutely nothing to do with his decision to limit his term as Chief to only one year.

The Interim Chief situation provides an unusual opportunity to consider the type of change proposed by Article 8 without having the effect of "changing the rules in the middle of the game". There is no existing list of internal candidates. This change is not being proposed after an announcement has been made of an open position. Everyone

who might eventually apply for the permanent appointment of Chief would be placed on the same footing before any screening process would be formally initiated.

A majority of the Board of Selectmen want to afford the Town the opportunity to explore what kind of candidate pool can be developed for the position of Fire Chief. They believe that the Town should not deprive itself of conducting the most fully informed screening process possible. If at the end an internal candidate is appointed, all the better. The public safety of the Town is too important not to take every opportunity to identify the best possible candidate for this critical leadership position.

A majority of the Board recommends **FAVORABLE ACTION**, by a 4-1 vote taken on October 21, 2003, on the following vote:

VOTED: That the Town authorize and empower the Board of Selectmen to file a petition, in substantially the following form, with the General Court:

AN ACT AMENDING CHAPTER 534 OF THE ACTS OF 1973 RELATIVE TO THE OFFICE OF CHIEF OF THE FIRE DEPARTMENT OF THE TOWN OF BROOKLINE.

Be It Enacted, etc., as follows:

Section 1. The first, second and third sentences in SECTION 5 in Chapter 534 of the Acts of 1973, are hereby deleted and replaced with the following:

SECTION 5. The board of selectmen shall appoint a chief of the fire department for a term of one year, unless a different term is otherwise determined in an employment contract established under the provisions of Section 1080 in chapter 41 of the general laws.

Section 2. This act shall take effect upon its passage.

ROLL CALL VOTE:

Favorable Action

Goldberg

Geller

Hoy

Sher

No action

Allen

MINORITY REPORT

Voting in the minority, Selectman Allen noted that he sees some benefits to the proposed change in offering the opportunity to compare internal candidates with external

candidates. He contends that Brookline Fire command personnel would make a very strong showing in such a comparison. However, he noted that the potential negatives of this change far outweigh the benefits. The principle of "climbing the ranks" might be violated. Morale could be damaged. In addition, appointing a candidate from outside the Department would potentially forgo the opportunity to draw upon the local knowledge base and the sensitivity to the community that only internal candidates can provide. Anyone new coming into the Department would have to master the details of Brookline's specific matters such as collective bargaining agreements, budget process, and Town Meeting.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

With the supporting vote of the Brookline Town Meeting, Chapter 534 of the Acts of 1973 of the Commonwealth of Massachusetts abolished the office of Fire Commissioner in the Town of Brookline. This act transferred the powers and duties to the Office of the Selectmen as the overseeing authority.

Section 5 of Chapter 534 of the Acts of 1973 specifies that the appointed Fire Chief must have held the permanent position of Captain or higher in the Brookline Fire Department and that the term of the appointment shall be one year.

The provisions of MGL 41 ss 1080, as amended, allows towns and cities to enter into employment contracts with Fire Chiefs, presumably including the length of appointment. While MGL 41 ss 1080 may supercede Chapter 534 provisions, it would not be in keeping with Town Meeting's originally voted one-year appointment term.

The Selectmen are requesting that the Town vote to change Section 5, thereby permitting the appointment of the Fire Chief to be made from an open applicant pool rather than just the 15 Captains and Deputies from within the Brookline Fire Department.

This is not unusual among fire departments. Belmont, Newton, Framingham and Wellesley, among others, provide for applicants beyond their own internal ranks.

If adopted here, applicants could apply from anywhere, including of course, the Brookline Fire Department and the conditions of the Chief's appointment would be specified in an employment contract as it is for other department heads.

The Selectmen believe now is the time to make this change, prior to the appointment of a new Fire Chief. As well, the selection process would align with that of other departments.

DISCUSSION

Section 5 of Chapter 534 presents two fundamental limitations; the applicant pool for the position of Fire Chief is limited to the 15 Brookline Captains and Deputies, and the term of the Fire Chief is one year. As mentioned above, this time restriction can be superseded but would be inconsistent.

Negotiable appointment terms can provide a measure of flexibility as well as stability in the position. The Fire Fighters' Union representatives concurred with that assessment and the Committee believes the one year restriction should be changed.

We should note that the current employment structure and appointment process for Fire Chief is significantly different than that which is in place for the Town's other department heads.

For the positions of Planning Director, Director of Human Resources, Information Services Director and Police Chief, to name a few, open searches were performed and applicants came from within and outside of the Town. For the Planning Director there were 55 applicants, HR Director 140 applicants, IS Director over 400 applicants, and Police Chief 109 applicants (most of those from outside of Brookline). This is in contrast to only 7 applicants for the Fire Chief (though there are 15 eligible positions).

The Committee feels that such a limited pool is unhealthy for the department, the community and the position of Fire Chief. The position of Fire Chief should be accorded the same degree of seriousness, vigor and significance in recruitment as other department heads.

Always looking from the inside out, as a matter of policy, is structurally unhealthy. The proposed changes to 534 will open the application process, encouraging thoughtfulness, creativity and rigor, without excluding the strong Brookline candidate pool.

The Firefighters' union representatives voiced concern over the change. The concern they emphasized most regarded the "timing" of implementing the change. They felt that it was unwise to make the change now given the recent morale issues and the unsettled nature of the department during this year.

The Committee, however, believes this is the ideal time to make the change since we need to appoint a Fire Chief. The position is currently filled on an interim basis. This will allow for an open search with the structure clear from the beginning, rather than making a change in mid-course.

The other concern voiced by the Firefighters' union was the inherent value to having a Chief who came through Brookline's ranks as they have an institutional understanding of the department and are known to the firefighters. It was noted that firefighters rely on each other in matters that involve life and death. A firefighter must trust the Chief with his/her life and be willing to follow that person into a burning building.

This point of trust and the time it takes to establish a relationship was well taken by the Committee. However, familiarity with someone is not synonymous with trust and it is not clear that the primary function of a Fire Chief in Brookline in this day and age is to lead firefighters into burning buildings. Certainly it is hard to imagine that there can be no other competent or qualified person anywhere else in the world but Brookline's 15 Captains and Deputies who can service the community well as Fire Chief. Clearly, there is merit to having someone familiar with the department and undoubtedly that will carry great weight in the process. Out of 109 (mostly non-Brookline) applications for the Police Chief position, a Brookline officer was chosen. The best qualified candidate may well be in the Brookline ranks, but should we have as a matter of policy a structure that prohibits this community from ever considering any other candidate? The Committee felt the answer was clearly no. The position of Fire Chief is important enough that it deserves the respect of an open process. The selected Fire Chief must come from a process that demonstrates to the community that the choice was made strictly on the basis of merit and a selection pool of only 7 undermines that sense of assurance -- even if the choice is indeed well qualified.

RECOMMENDATION

Natural fears of change put aside, the Advisory Committee believes this will benefit the position of Fire Chief specifically, the entire department generally, and the community of Brookline particularly.

The Advisory Committee, therefore, recommends by a vote of 9 to 3, **FAVORABLE ACTION** on the vote offered by the Selectmen.

XXX

November 18, 2003
Special Town Meeting
Article 8 – Supplement No. 1

MOTION TO BE OFFERED UNDER ARTICLE 8
MARTIN R. ROSENTHAL – TMM Precinct 9

MOVED: to refer the subject of this article to a Moderator's Committee, which includes at least one representative of the Town's firefighters, to report to a future Town Meeting on the following two issues:

- 1. the criteria for selection of a chief, including whether the Town should open up the selection process to outside candidates, as well as to consider giving Town firefighters some form of preference in any newly-devised process; and*
- 2. whether there is a need for a management and leadership training program for Town firefighters.*

EXPLANATION

Art. 8 seeks to overturn the provisions of Chapter 534 of the Acts of 1973 in two ways: the term for Fire Chief would be limited to a one-year term unless negotiated to be different and a candidate would no longer be required to be selected from an internal pool of captains or deputy chiefs within the department. The Selectmen and the Advisory Committee assert that this provision would open up the pool of candidates and thereby improve the quality of choices for the next chief. Brookline PAX is not necessarily opposed to giving the Town more choices, but we do not want to foreclose the opportunity for our local firefighters to move up to leadership in the department. Also, we have not been apprised of any hard data or studies that weigh this article's asserted and potential benefits against the concerns of local firefighters that local preference is important to morale and performance.

Finally, we believe that Article 8 would not be enacted soon enough to address the present vacancy, because this is likely to be a controversial Home Rule Petition that would have serious opponents in the legislature. In order to avoid a battle at Town Meeting, and later in the legislature, PAX recommends referring the matter to a Moderator's Committee to review criteria for selection of a chief, and to consider whether the Town should open up the selection process to outside candidates, as well as to consider allowing local firefighters some preference in any new process. Further, the Committee should consider instituting a management training program to help our firefighters develop the necessary skills to become the next chief. The Moderator's Committee should be limited to these issues.

ARTICLE 8

SELECTMEN’S RECOMMENDATION ON THE MOTION TO REFER ARTICLE 8

Referral will result in the Fire Department functioning without permanent leadership for a protracted period of time, perhaps as long as two years. The current Interim Chief will step down on June 30, 2004, by which time a permanent chief is expected to be appointed under the provisions of Article 8. Referral of Article 8 will prolong the interim situation, resulting in four different acting chiefs from May 03 – July 04.

The main motion under Article 8 would place the conditions of appointment of the Fire Chief on virtually the same basis as all other Department Heads, particularly the Police Chief. When the position of Police Chief was removed from Civil Service by Town Meeting in 1992, it resulted in the same conditions of employment as are being proposed for the Fire Chief:

- Formal description referencing state statute defining the “head of the fire department” G.L. c.148 as the Chief as specified in Chapter 7 of the Department Rules and Regulations.
- Employment contract under the state statute authorizing such agreements for Fire Chief G.L. c.41. Section 1080.
- Professionally based recruitment and screening utilizing interview panels with professional peers and/or independent organizations established for this purpose to work in conjunction with town officials.

This approach has been more than “field tested” by its implementation in the Brookline Police Department. Further study could not provide more real information than this actual experience. The Police Chief and others have indicated that his appointment out of a field of 100 candidates helped better prepare him to assume his position and bolstered the legitimacy of his appointment.

Discussion about management training will not address the immediate need to appoint permanent leadership from the most qualified candidate pool possible. This only shifts the focus from the existing unduly restrictive selection process. Over the long term all town departments could benefit from more management training. However, the need to

open up the selection process for the Fire Chief stands on its own. Leadership training should not be used to delay the need to appoint a permanent Fire Chief.

Interim Chief Sherry has worked hard with the Town to move the Department in the right direction. With the support of the personnel of the Department, the following has occurred since July:

- Overtime and sick leave levels are down
- A new technology plan is in place
- Administrative cooperation with Police Department has advanced
- Homeland Security Funding is being used to the fullest extent possible

Further delay in appointing a permanent Chief runs the risk of reversing these advances. It would be highly unlikely for a Moderator's Committee to complete its work in time for the opening (Jan '04) and closing (Mar '04) of the next Annual Town Meeting Warrant. Most often Town Meeting must wait a year to act on Committee recommendations. In this case a Moderator's Committee might not get underway until January of 2004. Given the complexity of the subject matter it would not be unreasonable to assume that its work would take months.

The Brookline Fire Department needs a permanent Chief. Town Meeting is urged to take decisive action on this matter.

The Selectmen recommend **NO ACTION** on the motion to refer.

ARTICLE 9

NINTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- A. In ARTICLE IV USE REGULATIONS add §4.11 – LAND DISTURBING ACTIVITIES AND STORMWATER MANAGEMENT as follows:

**§4.11 – LAND DISTURBING ACTIVITES AND STORMWATER
MANAGEMENT**

Land disturbing activities and stormwater management are controlled by the By-Laws of the Town of Brookline, Article 8.25 Stormwater Management, and administered and enforced by the Department of Public Works. See Town By-Law subsections 8.25.1 Discharges to the Municipal Drain System, 8.25.2 Erosion and Sediment Control, and 8.25.3 Post Construction Stormwater Management for these specific regulations.

- B. In ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 DESIGN REVIEW, paragraph 4. Community and Environmental Impact and Design Standards, subparagraph e. Surface Water Drainage add the following words as underlined and in bold type at the end:

e. Surface Water Drainage -and will not create puddles in the paved areas. **See By-Laws of the Town of Brookline, Article 8.25 Stormwater Management.**

or act on anything relative thereto.

PLANNING BOARD REPORT AND RECOMMENDATION

Article 9 adds needed Zoning By-Law cross references to a Town By-Laws Article unanimously approved by Town Meeting last spring – Article 8.25 Storm Water Management. The Town By-Law provides new regulations to be administered by the Department of Public Works to govern Land Disturbing Activities and Storm Water Management and includes subsections on Discharges to the Municipal Drain System, Erosion and Sediment Control and Post Construction Storm Water Management. The cross references in the Zoning By-Law will ensure that applicants, when preparing site and/or development plans, etc., are aware of these requirements. Without these references, the possibility exists that an applicant could proceed through the Planning Board and Board of Appeals process and then reach the Department of Public Works only to find that the site/development plan needs to be significantly revised.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Article 9.

SELECTMEN'S RECOMMENDATION

At the 2003 Annual Town Meeting, Warrant Article 18 proposed a new Stormwater Management By-Law to meet the requirements and timetable of the U.S. EPA for the development of a stormwater management program. It was approved by Town Meeting. This article simply references the new Stormwater Management By-Law in the Town's Zoning By-Law so that applicants, when preparing site and/or development plans, etc., are aware of these requirements.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Town meeting passed a warrant article last May to provide a stormwater management policy that complies with current EPA regulations. This article would require the town to publish information about the stormwater management policy in the Zoning By-Law, which is enforced by the Department of Public Works.

DISCUSSION

If this article is passed, a developer who checks the requirements for zoning would take into account the additional cost required by the Stormwater Management Policy. A copy can be obtained from the Engineering Office of the town.

The Stormwater Management Policy addresses three major areas:

1. Reducing contamination in stormwater basins.
2. Controlling sediment in stormwater basins during pre-construction.
3. Reducing surface water from entering stormwater basins post-construction.

RECOMMENDATION

The Advisory Committee unanimously (14-0) recommends **FAVORABLE ACTION** on the following vote:

VOTED: That the Town amend the Zoning By-Law as follows:

- A. In ARTICLE IV USE REGULATIONS add §4.11 – LAND DISTURBING ACTIVITIES AND STORMWATER MANAGEMENT as follows:

§4.11 – LAND DISTURBING ACTIVITES AND STORMWATER MANAGEMENT

Land disturbing activities and stormwater management are controlled by the By- Laws of the Town of Brookline, Article 8.25 Stormwater Management, and administered and enforced by the Department of Public Works. See Town By- Law subsections 8.25.1 Discharges to the Municipal Drain System, 8.25.2 Erosion and Sediment Control, and 8.25.3 Post Construction Stormwater Management for these specific regulations.

- B. In ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 DESIGN REVIEW, paragraph 4. Community and Environmental Impact and Design Standards, subparagraph e. Surface Water Drainage add the following words as underlined and in bold type at the end:

e. Surface Water Drainage -and will not create puddles in the paved areas. **See By-Laws of the Town of Brookline, Article 8.25 Stormwater Management.**

XXX

ARTICLE 10

TENTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

In ARTICLE IV, USE REGULATIONS, amend the Table of Use Regulations, by adding the following words, underlined and in bold type, as part of Principal Use 38C, so that Principal Use 38C reads as follows:

- 38C. Open-air use, other than commercial recreation facilities, **seasonal outdoor seating for a licensed Food Vendor that does not exceed six months in each calendar year**, and Uses 22 to 28 inclusive, including but not limited to the sale of flowers, garden supplies, or agricultural produce.

or act on anything relative thereto.

The purpose of the amendments proposed in Articles 10 and 11 is to both support seasonal open-air cafes and eliminate the special permit requirement for use. The Planning Board would still conduct design review of them and submit its recommendation to the Board of Selectmen who would be the permit granting authority. This amendment also makes consistent the review and approval of open air cafes on private **and** public sidewalk.

PLANNING BOARD REPORT AND RECOMMENDATION

The purpose of these two amendments (one to the Zoning By-law and the second to a Town Bylaw article) is to support and encourage well-designed seasonal open air cafes by eliminating the special permit requirement for outdoor seating on *private* sidewalk and by requiring advisory reports from the Planning Board, Building and Public Works Commissioner and Police Department to the Selectmen before their approval of outdoor seating on *public* sidewalk during the licensing procedure for food vendors.

Use 38C in the Table of Uses, Article IV of the Zoning By-Law currently requires a special permit for an outdoor use, including open air cafes. This has required restaurants to go before the Planning Board and Board of Appeals for review and approval, a process that takes at least three to four months due to state statutory requirements for public notice and appeal. Although the special permit requirement would be eliminated, a restaurant applying for outdoor seating would still be required to undergo design review by the Planning Board under Section 7.06,

Regulated Façade Alterations, which applies to any visual changes to commercial buildings. The Planning Board in past cases has reviewed the layout and appearance and overnight storage of tables and umbrellas, hours of operation, and provision of trash receptacles.

Up until now, the Planning Board has reviewed only outdoor seating on a *private* sidewalk that is part of a restaurant's lot because outdoor seating on a *public* sidewalk had not been allowed. However, Town Meeting passed a Town By-Law, Section 8.10.8 Use of Sidewalks and Outdoor Premises in May, 2000, allowing outdoor seating on public sidewalks contiguous to a restaurant if permitted by the Selectmen during the Licensing Procedure for Food Vendors. This process would remain but Article 11 would require an advisory report to the Selectmen on design and safety issues from the Planning Board and other Town Departments.

The Planning Board strongly believes that outdoor dining enhances the vitality of our commercial areas and provides a public benefit for those who like to enjoy the outdoors as much as possible during our warm weather months.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Articles 10 and 11.

SELECTMEN'S RECOMMENDATION

Together, Articles 10 and 11 support seasonal open-air cafes, places that residents throughout town enjoy. Along with the Planning Board, the Selectmen believe that outdoor dining enhances the vitality of the Town's commercial areas and provides a public benefit for those who like to enjoy the outdoors as much as possible during our warm weather months. Article 10 would eliminate the requirement that restaurants go before the Planning Board and Board of Appeals for review and approval of a special permit, a process that takes at least three to four months due to state statutory requirements for public notice and appeal. Under this amendment, while the special permit requirement would be eliminated, a restaurant applying for outdoor seating would still be required to undergo design review by the Planning Board under Section 7.06, Regulated Façade Alterations, which applies to any visual changes to commercial buildings.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the following vote:

VOTED: That the Town amend the Zoning By-Law as follows:

In ARTICLE IV, USE REGULATIONS, amend the Table of Use Regulations, by adding the following words, underlined and in bold type, as part of Principal Use 38C, so that Principal Use 38C reads as follows:

38C. Open-air use, other than commercial recreation facilities, **seasonal outdoor seating for a licensed Food Vendor that does not exceed six**

months in each calendar year, and Uses 22 to 28 inclusive, including but not limited to the sale of flowers, garden supplies, or agricultural produce.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article seeks to amend the Zoning By-Law to eliminate the special permit requirement for restaurants which want outdoor seating on their **privately** owned sidewalk. It is intended to promote outdoor cafes where appropriate.

DISCUSSION

Presently, a restaurant that owns the sidewalk outside their establishment must apply for a special permit if they want to conduct an outdoor café. This process requires approval by both the Planning Board and the Zoning Board of Appeals. Due to state statutory requirements, it also takes at least three to four months. It was submitted that the timing and the burden of this process discourage outdoor cafes. If this amendment were adopted, applicants would still have to undergo design review before the Planning Board, which has authority over visual changes to commercial buildings. In the past, the Planning Board has reviewed layout and appearance, overnight storage of tables, hours, and provision of trash receptacles. No public opposition was expressed to this article at our hearing. The Planning Board has voted unanimously in favor of the changes.

RECOMMENDATION

Town Meeting has already decided to allow outdoor cafes. The present process seems somewhat inefficient and the proposed amendment would continue to provide for review by the Planning Board (although it does seem a slight stretch of their authority over "facade review"). Although the special permit process is important in many contexts, the area of sidewalk cafes did not strike our Committee as one of them. Accordingly, the Advisory Committee unanimously (13-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

XXX

ARTICLE 11

ELEVENTH ARTICLE

To see if the Town will amend Section 8.10.8 Use of Sidewalks, in Article 8.10 Food Vendors License, in the By-Laws of the Town of Brookline, by inserting the following words, underlined and in bold type, so that SECTION 8.10.8, as amended, reads as follows:

SECTION 8.10.8 USE OF SIDEWALKS **AND OUTDOOR PREMISES**

The Board of Selectmen may, upon written application by a licensed Food Vendor, after notice and hearing, grant, upon such terms and conditions as they determine to be necessary and desirable, **that** Licensed Food Vendor the right to use **the outdoor portion of the licensed premises and/or** a portion of a town sidewalk that is contiguous to the licensed premises for outdoor seating for Patrons. **Prior to such a grant, the Board of Selectmen shall seek advisory reports from the Planning Board, Building Commissioner, Police Department and Commissioner of Public Works.** No such grant shall be for more than six months in any license year. No such grant shall extend beyond the term of the license. Any right granted hereunder shall be subject to revocation if the exercise of the grant interferes with public safety and convenience.

or act on anything relative thereto.

The purpose of the amendments proposed in Articles 10 and 11 is to both support seasonal open-air cafes and eliminate the special permit requirement for use. The Planning Board would still conduct design review of them and submit its recommendation to the Board of Selectmen who would be the permit granting authority. This amendment also makes consistent the review and approval of open air cafes on private **and** public sidewalk.

PLANNING BOARD REPORT AND RECOMMENDATION

The purpose of these two amendments (one to the Zoning By-law and the second to a Town Bylaw article) is to support and encourage well-designed seasonal open air cafes by eliminating the special permit requirement for outdoor seating on *private* sidewalk and by requiring advisory reports from the Planning Board, Building and Public Works Commissioner and Police Department to the Selectmen before their approval of outdoor seating on *public* sidewalk during the licensing procedure for food vendors.

Use 38C in the Table of Uses, Article IV of the Zoning By-Law currently requires a special permit for an outdoor use, including open air cafes. This has required restaurants to go before the Planning Board and Board of Appeals for review and approval, a process that takes at least

three to four months due to state statutory requirements for public notice and appeal. Although the special permit requirement would be eliminated, a restaurant applying for outdoor seating would still be required to undergo design review by the Planning Board under Section 7.06, Regulated Façade Alterations, which applies to any visual changes to commercial buildings. The Planning Board in past cases has reviewed the layout and appearance and overnight storage of tables and umbrellas, hours of operation, and provision of trash receptacles.

Up until now, the Planning Board has reviewed only outdoor seating on a *private* sidewalk that is part of a restaurant's lot because outdoor seating on a *public* sidewalk had not been allowed. However, Town Meeting passed a Town By-Law, Section 8.10.8 Use of Sidewalks and Outdoor Premises in May, 2000, allowing outdoor seating on public sidewalks contiguous to a restaurant if permitted by the Selectmen during the Licensing Procedure for Food Vendors. This process would remain but Article 11 would require an advisory report to the Selectmen on design and safety issues from the Planning Board and other Town Departments.

The Planning Board strongly believes that outdoor dining enhances the vitality of our commercial areas and provides a public benefit for those who like to enjoy the outdoors as much as possible during our warm weather months.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Articles 10 and 11.

SELECTMEN'S RECOMMENDATION

Together, Articles 10 and 11 support seasonal open-air cafes, places that residents throughout town enjoy. As does the Planning Board, the Selectmen believe that outdoor dining enhances the vitality of the Town's commercial areas and provides a public benefit for those who like to enjoy the outdoors as much as possible during our warm weather months. The amendment proposed under Article 11 would make consistent the review and approval of open air cafes on private and public sidewalk. Presently, the Planning Board reviews only outdoor seating on a private sidewalk that is part of a restaurant's lot because outdoor seating on a public sidewalk had not been allowed. Section 8.10.8 of the Town's By-Laws allows outdoor seating on public sidewalks contiguous to a restaurant if permitted by the Selectmen during the Licensing Procedure for Food Vendors. This process would remain, but Article 11 would require an advisory report to the Selectmen on design and safety issues from the Planning Board and other Town Departments.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article would require that the Board of Selectmen seek advisory reports from the Planning Board, Building Commissioner, Police Department and Department of Public Works, prior to granting a permit to use part of a town sidewalk for an outdoor café. Presently, the Board of Selectmen can grant such a permit without requesting such reports.

This article is intended to promote sidewalk cafes in Brookline. The May 2000 Town Meeting approved a by-law allowing cafes on town owned sidewalks if approved by the Selectmen under their licensing procedure. This article would continue that process but require that the Board of Selectmen seek reports from the relevant town departments.

DISCUSSION

A majority of the Advisory Committee agrees that the Board of Selectmen should seek reports from the Planning Board, Building Commissioner, Police Department, and Department of Public Works prior to granting a permit for an outdoor café. A minority of the Advisory Committee was concerned that this might result, however, in creating a record which could be used in a court challenge to denial of a license by the Board of Selectmen. Town Counsel advised us, however, that he was not concerned on this point as the Selectmen have broad discretion with respect to licensing and thus any challenge would remain difficult.

The Advisory Committee further notes, however, that nothing presently prohibits the Board of Selectmen from seeking such reports. Similarly, nothing in the proposed article prevents the Board of Selectmen from ignoring any of these reports. The input of other Town departments, in particular the Health Department, might also be warranted. Nonetheless, review by the above Town departments, and preparation of reports, which presumably would be on file as public records, struck most of us as a useful addition to the process.

RECOMMENDATION

By a vote of 11-3-2, the Advisory Committee recommends **FAVORABLE ACTION** on the following vote:

VOTED: That the Town amend Section 8.10.8 Use of Sidewalks, in Article 8.10 Food Vendors License, in the By-Laws of the Town of Brookline, by inserting the following words, underlined and in bold type, so that SECTION 8.10.8, as amended, reads as follows:

SECTION 8.10.8 USE OF SIDEWALKS AND OUTDOOR PREMISES

The Board of Selectmen may, upon written application by a licensed Food Vendor, after notice and hearing, grant, upon such terms and conditions as they determine to be necessary and desirable, **that** Licensed Food Vendor the right to use **the outdoor portion of the**

licensed premises and/or a portion of a town sidewalk that is contiguous to the licensed premises for outdoor seating for Patrons. **Prior to such a grant, the Board of Selectmen shall seek advisory reports from the Planning Board, Building Commissioner, Police Department and Commissioner of Public Works.** No such grant shall be for more than six months in any license year. No such grant shall extend beyond the term of the license. Any right granted hereunder shall be subject to revocation if the exercise of the grant interferes with public safety and convenience.

XXX

ARTICLE 12

TWELFTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- A. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. c. by adding the following words as underlined and in bold type:

§7.00 – SIGNS IN ALL DISTRICTS

1. c. No sign or other advertising device attached to a building shall project above the roof or parapet line nor more than 12 inches out from the wall to which it is attached. **However, a banner type sign, composed of fabric or similar material, may project more than 12 inches out from the wall to which it is attached subject to the approval of the Planning Board.**
- B. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. f. by deleting the words in [] and in bold as follows:
1. f. Signs, whether temporary or permanent, on the exterior of buildings shall be made of substantial materials. [Should a sign of fabric or plastic be desired, a] A special permit of the Board of Appeals shall be required to determine the appropriateness to the building of any flags [, banners], streamers, and balloons etc. used for sign purposes. National, state and Town flags are exempted from this provision. The Building Commissioner may approve temporary banners for public events.

or act on anything relative thereto.

This modification would allow fabric banners if approved by the Planning Board during the required sign design review process, instead of requiring a variance from the Board of Appeals. The Planning Board has found that in some situations banners are more appropriate than a conventional sign, fit better with the architectural style of the building, and may be very attractive, i.e. at The Studio and Fitness Unlimited, both second floor tenants on Harvard Street, and at Golden Temple Restaurant on Beacon Street.

PLANNING BOARD REPORT AND RECOMMENDATION

The Planning Board reviews and approves all signs and awnings in the Town subject to the requirements of the Zoning By-Law and design guidelines that it has adopted after public hearings. Currently, the Zoning By-Law does not allow banner signs, a sign made of fabric or other material, secured at the top and bottom, and projecting from the face of a building. This proposed modification to two subsections of the Zoning By-law, Section 7.0, Signs in All Districts, would allow fabric banners if approved by the Planning Board during the sign design review process, instead of requiring a special permit from the Board of Appeals, a much lengthier process. The Planning Board has found that in some situations banners are more appropriate and attractive than a conventional sign and may fit better with the architectural style of a building, i.e. at the The Studio and Fitness Unlimited, both second floor tenants on Harvard Street, and at the Golden Temple Restaurant on Beacon Street.

At the 10/2/03 Planning Board public hearing, citizens raised the issue of how a banner sign would be defined and this resulted in the Planning Board suggesting revisions to the amendment to clarify that a banner sign is a vertical sign that is perpendicular to the building.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on a revised Article 12 as follows.

To see if the Town will amend the Zoning By-Law as follows:

- A. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. c. by adding the following words as underlined and in bold type:

§7.00 – SIGNS IN ALL DISTRICTS

- 1.c. No sign or other advertising device attached to a building shall project above the roof or parapet line nor more than 12 inches out from the wall to which it is attached. **However, a vertical banner sign, composed of fabric or similar material, may project more than 12 inches in a perpendicular manner from to the wall to which it is attached subject to the approval of the Planning Board.**
- B. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. f. by deleting the words in [] and in bold as follows:
1. f. Signs, whether temporary or permanent, on the exterior of buildings shall be made of substantial materials. [Should a sign of fabric or plastic be desired, a] A special permit of the Board of Appeals shall be required to determine the appropriateness to the building of any flags [, banners], streamers, and balloons etc. used for sign purposes. National, state and Town flags are exempted from this provision. The Building Commissioner may approve temporary banners for public events.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 12 proposes an amendment to the Town's Zoning By-Law relative to fabric banners. If the amendment is approved, fabric banners would be allowed if approved by the Planning Board during the sign design review process, instead of requiring a special permit from the Board of Appeals, a much lengthier process.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 12, offered by the Planning Board, proposes modifications to two subsections of the Zoning By-law, Section 7.0, Signs in All Districts. This change would allow fabric banners at commercial establishments. The banners would mount on the front of the establishment and stick out at a right angle from the wall up at the usual height for signage. They could be approved by the Planning Board during the typical sign design review process. That would also allow a simpler design review compared the Special Permit process of the Zoning Board of Appeals, which is more lengthy and expensive for an applicant. Abutters, and TMM's in affected in precincts would receive the typical notice of the Planning Boards review, which only happen at public hearings.

DISCUSSION

The Planning Board in their review and approval of the article states that they have found "in some situations banners are more appropriate and attractive than a conventional sign and may fit better with the architectural style of a building". They cite examples: at *The Studio* and *Fitness Unlimited*, both second floor tenants on Harvard Street, and at the *Golden Temple Restaurant* on Beacon Street. We were in overall agreement with their assessment of the article and their recommended revised language that defines "banners" in the article, as being different from standard fixed signs or flags.

The Advisory committee raised a couple questions during it's hearing, where Planning Director Duffy provided answers for the Planning Board. We asked: should the "fabric or other material" be noted to be flexible enough to be truly banner-like, even if restrained top and bottom by frame pieces? Yes, so accordingly we recommend the addition of the word "pliable" to the phrase: "of *pliable* fabric or similar material." Also, we recommend that the review suggest the use of color-fast and anti-fade material, so that the appearance will diminished over time.

RECOMMENDATION

The Advisory recommends **FAVORABLE ACTION** on this article, as revised by the Planning Board, and further revised with the addition of the word "pliable" to paragraph 1c before the word "fabric".

VOTED: That the Town amend the Zoning By-Law as follows:

A. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. c. by adding the following words as underlined and in bold type:

§7.00 – SIGNS IN ALL DISTRICTS

1.c. No sign or other advertising device attached to a building shall project above the roof or parapet line nor more than 12 inches out from the wall to which it is attached. **However, a vertical banner sign, composed of pliable fabric or similar material, may project more than 12 inches perpendicular to the wall to which it is attached subject to the approval of the Planning Board.**

B. Amend ARTICLE VII SIGNS, ILLUMINATION, & REGULATED FAÇADE ALTERATIONS, §7.00 – SIGNS IN ALL DISTRICTS, paragraph 1. f. by deleting the words in [] and in bold as follows:

1. f. Signs, whether temporary or permanent, on the exterior of buildings shall be made of substantial materials. [Should a sign of fabric or plastic be desired, a] A special permit of the Board of Appeals shall be required to determine the appropriateness to the building of any flags [, banners], streamers, and balloons etc. used for sign purposes. National, state and Town flags are exempted from this provision. The Building Commissioner may approve temporary banners for public events.

ARTICLE 13

THIRTEENTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- A. In §4.07 Table of Use Regulations, Principal Use 6, replace last sentence of footnote “Not permitted below second floor in G-1.75 (CC) District.” with “In G districts, the ground floor of a building must have no more than 40% of its frontage along a street devoted to residential use, including associated parking or lobby use.”

or act on anything relative thereto.

The viability and continuity of our major commercial areas is of paramount importance. This amendment which requires that in General Business (G) zones at least a portion of the ground level of residential buildings facing the street have commercial uses will enhance this objective.

PLANNING BOARD REPORT AND RECOMMENDATION

In Brookline, unlike many other communities, the Zoning By-Law does not exclude residential buildings or uses from business zoning districts. This amendment does not change that but specifically addresses the use of a residential building’s ground floor in a General Business zone and requires that no more than 40% of its frontage along a street can be for residential use or associated uses, like parking or lobby area. This amendment is important to help preserve the viability of our major commercial areas and to prevent gaps in the business area streetscape.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Article 13.

SELECTMEN’S RECOMMENDATION

Article 13 proposes an amendment to the Town’s Zoning By-Law. It would require that in General Business Zones (G), at least a portion of the ground level of residential buildings facing the street have commercial uses. This article is important to help preserve the viability of the Town’s major commercial areas and to prevent gaps in business area streetscapes, something this Board fully supports.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 30, 2003, on the following vote:

VOTED: That the Town amend the Zoning By-Law as follows:

In §4.07 Table of Use Regulations, Principal Use 6, replace last sentence of footnote “Not permitted below second floor in G-1.75 (CC) District.” with “In G districts, the ground floor of a building must have no more than 40% of its frontage along a street devoted to residential use, including associated parking or lobby use.”

ADVISORY COMMITTEE’S RECOMMENDATION

BACKGROUND

Article 13 proposes an amendment to the Zoning By-Laws regarding multiple or attached dwellings in General Business districts. The zoning change would state that “In G (General Business) districts, the ground floor of a building must have no more than 40% of its frontage along a street devoted to residential use, including associated parking or lobby use.” Current zoning does not specify ground floor usage of residential buildings except in the Coolidge Corner district where residential use is not permitted below the second floor. This zoning change, limiting residential use on the ground floor to 40% of street frontage, would pertain to all G districts, including Coolidge Corner. The zoning change would pertain only to new construction or major renovations.

DISCUSSION

This amendment to the Zoning By-Laws is based on the fact that Brookline has a unique and desirable mix of residential and commercial buildings in its business districts but recognizes the importance of maintaining the continuity of an uninterrupted commercial streetscape wherever possible. Because the success of most businesses relies on the close proximity of other businesses, limiting any residential ground floor use to less than 40% of a building’s frontage will help maintain this critical balance. The idea of allowing parking as any part of a first floor façade was not viewed favorably but the Planning Department staff stressed that parking would not be encouraged at the street level of main thoroughfares but that vehicle entrance and egress was sometimes required. It was generally felt that this zoning change would benefit our commercial areas and would encourage residential developments to include viable commercial space in the design of ground floor plans.

RECOMMENDATION

The Advisory Committee unanimously (16-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

ARTICLE 14

FOURTEENTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- A. Modify ARTICLE IV USE REGULATIONS, §4.07- TABLE OF USE REGULATIONS, Principal Use #33, to read:

	Residence				Business			Industry
	S	SC	T	M	L	G	O	I
33. Stores not exceeding 10,000 square feet of gross floor area serving the general retail needs of a major part of the Town, including but not limited to general merchandise department store, furniture and household goods.	No	No	No	No	No	Yes	No	No

- B. Add to ARTICLE IV USE REGULATIONS, §4.07- TABLE OF USE REGULATIONS, Principal Use #33A, to read:

	Residence				Business			Industry
	S	SC	T	M	L	G	O	I
33A. Stores over 10,000 square feet of gross floor area serving the general retail needs of a major part of the Town, including but not limited to general merchandise department store, furniture and household goods.	No	No	No	No	No	SP*	No	SP

* supermarket (grocery store) over 10,000 sq. ft. is an allowed use in a G district.

or act on anything relative thereto.

These amendments would enable the Town to continue to focus on the retention and attraction of small retail uses that today make up Brookline’s commercial areas. Except for grocery stores, only

one retailer (Barnes and Noble) exceeds 10,000 sq. ft. Stores in General Business Districts, such as the GAP and Pier 1, are less than 10,000 sq. ft. However, a retail store over 10,000 sq. ft. would be allowed by special permit after a case-by-case review. Supermarkets or grocery stores are excluded from the 10,000 sq. ft. limit because they typically are larger than other retail stores and provide a valuable service to the neighborhood.

PLANNING BOARD REPORT AND RECOMMENDATION

There are two types of Business districts zones in Brookline: Local Business District (L) and General Business District (G), the first allows retail businesses and restaurants under 5,000 square feet which serve the local needs of an area, and the second allows retail businesses and restaurants over 5,000 square feet which serve the needs of the Town in general. Both general and medical office use are allowed in either district with no size restrictions (except where the provision of off-street parking limits the size of the use).

Article 14 would create a new size limit of 10,000 square feet for retail uses (not including restaurants or supermarkets) in General Business Zones. Large stores over 10,000 square feet would still be allowed by special permit after a case-by-case review by the Board of Appeals.

The goal of these amendments is to enable the Town to continue to focus on the retention and attraction of small retail uses that today make up Brookline's commercial areas and contribute to its uniqueness. Except for grocery stores, only one retailer (Barnes and Noble) exceeds 10,000 sq. ft. in a General Business District; the GAP and Pier 1 are less than 10,000 sq. ft. Existing stores and uses are "grandfathered" or protected so that these amendments apply to new developments or changes of use. Supermarkets or grocery stores are excluded from the 10,000 sq. ft. limit because they typically are larger than other retail stores and provide a valuable service to the neighborhood. The Planning Board believes that these amendments will help preserve the viability of our major commercial areas.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Article 14.

SELECTMEN'S RECOMMENDATION

The amendment to the Town's Zoning By-Law proposed under Article 14 would create a new size limit of 10,000 square feet for retail uses, excluding restaurants and supermarkets, in General Business Zones. Large stores over 10,000 square feet would still be allowed by special permit after a case-by-case review by the Board of Appeals. The objective of Article 14 is to retain current small retail businesses and attract new small retail businesses to the commercial areas within Brookline. This is yet another example of the Board of Selectmen's support for the Town's unique small businesses that are the strength of the Town's commercial areas.

The Selectmen recommend **FAVORABLE ACTION**, by a 5-0 vote taken on September 30, 2003, on the vote offered by the Advisory Committee.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 14 proposes an amendment to the Zoning By-Laws to limit the allowable gross floor area of retail establishments in General Business zoning districts. As described in Article IV, 4.07, Principle Use Regulations Table, Principle Use 33, this includes: "Stores serving the general retail needs of a major part of the Town, including, but not limited to general merchandise department store, furniture and household goods." The language used under principle use # 33 would be modified to state that the gross floor area for such stores **would not be allowed to exceed 10,000 square feet**. The article also includes an addition to the Use Regulation Table (33 A.) requiring a Special Permit for stores over 10,000 square feet of gross floor area in either a General Business or Industry zoning district. The Special Permit requirement under the General Business district includes a notation, indicating that a supermarket (grocery store) over 10,000 square feet is an allowed use in a G district, not requiring a special permit.

DISCUSSION

This zoning change would apply only to General Business districts. Local Business districts currently restrict retail and restaurant uses to 5,000 square feet. Setting a limit of 10,000 square feet of gross floor area is intended to protect and encourage independent retail businesses in our general business districts, including Washington Square, Coolidge Corner, and Brookline Village. Most of the larger stores currently in these areas of town occupy under 10,000 square feet including The Gap (2 stores) and Pier 1. Barnes and Noble occupies over 10,000 square feet but is seen as an exception since it occupies upper level retail space. The former Woolworth's, one of Coolidge Corner's original "anchor" stores was under 10,000 square feet. It was generally agreed that Brookline should discourage "big box" retailers however there was a sense that we should be encouraging a range of retail uses to maintain the viability and vitality of our commercial areas. The Advisory Committee was in general agreement that this size limitation was a useful tool for promoting small businesses to locate in Brookline.

The Advisory Committee took up this warrant article a second time to discuss the exclusion of supermarkets or grocery stores from the special permitting process. Although there is currently no limit of gross floor area for supermarkets or other retail stores, there was concern that zoning for this use should include a clearer definition of "supermarket" and specific figures for the maximum allowable gross floor area. The Planning Director suggested that such definitions and figures could be proposed in a warrant article at the next Town Meeting to clarify and define this retail use.

RECOMMENDATION

The Advisory Committee by a vote of 12-9 recommends **FAVORABLE ACTION** on the following vote:

VOTED: That the Town amend the Zoning By-Law as follows:

- A. Modify ARTICLE IV USE REGULATIONS, §4.07- TABLE OF USE REGULATIONS, Principal Use #33, to read:

		Residence				Business			Industry
		S	SC	T	M	L	G	O	I
33.	Stores not exceeding 10,000 square feet of gross floor area serving the general retail needs of a major part of the Town, including but not limited to general merchandise department store, furniture and household goods.	No	No	No	No	No	Yes	No	No

- B. Add to ARTICLE IV USE REGULATIONS, §4.07- TABLE OF USE REGULATIONS, Principal Use #33A, to read:

		Residence				Business			Industry
		S	SC	T	M	L	G	O	I
33A.	Stores over 10,000 square feet of gross floor area serving the general retail needs of a major part of the Town, including but not limited to general merchandise department store, furniture and household goods.	No	No	No	No	No	SP*	No	SP

* supermarket (grocery store) over 10,000 sq. ft. is an allowed use in a G district.

ARTICLE 15

FIFTEENTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- A. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 - DESIGN REVIEW, paragraph 4. Community and Environmental Impact and Design Standards, d. Circulation, by adding the following words in bold letters and underlined:

d. Circulation-With respect to vehicular, **bicycle** and pedestrian circulation, including entrances, ramps, walkways, drives, and parking, special attention shall be given to location and number of access points to the public streets (especially in relation to existing traffic controls and mass transit facilities), width of interior drives and access points, general interior circulation, separation of pedestrian and vehicular traffic, access to community facilities, **demand for and availability of bicycle parking and storage facilities**, and arrangement of parking areas that are safe and convenient and, insofar as practicable, do not detract from the use and enjoyment of proposed buildings and structures and the neighboring properties.

- B. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 - DESIGN REVIEW, paragraph 3. Procedure, c. All 5.09 Projects, 6) Transportation Studies, by adding the following words in bold letters and underlined:

6) Transportation Studies - Certain projects, which due to their size, use characteristics or location, may have a significant impact on traffic and may require the preparation of transportation studies. The following development threshold levels indicate the nature of studies required. However, additional studies may be required for projects of any size which the Transportation Director or the Planning Director consider may have substantial environmental effects on the community. Any required transportation studies must be prepared in accordance with the Transportation Access Plan Guidelines issued by the Transportation Department. **An Access Plan should include a transportation impact analysis and, as warranted, a proposed package of mitigation measures. Impact mitigation measures may include, but should not be limited to: construction management; traffic mitigation and encouragement of transit use; parking management; transit improvements; number and location of bicycle parking and storage facilities; parking and access for delivery and service vehicles; pedestrian amenities; and capital improvements.**

or act on anything relative thereto.

Work on a potential zoning amendment on bicycle space and design requirements dates back to a previous Town meeting, which referred Andrew Fischer's article on this subject to the Zoning By-Law Commission for further study. Over the past year, several alternative drafts for a bicycle amendment have been developed with the assistance of a working committee that included Mr. Fischer and some members of the Transportation and Planning Boards. However, none of these alternatives are fully supported by the Transportation Board and Planning Board. The Planning and Community Development Department has prepared an alternative Zoning By-law amendment, which we believe the Planning Board and Transportation Board might support. This alternative revises two subparagraphs under Section 5.09 Design Review of the Zoning By-law and addresses a number of important objectives:

1. Expands the current design review and transportation guidelines to include bicycle parking and storage.
2. Notes the importance of considering the actual demand for bike parking and storage on an individual project basis, primarily as that demand might be generated by major impact projects.
3. Considers the availability of existing on or off site parking for bikes, including potential plans by DPW to provide bike parking.
4. Does not set a rigid set of standards and then enables the Board of Appeals to modify these standards.
5. Enables the Transportation Board and Department to consider the demand and feasibility for bike parking on a case by case basis and propose viable mitigation measures.
6. Utilizes the existing design review and consultation process in place today.
7. Enables the Board of Appeals to appropriately condition projects requiring various forms transportation mitigation, including the provision for bike parking and storage if warranted and as recommended by the Transportation Department and Board.

PLANNING BOARD REPORT AND RECOMMENDATION

Work on a potential zoning amendment on bicycle space and design requirements dates back to a previous Town meeting, which referred Andrew Fischer's article on this subject to the Zoning By-Law Commission for further study. Over the past year, several alternative drafts for a bicycle amendment have been developed with the assistance of a working committee that included Mr.

Fischer and some members of the Transportation and Planning Boards. However, none of these alternatives to date were fully supported by the Transportation and Planning Boards, and the Planning and Community Development Department prepared an alternative Zoning By-law amendment, which we believed might gain wider support. This alternative adds language to the existing design review standard under Section 5.09.4.d, called Circulation, to give special attention to the provision of bike parking, storage facilities and circulation. Additionally, under Section 5.09.3.c.6, Transportation Studies, the number and location of bicycle parking and storage facilities must be considered when evaluating traffic impacts for a new project.

Thus, this alternative Article 15 will enable the Transportation Board and Department to consider the demand and feasibility for bike parking on a case by case basis and propose viable mitigation measures rather than requiring a rigid set of standards and allows consideration of the availability of existing on or off site parking for bikes and potential plans for the Town to provide bike parking in public parking lots or designated areas.

Additionally, the Planning Board is willing to support a revised Article 15 to add language to have the Planning Board and Board of Appeals consider requiring the provision of bicycle facilities during the design review of a project or as transportation mitigation measures and through the application of Planning Board Bicycle Guidelines related to the design, location and maintenance of the bicycle parking facilities.

Therefore, the Planning Board unanimously recommends **FAVORABLE ACTION** on Article 15 with the following revisions.

To see if the Town will amend the Zoning By-Law as follows:

- A. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 – DESIGN REVIEW, paragraph 4. Community and Environmental Impact and Design Standards, d. Circulation, by adding the following words in bold letters and underlined:

d. Circulation-With respect to vehicular, **bicycle** and pedestrian circulation, including entrances, ramps, walkways, drives, and parking, special attention shall be given to location and number of access points to the public streets (especially in relation to existing traffic controls and mass transit facilities), width of interior drives and access points, general interior circulation, separation of pedestrian and vehicular traffic, access to community facilities, **demand for and availability of bicycle parking and storage facilities**, and arrangement of parking areas that are safe and convenient and, insofar as practicable, do not detract from the use and enjoyment of proposed buildings and structures and the neighboring properties.

- B. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 - DESIGN REVIEW, paragraph 3. Procedure, c. All 5.09 Projects, 6) Transportation Studies, by adding the following words in bold letters and underlined:

6) Transportation Studies – Certain projects, which due to their size, use characteristics or location, may have a significant impact on traffic and may require the preparation of

transportation studies. The following development threshold levels indicate the nature of studies required. However, additional studies may be required for projects of any size which the Transportation Director or the Planning Director consider may have substantial environmental effects on the community. Any required transportation studies must be prepared in accordance with the Transportation Access Plan Guidelines issued by the Transportation Department. **An Access Plan should include a transportation impact analysis and, as warranted, a proposed package of mitigation measures. Impact mitigation measures may include, but should not be limited to: construction management; traffic mitigation and encouragement of transit use; parking management; transit improvements; number and location of bicycle parking and storage facilities; parking and access for delivery and service vehicles; pedestrian amenities; and capital improvements.**

- C. Amend SECTION 6.05, Bicycle Space and Design Regulation, by adding the bolded words to paragraph 1 as follows:
1. Spaces for off-street parking of bicycles shall be provided for the residents of each multi-family residential building in the amount of one space per five housing units or fraction thereof, not counting units having a ground floor entrance, **and wherever else the Board of Appeals requires bicycle spaces as part of design review under Section 5.09.4.d "Circulation" and/or as transportation mitigation measures,** subject to the further provision of this section, Section 6.01, **and adopted Planning Board Bicycle Guidelines.** The requirements of this section shall not apply to that portion of a housing development designed exclusively for elderly persons.
- D. Amend SECTION 6.05, Bicycle Space and Design Regulation, by replacing paragraph 2 with the following:
2. **The design, location and maintenance of bicycle parking facilities shall be guided by the Bicycle Guidelines approved by the Planning Board pursuant to Section 5.09.4.n, Design Review - Guidelines.**

SELECTMEN'S RECOMMENDATION

The issues of bicycle space and design requirements, which are the subjects of Articles 15 and 16, have been under discussion for some time. As part of the Warrant for the 2002 Special Town Meeting in November, Article 11 proposed amending the Town's Zoning By-Law relative to bicycle parking requirements. Town Meeting voted to refer the subject matter to the Zoning By-Law Commission for further study. The Zoning By-Law Commission established a working committee that included the petitioner of the article and members of the Transportation and Planning Boards. An alternative proposal could not be agreed upon, so the petitioner filed a new article for this Town Meeting (Article 16). The Department of Planning and Community Development submitted Article 15 as an alternative to the petitioned article. Fortunately, after

much work between the petitioner and the Department of Planning and Community Development, an agreement was reached.

This amended Article 15 approved by the Planning Board will enable the Transportation Board and Department to consider the demand and feasibility for bike parking on a case-by-case basis and propose viable mitigation measures rather than requiring a rigid set of standards and allows consideration of the availability of existing on- or off-site parking for bikes and potential plans for the Town to provide bike parking in public parking lots or designated areas.

Additionally, the revised Article 15 adds language that requires the Planning Board and Board of Appeals to consider requiring the provision of bicycle facilities during the design review of a project or as transportation mitigation measures and through the application of Planning Board Bicycle Guidelines related to the design, location, and maintenance of the bicycle parking facilities.

The Selectmen appreciate the work on this article by all parties and fully support Article 15. Therefore, the Board recommends **FAVORABLE ACTION**, by a vote of 3-0 taken on October 14, 2003, on the following vote:

VOTED: That the Town amend the Zoning By-Law as follows:

A. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 – DESIGN REVIEW, paragraph 4. Community and Environmental Impact and Design Standards, d. Circulation, by adding the following words in bold letters and underlined:

d. Circulation-With respect to vehicular, **bicycle** and pedestrian circulation, including entrances, ramps, walkways, drives, and parking, special attention shall be given to location and number of access points to the public streets (especially in relation to existing traffic controls and mass transit facilities), width of interior drives and access points, general interior circulation, separation of pedestrian and vehicular traffic, access to community facilities, **demand for and availability of bicycle parking and storage facilities**, and arrangement of parking areas that are safe and convenient and, insofar as practicable, do not detract from the use and enjoyment of proposed buildings and structures and the neighboring properties.

B. Amend ARTICLE V DIMENSIONAL REQUIREMENTS, §5.09 - DESIGN REVIEW, paragraph 3. Procedure, c. All 5.09 Projects, 6) Transportation Studies, by adding the following words in bold letters and underlined:

6) Transportation Studies – Certain projects, which due to their size, use characteristics or location, may have a significant impact on traffic and may require the preparation of transportation studies. The following development threshold levels indicate the nature of studies required. However, additional studies may be required

for projects of any size which the Transportation Director or the Planning Director consider may have substantial environmental effects on the community. Any required transportation studies must be prepared in accordance with the Transportation Access Plan Guidelines issued by the Transportation Department. **An Access Plan should include a transportation impact analysis and, as warranted, a proposed package of mitigation measures. Impact mitigation measures may include, but should not be limited to: construction management; traffic mitigation and encouragement of transit use; parking management; transit improvements; number and location of bicycle parking and storage facilities; parking and access for delivery and service vehicles; pedestrian amenities; and capital improvements.**

C. Amend SECTION 6.05, Bicycle Space and Design Regulation, by adding the bolded words to paragraph 1 as follows:

1. Spaces for off-street parking of bicycles shall be provided for the residents of each multi-family residential building in the amount of one space per five housing units or fraction thereof, not counting units having a ground floor entrance, **and wherever else the Board of Appeals requires bicycle spaces as part of design review under Section 5.09.4.d "Circulation" and/or as transportation mitigation measures,** subject to the further provision of this section, Section 6.01, **and adopted Planning Board Bicycle Guidelines.** The requirements of this section shall not apply to that portion of a housing development designed exclusively for elderly persons.

D. Amend SECTION 6.05, Bicycle Space and Design Regulation, by replacing paragraph 2 with the following:

2. The design, location and maintenance of bicycle parking facilities shall be guided by the Bicycle Guidelines approved by the Planning Board pursuant to Section 5.09.4.n, Design Review - Guidelines.

ROLL CALL VOTE:

Favorable Action

Goldberg

Hoy

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 16, which has been revised several times, is a petition article that seeks to amend Section 6.05 of the Zoning By-Laws by providing specific requirements concerning the location and number of storage spaces to be provided for bicycles in newly constructed commercial and residential buildings and to provide for sidewalk bicycle racks. In response to the need to address the subject, the Planning and Community Development filed Article 15 which would add language to the design review provision, Section 5.09.4.d - *Circulation*, addressing these issues and under Section 5.09.3.c.6 - *Transportation Studies*, as these issues relate to traffic. Article 15, as revised, will also amend Section 6.05 by incorporating by reference the amended Section 5.09.4.d, transportation mitigation measures, and the Planning Board bicycle guidelines. At the present time, Section 6.05 addresses the subject of bicycle storage in residential buildings only.

DISCUSSION

Both the Planning Board and the Transportation Board are interested in dealing with the bicycle issues on a case by case basis rather than having to impose rigid, inflexible rules on future development via zoning by-law amendments. This will allow them to develop guidelines that will take bicycle facilities into consideration during design review and/or as transportation mitigation measures related to the design, location and maintenance of such facilities. The two Boards believe that a flexible approach is preferable in dealing with the subject of bicycles.

The petitioner and the Planning and Community Development Department staff have met and discussed their respective articles and the petitioner now appears to be in agreement with the revised version of Article 15. The Planning Board unanimously voted to recommend favorable action on Article 15 as revised and to recommend no action on Article 16.

RECOMMENDATIONS

The Advisory Committee unanimously (13-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

XXX

ARTICLE 16SIXTEENTH ARTICLE

To see if the town will amend the Zoning By-law by deleting Section 6.05 Bicycle Space and Design Regulations, and by replacing it with the following:

§6.05 - BICYCLE SPACE AND DESIGN REGULATIONS

1. Purpose - The purpose of Section 6.05 is to provide adequate and safe facilities for the short and long term storage of bicycles.
2. Applicability - The provisions of Section 6.05 shall apply to all new development, changes of use or occupancy of existing buildings and any expansion of an existing building which requires a permit. Except as otherwise provided herein, bicycle parking shall be provided at all buildings containing four (4) or more dwelling units and at all non-owner occupied buildings containing two (2) or more dwelling units; at all buildings in commercial and industrial zoning districts; at all churches and schools; at all automobile parking structures; at all buildings containing any institutional uses; and at planned park and ride lots and major transit stops.
3. Exemptions - No bicycle parking spaces shall be required for the following uses:
 - a. Single-family buildings and owner occupied two and three family residences.
 - b. Seasonal uses, such as Holiday retail and tree sales.
4. Design and Maintenance of Bicycle Parking Facilities
 - a. Accessory off-street parking for bicycles shall be located in highly visible, well-lighted areas, to minimize theft and vandalism, and protected from the weather when feasible.
 - b. Bicycle parking facilities (hereinafter referred to as Facilities) shall be sited so they do not impede pedestrian or vehicular traffic and circulation. They should be incorporated whenever possible into building design or street furniture.
 - c. The Facilities shall provide lockable enclosed lockers or racks or equivalent structures in or upon which the bicycle may be locked by the user. Such structures shall be securely anchored to the ground, a foundation, or a building or structure to prevent them from being easily removed and be of sufficient strength to resist vandalism and theft.
 - d. Facilities that require a user-supplied locking device shall be designed to accommodate steel frame U-shaped locking devices and shall be permanently anchored to a foundation to which a bicycle frame and at least one wheel may be conveniently secured.
 - e. The separation of the bicycle parking spaces and the amount of corridor space shall be adequate for convenient access to every space in the Facility.

f. Any bicycle parking space within a structure to be used for motorized bicycles shall be subject to regulations pertaining to interior storage of gasoline.

g. [T]he surfacing of bicycle parking facilities shall be designed and maintained to be mud and dust free when the facility is on an unpaved surface.

h. Any property owner required to have bicycle parking may elect to establish a shared bicycle parking facility with any other property owner, within a 500' radius of the site, to meet the combined requirements for each use. Town bicycle parking facilities may be used as the basis for a shared bicycle parking facility.

i. A bicycle parking post¹ shall be established at the entrance of any office and non-retail commercial facility for the temporary use of messengers, couriers, and delivery people.

5. Variations to Requirements

a. Substitution of car parking with bicycle parking. New and existing developments may, when authorized by a Special Permit, convert up to 10 percent of the required automobile parking spaces to additional bicycle parking, as long as the spaces are conveniently located near an entrance. Converted parking spaces must yield a minimum of six bicycle parking spaces on each automobile space. Upon conversion, any residual land area may be utilized for other purposes.

b. The requirements of this Section 6.05 may be modified by the Zoning Board of Appeals, by Special Permit, (1) if the proposed modification adequately addresses the purposes and requirements of this section; (2) if there is a showing why the requirements cannot or should not be met; and (3) if the Transportation Board recommends the modification and states how the modification serves the purpose of this Section 6.05 and meets the criteria of the town's transportation policy.

6. Circulation

With respect to vehicular (including bicycle) and pedestrian circulation, including entrances, ramps, walkways, drives, and parking, special attention shall be given to the location and number of access points to the public streets (particularly in relation to existing traffic control and mass transit facilities), width of interior drives and access points, general interior circulation, separation of pedestrian, bicycle and vehicular traffic, and the provision of adequate operating areas for bicycles so that adequate and safe vehicular, bicycle and pedestrian traffic operation and flow can be established and preserved.

7. Location of Bicycle Parking Facilities

All parking spaces required by Section 6.05 shall be located on the same zoning lot as the use served except that parking facilities may, by Special Permit, be located on land other than the

¹ Bicycle parking post should be similar to the CycLoops Bike Rack (#2172-P-S)

zoning lot on which the building or use served is located, provided that such off-site bicycle parking facilities shall be located in a clearly designated, safe and convenient location. The design and location of such facility shall be harmonious with the surrounding environment. The facility location shall be at least as convenient as the majority of auto parking spaces and should provide a balance of appropriate short term and long term spaces.

8. Bicycle Parking Spaces Required

Bicycle parking spaces shall be provided in accordance with the following Table of Bicycle Parking Space Requirements:

Table 6.05, Bicycle Parking Space Requirements

Use	Amount Required	Minimum*
Multifamily Residential (4 units or more)	0.5 for each unit plus 1 for each 10 employees	2
Hotels	1 for each 20 employees plus 1 for each 20 guest rooms	6
Colleges/Universities/Jr/Sr H/Schools	1 for each 10 employees/students	10
Nursery/Elementary schools	1 for each 10 employees/students	10
Public Assembly, Recreation etc.	1 for each 10 employees plus 1 for each _____	6
Hospital, Life Care Facility, Convalescent Home, Nursing Home, or Similar Facility	1 for each 10 employees plus 1 for each 20 beds	6
Other Institutional	1 for each 2,000 sq. ft. of bldg. area	6
Passive Recreational	1 for each 5,000 sq. ft. of land area	2
Active Recreational	1 for each 2,000 sq. ft. of land area	6
Retail Commercial	1 for each 1,000 sq. ft. of bldg. area	2
Office and Non-Retail Commercial	1 for each 2,000 sq. ft. of bldg. area	2
Industrial	1 for each 5,000 sq. ft. of bldg. area	2
Other Uses	1 for each 2,000 sq. ft. of bldg. area	2
Or act on anything relative thereto.		

The intent of this amendment is to provide minimum requirements standards for orderly and safe bicycle parking. Improving bicycle parking will benefit motorists, pedestrians and local businesses, as well as bicyclists. These benefits include:

Community Benefits

- Improve the quality of life by encouraging non-polluting, low-impact and inexpensive transportation, cleaner air, less noise and less congestion
 - Promote public health by making it easier to bicycle for shopping, errands or commuting

Business Benefits

- Provide an alternative way to access local businesses, encouraging more people to shop in Brookline
 - Reduce the demand for car parking, which frees up valuable parking spaces for motorists
 - Provide an economical means of accommodating the parking needs of additional customers

PLANNING BOARD REPORT AND RECOMMENDATION

The Planning Board believes that Article 16 (by petition) establishes unreasonable standards for the number of bicycle spaces to be provided and does not clearly explain how these new requirements would be applied or administered to expansions or changes of use. The Planning Board, however, does support a revised Article 15, which instead of rigid standards, provides more flexible ones that include a case-by-case analysis of the need for bicycle parking at a particular building or use. Additionally, the design and location of bicycle parking could be incorporated into a set of Planning Board Bicycle Guidelines to be adopted under the current provisions of Section 5.09, Design Review.

Therefore, the Planning Board unanimously recommends **NO ACTION** on Article 16.

SELECTMEN'S RECOMMENDATION

The issues of bicycle space and design requirements, which are the subjects of Articles 15 and 16, have been under discussion for some time. As part of the Warrant for the 2002 Special Town Meeting in November, Article 11 proposed amending the Town's Zoning By-Law relative to bicycle parking requirements. Town Meeting voted to refer the subject matter to the Zoning By-Law Commission for further study. The Zoning By-Law Commission established a working committee that included the petitioner of the article and members of the Transportation and Planning Boards. An alternative proposal could not be agreed upon, so the petitioner filed a new article for this Town Meeting (Article 16). The Department of Planning and Community Development submitted Article 15 as an alternative to the petitioned article. Fortunately, after much work between the petitioner and the Department of Planning and Community Development, an agreement was reached.

The amended Article 15 being recommended will enable the Transportation Board and Department to consider the demand and feasibility for bike parking on a case-by-case basis and propose viable mitigation measures rather than requiring a rigid set of standards and allows consideration of the

availability of existing on- or off-site parking for bikes and potential plans for the Town to provide bike parking in public parking lots or designated areas.

Additionally, the recommended Article 15 adds language that requests the Planning Board and Board of Appeals to consider requiring the provision of bicycle facilities during the design review of a project or as transportation mitigation measures and through the application of Planning Board Bicycle Guidelines related to the design, location, and maintenance of the bicycle parking facilities.

Since the revised Article 15 addresses the issues of Article 16, the Board recommends **NO ACTION**, by a vote of 3-0 taken on October 14, 2003.

ROLL CALL VOTE:

No Action

Goldberg

Hoy

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

The Advisory Committee's report on this matter is included under Article 15. The Advisory Committee unanimously (13-0) recommends **NO ACTION** on Article 16.

XXX

ARTICLE 17

SEVENTEENTH ARTICLE

To see if the Town will amend the Zoning By-Law as follows:

- I. With respect to the Village Square General Business District G-2.0 (VS):
 - A. In TABLE 5.01, TABLE OF DIMENSIONAL REQUIREMENTS referenced in SECTIONS 5.00 DISTRICT REGULATIONS of ARTICLE V – DIMENSIONAL REQUIREMENTS, by adding a footnote 17 for the G-2.0 District to read as follows:

“17. In the G-2.0 (VS) District, the following dimensional requirements are allowed subject to the provisions of paragraph 4 of § 5.06: floor area ratio maximum of 4.0; and height maximum of 135 feet.
 - B. In ARTICLE V - DIMENSIONAL REQUIREMENTS, by adding a new paragraph 4 to SECTION 5.06, to read as follows:
 4. Village Square General Business District G-2.0 (VS)
 - a. All applications in the G-2.0 (VS) District shall be subject to review by the Planning Board in accordance with § 5.09, Design Review, but notwithstanding the provisions of § 5.09, no special permit shall be required under § 5.09 for a project located wholly within the G-2.0 (VS) District. The Preservation Commission, Transportation Board, and any other interested Town body may submit an advisory report to the Planning Board for its consideration.
 - b. For such applications, the maximum height shall not exceed 135 feet and the maximum gross floor area ratio shall not exceed 4.0, provided that the following conditions are satisfied:
 - 1) no less than 20% of the Lot Area shall be devoted to landscaped open space or usable open space.
 - 2) no less than 60% of the parking spaces required by §6.02, as affected by paragraph 4.c of this § 5.06, shall be provided completely below grade.
 - 3) no less than 25% of the parking spaces required by §6.02, as affected by paragraph 4.c of this § 5.06, shall be offered to residents for overnight parking.
 - 4) no less than 1% of the hard construction cost of constructing the Building on the Lot (exclusive of tenant fit-up) shall be devoted to making off-site streetscape improvements (such as, but not limited to, lighting, street furniture and widening sidewalks) and undertaking transportation mitigation measures. A plan of the proposed off-site streetscape improvements and a description of the proposed transportation mitigation measures shall be submitted

to the Planning Director or his/her designee for review by the Planning Board in accordance with §5.09.

5) The owner of the Lot shall deliver to the Town of Brookline a recordable instrument benefiting the Town of Brookline which provides that the owner of the Lot, its successors or assigns, shall continue to pay property taxes or an equivalent amount in lieu of taxes with respect to the Lot and the improvements thereon, or another agreement providing for payment of an equivalent amount to the Town of Brookline, in either case, to the satisfaction of Town Counsel and the Board of Assessors.

c. Notwithstanding the provisions of §6.02, in light of the proximity of the G-2.0 (VS) District to Mass Transit, the number of parking spaces which must be provided on a Lot located wholly within the G-2.0 (VS) District shall be reduced by 18% from the requirements set forth in §6.02, provided that the conditions set forth in paragraph 4.b above are satisfied, and provided further that the owner or operator of the building subsidizes monthly transit passes for those working on the Lot and provides other means to encourage the use of mass transit and car pooling.

d. Except as specifically set forth herein, nothing stated herein shall affect the application of the other provisions of this Zoning By-Law, including, without limitation, §5.21 and §5.32, to the G-2.0 (VS) District.

C. In ARTICLE VI – VEHICULAR SERVICE USES REQUIREMENTS, by adding in SECTION 6.02 – TABLE OF OFF-STREET PARKING SPACE REQUIREMENTS, a footnote designated “*****” after “General” in the column entitled “RETAIL & OFFICE” to read as follows:

“***** In accordance with paragraph 4.c of § 5.06, a project in the G-2.0 (VS) District shall receive an 18% reduction from the requirements set forth herein provided that the conditions set forth in paragraph 4.c are satisfied.”

II. With respect to Section 4.07 – Table of Use Regulations:

In ARTICLE IV – USE REGULATIONS, by replacing the text of Principle Use 36A in SECTION 4.07 – TABLE OF USE REGULATIONS with the following:

36A. Research laboratory for scientific or medical research provided the use is operated in compliance with all town, state and federal health and safety regulations and that thirty days prior to a Board of Appeals hearing and annually a report to the Fire Chief and Director of Public Health and Human Services shall be submitted detailing hazardous materials operations, processes, disposal and storage. The initial submission shall require review and comment in writing by the Fire Chief and Director of Public Health and Human Services to the Board of Appeals prior to its hearing.

or act on anything relative thereto.

PLANNING BOARD REPORT AND RECOMMENDATION

Explanation

The purpose of this amendment is to allow economically feasible commercial development to take place in a currently underutilized general business district in Brookline Village. The zoning change as initially proposed involves:

- ◆ Raising the allowable height from 100 feet to 135 feet;
- ◆ Increasing the allowable floor area ratio (FAR), from 2.5 to 4.0.
- ◆ Permitting a reduction in required parking for up to 18% in recognition of the site's proximity to mass transit and in consideration for transit incentives to be provided to employees.
- ◆ Modifies the special permit process to allow medical research laboratories after the submittal of written reports by the Fire Chief and Director of Public Health and Human Services.

The new zoning also makes any new building subject to the following MINIMUM specified public benefits:

- ◆ 20% of the site is usable open space;
- ◆ 60% of the parking is underground;
- ◆ 25% of parking offered to residents for overnight parking;
- ◆ 1% of hard construction costs dedicated to Town-identified off-site improvements.

In addition, the project will be subject to the Planning Board design review process.

Background

This project began as an initiative of the Economic Development Advisory Board (EDAB) and built on the work of the Comprehensive Planning Committee. Two years ago, the EDAB formed an Office Space Task Force to encourage development of new office space in Brookline, motivated by a desire to both increase the commercial tax base and supply additional foot traffic for small businesses located in our commercial areas. The Task Force identified a few areas where office space could be feasible, and approached those property owners to invite them to work with the Town to generate good project proposals. When the owner of the 2 Brookline Place site expressed willingness to work with the Town, EDAB asked the Board of Selectmen to appoint a Project Review Team (PRT). The PRT, which included a representative from the Planning Board, began work after hearing a presentation of the work-to-date for Brookline Village by the Comp Plan Committee.

The project began to take shape after two charrettes with the developer's architect, and the PRT's design subcommittee hammered out some good principles for the site. The design subcommittee defined its goal as a project that maintains Brookline Village's "urban village" feel, specifically by:

- ◆ recognizing the importance of green space and trees as Brookline's signature gateway element;
- ◆ not making the divisive nature of Route 9 worse;
- ◆ improving connections between the T and Route 9, neighborhood, and surrounding streets and other public open spaces in Brookline Village;
- ◆ making sure that the design of new development on this site is sensitive and neighborhood-appropriate.

Several key elements of the current design scheme made the committee feel like it was moving in a good direction:

- ◆ open space had increased during the course of the design review to where two distinct open spaces are now proposed—one with trees, the other green;
- ◆ height had come down from an initial 165 to 135 feet;
- ◆ to break up massing, the building is broken down to appear as if 2 buildings are coming together—recognizing the geometry of the site to put a straight wall edge on one end and a curved wall on another.
- ◆ Ground level retail remains an active presence on the site.
- ◆ Nature is recognized as the key element of the gateway to the village.
- ◆ Materials are meant to match the scale of the building, with glass frontage and a masonry anchor.
- ◆ Parking is in two underground levels and hidden from view.

Recommendation

The Planning Board, three to one, supports this zoning amendment with several revisions. (One member, although he supports the research laboratory use, feels that the FAR and height of the proposed building is still too great and does not feel the amendment should be passed or supported until the precise mechanism for assuring future real estate tax payments is identified and verified as enforceable.) The first revision the Board recommends is that a special permit for design review should be a requirement, since eliminating it would set a bad precedent and encourage other developers to seek the same exception. The second, relates to the definition of Use 36A, research laboratory, and the Board believes that language suggested by the Town's Director of Health and Human Services should be added to further define the type of laboratory use that would be allowed and to explicitly state that the use must be reviewed and approved by the Director of Health and the Fire Chief.

The Board also finds that this site on Route 9 is different in character than Brookline Village and therefore a larger building is acceptable. The Board believes that the extra open space, pedestrian improvements, mass transit station improvements and the enhancement of the "gateway" to

Brookline from Boston, will create a “smart growth” project with contributions that exceed any impacts from the greater density and height.

Therefore, the Planning Board, three to one, recommends **FAVORABLE ACTION** on Article 17 with the following revisions.

To see if the Town will amend the Zoning By-Law as follows:

I. With respect to the Village Square General Business District G-2.0 (VS):

- A. In TABLE 5.01 , TABLE OF DIMENSIONAL REQUIREMENTS referenced in SECTIONS 5.00 DISTRICT REGULATIONS of ARTICLE V – DIMENSIONAL REQUIREMENTS, by adding a footnote 17 for the G-2.0 District to read as follows:
- “17. In the G-2.0 (VS) District, the following dimensional requirements are allowed subject to the provisions of **paragraph 4 of § 5.06**: floor area ratio maximum of 4.0; and height maximum of 135 feet.
- B. In ARTICLE V - DIMENSIONAL REQUIREMENTS, by adding a new paragraph 4 to SECTION 5.06, to read as follows:
4. Village Square General Business District G-2.0 (VS)
- a. All applications in the G-2.0 (VS) District shall be subject to review by the Planning Board in accordance with **§ 5.09, Design Review**. The Preservation Commission, Transportation Board and any other interested Town body may submit an advisory report to the Planning Board for its consideration.
 - b. For such applications, the maximum height shall not exceed 135 feet and the maximum gross floor area ratio shall not exceed 4.0, provided that the following conditions are satisfied:
 - 1) no less than 20% of the Lot Area shall be devoted to landscaped open space or usable open space.
 - 2) no less than 60% of the parking spaces required by **§6.02**, as affected by **paragraph 4.c** of this **§ 5.06**, shall be provided completely below grade.
 - 3) no less than 25% of the parking spaces required by **§6.02**, as affected by **paragraph 4.c** of this **§ 5.06**, shall be offered to residents for overnight parking.
 - 4) no less than 1% of the hard construction cost of constructing the Building on the Lot (exclusive of tenant fit-up) shall be devoted to making off-site streetscape improvements (such as, but not limited to, lighting, street furniture and widening sidewalks) and

undertaking transportation mitigation measures. A plan of the proposed off-site streetscape improvements and a description of the proposed transportation mitigation measures shall be submitted to the Planning Director or his/her designee for review by the Planning Board in accordance with **§5.09**.

- 5) The owner of the Lot shall deliver to the Town of Brookline a recordable instrument benefiting the Town of Brookline which provides that the owner of the Lot, its successors or assigns, shall continue to pay property taxes or an equivalent amount in lieu of taxes with respect to the Lot and the improvements thereon, or another agreement providing for payment of an equivalent amount to the Town of Brookline, in either case to the satisfaction of Town Counsel **and the Board of Assessors**.

- c. Notwithstanding the provisions of **§6.02**, in light of the proximity of the G-2.0 (VS) District to Mass Transit, the number of parking spaces which must be provided on a Lot located wholly within the G-2.0 (VS) District shall be reduced by 18% from the requirements set forth in **§6.02**, provided that the conditions set forth in **paragraph 4.b** above are satisfied, and provided further that the owner or operator of the building subsidizes monthly transit passes for those working on the Lot and provides other means to encourage the use of mass transit and car pooling.

- d. Except as specifically set forth herein, nothing stated herein shall affect the application of the other provisions of this Zoning By-Law, including, without limitation, **§5.21** and **§5.32**, to the G-2.0 (VS) District.

- C. In ARTICLE VI – VEHICULAR SERVICE USES REQUIREMENTS, by adding in SECTION 6.02 – TABLE OF OFF-STREET PARKING SPACE REQUIREMENTS, a footnote designated “*****” after “General” in the column entitled “RETAIL & OFFICE” to read as follows:

“***** In accordance with **paragraph 4.c** of **§ 5.06**, a project in the G-2.0 (VS) District shall receive an 18% reduction from the requirements set forth herein provided that the conditions set forth in **paragraph 4.c** are satisfied.”

II. **With respect to Section 4.07 – Table of Use Regulations:**

In ARTICLE IV – USE REGULATIONS, by replacing the text of Principle Use 36A in SECTION 4.07 – TABLE OF USE REGULATIONS with the following:

36A. Research laboratory for scientific or medical research, **with a Biosafety Level of Level 1 or Level 2 as defined by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, and National Institutes of Health**, provided the use is operated in compliance with all town, state and federal health and safety regulations, and that thirty days prior to a Board of Appeals hearing on the use, and annually, a report detailing hazardous materials operations, processes, disposal and

storage **shall be reviewed and approved in writing** by the Fire Chief and Director of Public Health and Human Services.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

This proposed zoning amendment is the outcome of years of work on the part of the Town of Brookline. In 1997, public forums were held about what constitutes good development. More recently, in 2001 an office feasibility task force, made up of members of the Economic Development Advisory Board (EDAB) and others with commercial development expertise, produced recommendations that identified 2 Brookline Place as a prime development opportunity. Additionally, the Comprehensive Planning Committee identified areas of Route 9, and specifically 2 Brookline Place, as opportunities for economic development.

The Board now has an opportunity to approve a zoning amendment that would allow the Planning Board to work with the developer to produce a high-quality, transit-oriented commercial development that would produce many public benefits. The Town would have the opportunity to work with Winn Development, whose principal in charge, Roger Cassin, is a long-time Brookline resident, has an excellent reputation for working well with neighbors and the community, and is known for producing high-quality development projects and well-managed properties. This project could increase the commercial tax base in Brookline by up to 7.5% and help reverse the continued shift of the Town's tax burden onto residential taxpayers.

This is an exciting opportunity for our Town, as the development would:

- Increase Brookline's current commercial tax levy of \$17.5 million by an estimated \$800,000 for office use to \$1,200,000 for lab use, per year;
- Rely heavily on public transit, in keeping with the Town's "Smart Growth" effort to focus development at locations served by transit, pedestrian, and bicycle access;
- Bring additional foot traffic and vibrancy to Brookline Village restaurants and shops;
- Provide much larger public open spaces than currently exist, attractive retail areas designed to encourage use of the public open spaces, improved pedestrian connections leading from the MBTA stop through the site and beyond, and a connection with the neighborhood on the other side of Route 9 and the Emerald Necklace;
- Provide overnight parking for area residents; and
- Create a greenway of trees along Route 9 adjacent to the site.

At our request, the developer's financial assumptions were analyzed by members of the EDAB. They confirmed that the size of the current proposal is required to make the site redevelopment financially feasible. The Board of Selectmen then appointed a Project Review Team to work

with Winn Development Company to establish whether a project of the required size constituted a good opportunity for the Town. This Board believes the proposal developed in conjunction with the Project Review Team will be good growth for Brookline. This is a development opportunity the Town should not pass up.

Background

In 1994, Town Meeting created an economic development function for Brookline. After adjusting to Proposition 2 ½'s restrictions for more than a decade with significant efficiency initiatives and pursuit of outside revenue, Town Meeting concluded that economic development had to be part of the Town's strategy to keep up the quality of services we have come to expect here in Brookline.

Town Meeting was right. In comparison to many nearby communities that provide a similar high level of services, Brookline is considerably more reliant upon residential tax receipts. In fact, the Moderator's Committee on Tax Classification found that one of the reasons that Brookline has been experiencing a shift of its aggregate tax responsibility from commercial to residential properties is an erosion of the Town's commercial base due to the conversion of commercial properties to residential uses.

Over the last decade, Brookline has experienced owner-initiated residential development, but very little commercial development. Clearly, if left to the market alone, all new development in Brookline would be high-end residential. One of the findings of the Office Space Task Force, in fact, was that office developers do not even think of Brookline when conducting site searches. Furthermore, Brookline's reputation is that it is unfriendly to any development that requires a zoning change, and yet our zoning is often too restrictive to generate viable commercial development. Instead, commercial development occurs at our borders, where we feel the full impact of that development and yet receive none of the benefits.

Only two commercial projects have been completed in the past decade: 1010 Commonwealth Avenue and the Courtyard Hotel on Webster Street. Neither of these projects was a pure private market transaction. Both were made possible by the long-term lease of public land by the State and Town, respectively. They both add to the Town's financial capacity with little or no cost for incremental services. Each dollar we receive from commercial development is one less dollar we must cut from our budget in these tough economic times. In fiscal year 2004, 1010 Commonwealth Avenue and the hotel will bring over \$600,000 to the Town in taxes, and that number will grow in future years.

Development Standards

It is extremely important to all of us that the growth we encourage be Smart Growth. It should not only add to our tax base, but contribute to our Town in other ways that add to our quality of life.

To help set standards for development that would insure quality growth, EDAB held a series of public forums. Over 100 community members worked together to articulate a Brookline-appropriate commercial development strategy. It specifies that such development should:

- Be concentrated around “transit villages” or other places where public transportation exists.
- Expand the commercial tax base to pay for important public services.
- Nurture and protect small specialty stores.
- Manage traffic and parking as creatively as possible.
- Consult and engage neighborhoods and interested groups around project development.

In addition, it was clear that the community prefers to work with developers that have a strong track record and are known to be responsive to neighbors and their concerns.

Office Feasibility Task Force

After Town Meeting approved the hotel, EDAB turned its attention to office space because office uses pay a higher commercial tax rate while demanding virtually no Town services and the Town’s commercial districts need more daytime foot traffic. This need is felt most acutely by small businesses that have limited marketing budgets and must depend on ambient traffic. Office workers represent a supply of shoppers and diners during times when most Brookline residents are elsewhere.

For the foot traffic to be effective, the office building must be located in one of our commercial areas. The density necessary to make office development feasible requires that the location be on a main road, where height and density are already concentrated.

Brookline Village and Coolidge Corner stood out as matching the criteria for good office development in Brookline. In Brookline Village, the Route 9 section is where height and density make sense, and where the greatest opportunities for public amenities exist.

2 Brookline Place

Two Brookline Place has been an intended redevelopment site since the parcels known as 1 and 5 Brookline Place (the medical building and the daycare center) were redeveloped in the 1980’s. Two Brookline Place was what remained after those sites were redeveloped and the then-existing taxi garages and office building were converted into the mix of retail and office uses that are on the site today.

EDAB’s proactive and long-standing request for Winn Development to investigate redevelopment options met with a response this past Spring when a large restaurant lease lapsed.

Winn Development agreed to investigate the possibility for redeveloping 2 Brookline Place. Their analysis pointed to two effective possibilities that met Town objectives -- the office/retail or life science lab/retail combinations.

EDAB reviewed the developer's financial projections and compared them to industry standards and comparable buildings in the area. Their conclusion was that new office or lab development could not reasonably be pursued by a developer under existing zoning regulations.

With this conclusion, the question became whether or not a development in excess of current zoning would meet the Town's vision for good, transit-oriented development. EDAB determined that there was a good chance it could, and requested that we designate a Project Review Team to pursue the opportunity further.

Results from the Project Review Team and the current Proposal

The current proposal for 2 Brookline Place offers the qualities cited in the Town's objectives for good development. It:

- *Is transit-oriented.* Not only is the building located immediately adjacent to the Green Line's Brookline Village Station, but it is served by several bus lines and is a short walk from the Huntington Avenue branch of the Green Line as well. Moreover, the developer proposes to build a pedestrian pathway from the MBTA to the building and out to Route 9. These pedestrian improvements will make coming and going to the T station more pleasant for all riders, while connecting Station Street to the Emerald Necklace. In addition, the developer has committed to subsidize employees' T passes and offer other incentives to use public transit.
- *Supports small Brookline Village business.* On the way to and from work and during lunch hour, workers can be expected to shop and dine in our local stores in Brookline Village.
- *Expands our commercial tax base.* Current estimates are that net new taxes will be between \$800,000 and \$1,200,000 per year. It would take approximately 90 one-million dollar homes or 150 new high end condominiums to generate that level of tax revenue -- and those developments would require the full range of Town services. Furthermore, to reassure residents, the developer has offered a legally binding document guaranteeing that this project will pay taxes in perpetuity in the event of any sale to a tax-exempt owner.
- *Creates more open space.* The Town will gain five times more new public open space than is currently available on the site. That space will be specifically designed and constructed to encourage pedestrian connections from public transit through the site to retail tenants and restaurants and on to Route 9 and the Emerald Necklace. It will

provide a mix of hard- and soft-scape treatments to support a mix of uses and attractions to the site.

- *Provides overnight parking and traffic improvements.* At least 25% of the parking built will be offered to neighborhood residents for overnight parking, meeting a serious local need. Traffic mitigation measures to improve traffic flow will be identified by the Town and implemented by the developer during the design review process.
- *Contributes to the vitality of the neighborhood.* The design of the building and the open space will respect the context of the neighborhood, be visually enhancing, and create an important architectural transition between the high-density uses on Route 9 and the lower density, community feel of Brookline Village. The developer has committed to continue to work with the Town during Design Review to insure that the character of the development is an asset to the neighborhood and to implement “green building practices” to promote sustainability of the larger community.

The site plan concept that forms the foundation of this zoning amendment was shaped by the hard work of the Project Review Team and other citizen input. The Project Review Team process alone has included more than 10 public committee and subcommittee meetings, including two half-day design charrettes with the developer’s architect and meetings with and presentations by Town staff. The committee influenced schematic building design, open space and pedestrian connections, priorities for the types of retail establishments and how they interact with the neighborhood, and daytime and overnight parking concerns for the project and the community.

In addition, the Project Review Team has reviewed and discussed concerns about the future tax status of this site and ultimately required that the developer establish a legal method of guaranteeing a permanent tax stream. It reviewed and discussed the issue of lab use in the building and heard from the Director of Public Health and Safety as to how the building, if tenanted by a lab use, will be overseen and regulated to insure that it will as safe as, or safer, than similar uses in Boston and Cambridge.

The Project Review Team also spent a considerable amount of time reviewing and challenging the financial assumptions made by the developer. Many of the substantial improvements made to the developer’s original proposal were a direct result of pressure from the Project Review Team for the developer to “dig deep” and improve the design for the community. The requirement that a minimum of 60% of the parking for the project be underground resulted from demands made by the Project Review Team. This change significantly reduced the height and bulk of the project from the original proposal, where all of the parking would have been above ground, and substantially expanded the open space now required in the zoning amendment.

The Warrant Article

The Board of Selectmen is putting forward this warrant article to allow the project to be further designed and refined to meet community needs. The zoning change asks Town Meeting to increase the height and FAR allowed on this site, with public benefits, from the current 100 feet

to a proposed 135 feet, and from the current FAR of 2.5 to an FAR of 4.0, in exchange for a **minimum** of the following public benefits:

- ◆ 20% of the site dedicated to permanent, public open space;
- ◆ 60% of the parking underground;
- ◆ 25% of spaces built offered to neighborhood residents for overnight parking;
- ◆ significant off-site improvements, tied to a percentage of building costs;
- ◆ a legal contract guaranteeing commercial tax income from the property in perpetuity.

In addition, the warrant article allows the Planning Board to reduce the parking requirements in recognition of proximity to the MBTA light rail and bus lines, and after demonstration of transit incentive programs for employees.

Town Meeting will also be asked to approve a change to the language of Article 4, Use 36A, to make certain types of research laboratories an allowable special permit use. In other words, this will allow a developer to seek permission from the Board of Appeals for a certain kind of research laboratory, provided that the Director of Public Health and the Fire Chief approve the plan. The language before you has been slightly revised from the original proposed language to accommodate the Director of Public Health's, Alan Balsam's, judgment about limiting laboratory uses to Levels 1 and 2 only (the levels refer to biohazard levels set by NIH), and requiring his and the Fire Chief's written approval before a special permit can be considered.

Dr. Balsam has reviewed all concerns regarding Level 1 and 2 lab space and has stated that any risks associated with labs at those levels are primarily to lab workers and not to the community. In addition, Dr. Balsam is completely confident that, like our neighbors with lab Levels 1, 2, and 3 within a few miles of Brookline, procedures and regulations can be imposed that will insure the safety of all.

Next Steps

The Board of Selectmen appreciates the work done by EDAB, the various Boards and their members, the community and, in particular, the Village Square Project Review Team, with respect to the above referenced zoning amendment. It has taken a large amount of work to get to the point where this Board believes there is an exciting opportunity for the Town to have the property at 2 Brookline Place redeveloped in a manner that provides significant benefits to the Town and neighborhood, is responsive to the community's concerns, and provides an economic boost for Brookline.

While the progress that has been made on this project is enormous, we recognize that some questions remain and some community members need additional time to review and respond to the proposed zoning amendment. For this reason, we decided we needed more time to continue to review the project and answer everyone's questions. Understanding that the property owner bears substantial costs with any delay, the developer was reluctant, but as a town resident and community member, he has agreed to accept the postponement to a Special Town Meeting this

winter. This Board therefore voted to refer this amendment to the Planning Board for consideration at a future Town Meeting. It should be noted that the cost of having a Special Town Meeting is approximately \$1,500 - \$2,500.

We must emphasize that this is the first zoning amendment for a privately owned commercial property in Brookline in many decades. Our community has grown accustomed to the few developments that have been done in recent years on Town owned or controlled properties. This process is different because the Town must work with a private property owner and work to maximize the benefits to the Town with that owner. With the Request for Proposals process for Town property, the process and outcome were both within the Town's time frame and control. Town Meeting had the opportunity to consider designed and detailed projects. In this case, Town Meeting will be asked, in February, to consider a zoning amendment. The building design and the extensive Town design review process will follow Town Meeting and provide neighbors and interested citizens with further opportunities to shape the building's design.

The Selectmen recommend **FAVORABLE ACTION**, by a vote of 4-0 taken on October 28, 2003, on the following vote:

VOTED: To refer the zoning amendments proposed in Article 17 to the Planning Board for study and a report to a future Town Meeting.

ROLL CALL VOTE:

Favorable Action

Goldberg

Hoy

Allen

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

This warrant article would change the zoning by-law to allow the tallest, most massive building in Brookline. The proposed building would be located at Two Brookline Place. The zoning amendment, however, would also apply to the entire district which includes the present buildings at One Brookline Place and Five Brookline Place. The Article is offered by the Selectmen as a result of the work of the Town's Economic Development Advisory Board (EDAB). In follow up to the work of EDAB's Office Space Task Force, last Spring EDAB approached the owner of Two Brookline Place regarding opportunities for re-developing the site to create additional tax revenue. Two proposed uses have been suggested: a biolab or an office building, with a laboratory apparently being the developer's preferred option. EDAB submits that the proposed development will generate approximately \$1,000,000/year in new revenue. It is not anticipated,

however, that this revenue stream will be available until approximately FY 2009. The process has moved with substantial speed and much information regarding potential impacts, which has for past projects been available, has not been generated.

Until the day of the Advisory Committee's discussion of this article, the owner's representative had advised us that if Town Meeting did not approve the warrant article at the Fall Town Meeting the owner would not go forward. We had been advised that the owner maintained it cannot afford to allow this rental space to go vacant without Town Meeting's assurance, expressed by its approval of this article, that this project will go forward. Hours before the Advisory Committee's vote on this Article, the Selectmen voted to refer these zoning amendments back to the Planning Board which, it was anticipated, would offer them for a vote at a Special Town Meeting to be convened in approximately February 2004. We were advised that the owner was willing to wait until that time, but not until the Annual Town Meeting in May.

Below is set forth the nature of the proposed zoning changes; the history of zoning at the site; the nature of the public process to date; what is known about potential impacts; the financial aspects of this proposal; whether there is a legal mechanism to ensure that such a development is not conveyed to a tax exempt entity; a summary of the public comment received; and finally, our recommendations.

ADVISORY COMMITTEE REVIEW

Our Planning and Regulation Sub-Committee held two hearings on this Article. The first was a joint hearing with the Planning Board on October 2, 2003. The second was a hearing of the Sub-Committee only on October 9, 2003. In addition, individual members of the Sub-Committee had a lengthy meeting with Robert Duffy, Director of Planning and Community Development; and have had numerous follow-up communications with Mr. Duffy; Amy Schectman, the Town's Economic Development Officer; David Turner, Town Counsel; George Moody, the Town Assessor; and Randy Kincaid of the Town Assessor's Office; Dr. Balsam, Director of the Health Department; Acting Fire Chief Skerry; and Police Chief O'Leary. Sub-Committee members have also conferred with Ken Lewis and Jim Shea members of both the Project Review Team and the Economic Development Advisory Board. Our Sub-Committee also requested any available documents concerning the project, the process which led to it, the history of zoning on the site, the financial assumptions made, a proposed deed restriction and "opinion letter" and any analysis of potential impacts. Our Sub-Committee has, to the best of its ability, reviewed all documents which were made available to it in response to its requests. The Sub-Committee has also received and reviewed additional public comment on this warrant article. The full Advisory Committee met on October 28, 2003, and deliberated for a number of hours. We heard presentations from the Co-Chair of the Project Review Team; a representative of EDAB, the Town's Economic Development Officer and the architect for the developer and also engaged in extensive questioning concerning this article. We also viewed the scale model of the project presently on display at Town Hall.

SUMMARY OF PROPOSED ZONING CHANGES

Article 17 proposes a series of changes to the Zoning By-Laws for the Village Square General Business District. This zoning district was established in 1993 when the area was re-zoned to allow buildings up to 100' in height. Article 17 was submitted by order of the Planning Board on 9/18 and 9/25 in response to a redevelopment proposal for 2 Brookline Place by Winn Development, the owner of 1, 2, and 5 Brookline Place. The article includes changes to the established height and FAR limits and also establishes a number of conditions that must be satisfied for any buildings on lots within the district.

Vehicular Service uses are changed and allow a reduction in parking requirements, citing the proximity to public transit ("Mass Transit") as a reason for this reduction.

The Table of Use Regulations would be changed to allow "Research laboratories for scientific or medical research". Current zoning only allows research laboratories "not involving noxious or hazardous substances or processes".

The original language of the article stated that " no special permit shall be required under 5.09 " but the Planning Board has amended the article to retain the special permit process for this zoning district. (Please see our discussion of the special permit process below.)

The changes to the height and FAR requirements in the Table of Dimensional Requirements are as follows:

FAR/HEIGHT - ALLOWABLE AND WITH RE-ZONING

Existing allowable FAR – 2.0

Existing allowable FAR with public benefits – 2.5

Proposed FAR with public benefits – 4.0

Existing allowable height – 60'

Existing allowable height with public benefits – 100'

Proposed height with public benefits – 135'

With respect to both present zoning and the proposed zoning change it is important to understand that our present Zoning By-Law § 5.31 (1) allows an additional 10 feet of height for mechanical structures, such as ventilation, in addition to the maximum allowable height. Accordingly, a zoning change which increases the maximum height to 135' would actually permit a building 145' tall.

The conditions that would need to be satisfied within the district include:

- 20% of a site in the district should be "landscaped open space or usable open space"
- 60% of the parking spaces required must be below grade
- 25% of parking spaces "shall be offered to residents for overnight parking"

- 1% of hard construction costs “shall be devoted to making off-site streetscape improvements and undertaking transportation mitigation measures”
- a “recordable instrument benefiting the Town” shall be delivered that ensures that property taxes or the equivalent amount of money in lieu of taxes will be paid to the Town
- all other provisions of the Zoning By-Law must be followed including the exceptions to maximum floor area ratio regulations and maximum height regulations (Public Benefits Incentives) as described in 5.21 and 5.32 of the Zoning By-Law
- the building owner or operator would be required to provide subsidized monthly transit passes to workers in the building and the owner or operator would also be asked to provide “other means to encourage the use of mass transit and car pooling”.

A project in the Village Square zoning district would receive an 18% reduction from the requirements for parking as described in the 6.02 Table of Off-Street Parking Requirements under the Retail & Office heading.

BACKGROUND PHYSICAL BOUNDARIES

The Village Square General Business District is bounded by Brookline Avenue, Route 9 (Boylston/Washington Street) and Pearl Street. The zoning district was defined in 1992 when the site was upzoned by Town Meeting, following the work of the Brookline Development Committee’s 1991-92 Brookline Townwide Development Study. Prior to 1992, this area of Brookline Village was zoned for general business G – 2.0. The Village Square General Business District is in Precinct 4.

The neighborhoods abutting this zoning district include diverse parts of Brookline Village. These include:

- Station Street which abuts the MBTA Station and tracks and consists of mixed uses of residential and commercial space,
- The Village at Brookline (owned by Winn Development) residential development
- Brook House, including commercial, office and residential development
- Juniper Street Coop residential development

Building heights in the VS district and of buildings adjacent to the zoning district are as follows:

Brookline Fire Station Tower – 84’ –10”

10 Brookline Place - 82’ – 5”

1 Brookline Place - 92’ –5” and 78’ 10”

Station Street buildings 57 ‘ to 52’

The Village at Brookline - 71' (tallest buildings)

Brook House - 115' and 112'

10 Brookline Place (Hearthstone Plaza) is directly adjacent to the district on the west side of Pearl Street. This building currently house AI New England, a private college of technology and communication and medical offices.

Significant nearby open spaces include portions of the Emerald Necklace, including Leverett Pond/Olmsted Park and the Muddy River and the Brookline Avenue Playground. Within the zoning district itself , there is an area of lawn, shade and ornamental trees, benches and paths that forms a connection between the Brookline Village T Station and Boylston Street (Route 9).

Winn Development is the owner of all the properties in the Village Square General Business District G-2.0 (VS). These properties include:

- 1 Brookline Place
- 5 Brookline Place- former Waterworks Bldg.
2 story above grade parking garage
- 2 Brookline Place

HISTORICAL BACKGROUND

In 1900 much of the property in this current zoning district was owned by Brookline Gas Light Company and included a gas holding tank (gas holder). Pearl Street was lined with small residential buildings. In 1950, the district included a number of auto body shops, a filling station and some small residential properties.

These properties, when re -developed in the late 1960s, were known as the Marsh Urban Renewal Project, part of Brookline's Community Renewal Program. At that time, Route 9 was to be a connector road to the Inner Belt, the highway project that was halted in the early 1970s.

The name of this zoning district comes from the original "Village Square" that was centered on the intersection of Walnut Street, High Street, Washington Street and Boylston Street (Route 9). This area today includes the Fire Station, Brookline (Savings) Bank, Dunkin' Donuts and 10 Brookline Place (Hearthstone Plaza).

TIME LINE - PROCESS TO DATE

The Advisory Committee asked the Planning and Community Development office for an outline of the planning process for re-zoning the Village Square General Business District. We have

received a number of memos and reports regarding planning work that directly affects this area of Town and have attempted below to organize a summary of the work to date as we understand it.

- In 1991 – 1992 a Brookline Townwide Development Study was conducted with significant community input from four Neighborhood Task Forces, Town Boards and Commissions, the Transportation Department and the Planning Department. Consultants working on the study were David Dixon/Goody Clancy, Planning and Urban Design with Howard/Stein Hudson Associates, Transportation Consultants, Byrne McKinney and Associates, Market Feasibility and Development Strategies and Connery Associates, Zoning.

The 1992 study had 3 basic goals:

- identify new sources of tax revenue to the Town
- maintain the Town's essentially residential character
- improve the Town's physical quality – enhance gateways, connective boulevards, enhancing open spaces and respecting historic resources

One focus area of this work was Lower Boylston Street (Rte. 9) where planning and zoning recommendations include revised height limits at Brookline Place to permit buildings up to 100 ft. high, the introduction of design guidelines to shape future development and the introduction of the transportation access plan requirement for new development.

(In the 1992 study, the proposed area to establish a new Village Square (Brookline Place) zoning district included 10 Brookline Place as well as the Brookline Village MBTA station. The current Village Square General Business zoning district does not include 10 Brookline Place.)

- In 2000, the Town began developing the Brookline Comprehensive Plan with the Brookline Comprehensive Plan Committee. The Town hired the team of Goody/Clancy Associates and the Community Design Partnership as planning consultants to the planning process. The Comprehensive Plan Committee has been working toward developing three focused reports addressing:

- Route 9 Corridor
- Quality of Life: Neighborhoods, Commercial Areas & Public Spaces
- Affordable Housing

The draft Comprehensive Plan has not yet been presented to the public. A schedule is proposed for a series of public meetings to present the preliminary plan for review by the Comprehensive Plan Committee and Brookline residents.

- Brookline Village Neighborhood Forums held (2001 and Spring 2003). The well attended discussions included some limited dialogue regarding increased development at Brookline Place but no discussion was held regarding possible increases in allowable height or FAR. Discussions focused on existing zoning only and the prospect of increased development, in general, was not well received by neighborhood residents.
- In 2002 – an Office Development Study was undertaken by a sub-committee of the Economic Development Advisory Board. The purpose of this work was to identify potential locations in Town for office development with the goal of improving the Town’s commercial tax base.
- December 2002 -- memo from Robert Duffy and Rhoda Spector : proposal to prepare development guidelines for the Brookline Village district/ establish working group for Rte. 9 corridor

Concern that “ if we wait until the conclusion of the Comprehensive Plan, a major redevelopment opportunity may proceed in a direction that does not enhance the ultimate plan endorsed for the corridor or district”

- April 2003 - memo from Robert Duffy and Rhonda Spector – Brookline Village Gateway Development - Recommendation to Appoint Project Review Team (PRT)

Preliminary office redevelopment concepts given to EDAB by Winn Development (2 Brookline Place) and David Rubin (10 Brookline Place) - March/April 2003

“ Though further review by the Comprehensive Plan Committee of the consultant’s preliminary recommendations will occur, this work product to date provides an initial framework for structuring short term development review and for assessing general consistency with the emerging Comprehensive Plan.”

“Work with David Rubin will begin when the developer is ready and will be integrated with the work being done on the Winn Development site to insure appropriate and beneficial integration of the projects’ site plans”

Three proposed phases of the PRT’s proposed work:

1. Project Guideline Review
2. Plan Evaluation and Critique
3. Refinement of Alternatives and Development of Recommended Concept Plan

- May 2003 – Brookline Village Gateway Project Review Team formed. The PRT was originally scheduled to complete its work by the end of July. An extended schedule of meetings was proposed to run until November 10. The last several meetings of the PRT have been canceled. A plan evaluation, critique or recommended concept plan has not been developed by the PRT to date.
- May 2003 – Meeting of the Brookline Comprehensive Planning Committee
The Brookline Comprehensive Planning Committee last met on May 21, 2003. Since that time, members of the Comprehensive Planning Committee have not had a chance to review the work done to date on 2 Brookline Place.
- September 2003 – proposed Zoning Review Committee – charge to this short term committee is to “report to Board of Selectmen, Planning Board, Advisory Committee and Town Meeting regarding zoning and related articles that will be drafted for consideration at the November 2003 Town Meeting and to the Comprehensive Plan Committee on the preliminary Plan’s zoning recommendations.” 1st meeting: October 14
- September 2003 – Warrant Article 17 is drafted by the Board of Selectmen proposing zoning changes to the Village Square General Business District.

CONSIDERATION OF PLANNING PROCESS TO DATE:

The importance of improved economic development in Brookline Village has long been part of the Town’s planning agenda. A 1968 report on the Brookline Village Improvement Area states, “If the problems affecting this commercial district cannot be remedied, it is likely that a community other than Brookline will be the recipient of this potential increase in retail sales.” Additionally the report reads, “Some of the most serious problems in the Village concern the weakness of the area as a commercial district. The entire area is congested with traffic and there is a substantial shortage of parking space and loading areas. Clearly a rehabilitation program with some clearance is necessary.”

The issues we are grappling with today are certainly not new ones, but are issues that have a long and sustained history.

Recently we have had skilled and experienced members of the Economic Development Advisory Board and the Economic Development office of the Planning and Community Development Department to help lead important initiatives for a more robust commercial tax base for the Town. This work is vital to the fiscal health of Brookline and is valued by all.

The Planning and Regulation Sub-Committee fully supports the need to pursue potential economically viable projects in Town. We see Brookline Place as a likely location for such development but we have been surprised by a number of issues. These include:

- the rapid time frame within which the proposed zoning changes have needed to be evaluated,
- the scope of the changes and
- the methods that have been used to move the proposed project and re-zoning article forward.

We are concerned about the content of this Article primarily because this zoning district is such a pivotal piece in the fabric of Brookline Village.

The notion of developing a “gateway” may be a useful urbanistic tool but one that should be evaluated in a broad context. The idea that a single building is a “gateway” and that it should be significantly taller and bulkier than any other building in town are issues that should not be taken lightly. The potential impacts of such a building are many and should be addressed in a comprehensive planning framework. In addition to mass and height, some of the concerns that need to be addressed from an objective planning position include:

- wind
- shadow
- daylight
- pedestrian circulation
- air quality
- potential for existence of contaminated soil or groundwater
- construction impacts
- adjacent historic resources
- view corridors
- noise
- transportation/traffic/parking
- public benefits

We do not feel that the work done to date with the developer and the developer’s architect has resulted in any analysis or comparative study of options for the zoning district as a whole. The focus of the work of the PRT and the resulting warrant article for re-zoning has been specific to one building proposal offered by the developer. This project- focused work is driven by the developer’s window of opportunity and does not address the long term costs or benefits for the town in any terms other than economic ones.

We realize that many of the ideas that have been put forth during the Project Review of the 2 Brookline Place project relate to the work being conducted on the Comprehensive Plan. However, the Project Review Team’s work focused solely on the developer’s proposal for a single building. The work leading to the proposed re- zoning of this district has not address the parallel development plans for 10 Brookline Place, the regional transportation issues suggested by the Route 9 focus group of the Comprehensive Plan, or the complex environmental impacts

of development of this scale. The proposal for 2 Brookline Place addresses less than half of the Village Square Zoning District. The full impact of rezoning this district must be understood before contemplating such a significant increase in building height and mass.

A full build-out scenario for the zoning district, using the current height limit of 100' with and FAR of 2.5, including public benefits should be studied as well as the impact of upzoning the district to accommodate heights up to 135' and an FAR of 4.0 with public benefits. Each of these

physical models comes with costs and benefits and it is critical that the full range such potential impacts, both positive and negative are explored.

Additionally, the Project Review work to date has been called a community process where public forums were held. Unfortunately meeting notices were not mailed to abutters of the project nor were Town Meeting members from the project's precinct or abutting precincts notified of the proposed project or re-zoning consideration. Most of the community attendees at the PRT meetings were notified of the first meetings by word of mouth. After the initial meeting, notice was made by an e-mail list compiled at the meeting, postings on the Town's web site and the Town Hall bulletin board. This was an inadequate method of public notification for a planning project of this significance.

One could imagine a planning process for this zoning district that builds on the work of the Comprehensive Planning Committee, and includes meaningful community input. There is general agreement that Route 9 is a problematic but important corridor through our Town. It needs to be addressed with an open and clearly delineated process that takes into account economic viability and the long-term sustainability and quality of life of Brookline Village and the surrounding neighborhoods.

TRAFFIC IMPACT

The developer's consultant, *Howard, Stein-Hudson* (H/S-H) submitted to the Town of Brookline a document entitled "Two Brookline Place - Traffic Impact Study - Draft Report, dated September 2003.

This report's conclusion begins with the statement:

"Although this is a preliminary report, it indicated that this site can accept a development that requires a zoning change to allow an additional 86,400 square feet above what current zoning regulations permit."

That is approximately 200,000 more square feet of built space than what currently exists on the site.

They are continuing to work to produce a final report that, in their professional opinion, "will portray existing and future conditions as accurately as possible." They will continue to work with the town's own experts "to accomplish acceptable levels of research and analysis." They are counting on that "experience and familiarity to enhance the validity of this report..."

They will then "shift efforts to developing effective measures to mitigate the effects of the project. Again, the town will be consulted ... to ensure that all parties concur with what is presented."

And finally, "it is the goal of the developer and the development team that this project will be an asset to the Town of Brookline without being a burden to its transportation network."

There follows about an inch of appendices, to flesh out this document - daunting to any reader not well versed in "Synchro Analysis" or "Census Tract Information." The Subcommittee therefore thanks our Town Traffic Engineer, David Friend, for his preliminary written analysis of this document.

Mr. Friend draws their attention to important follow-up research, field measurements and documentation he expects and requires for the next phase of this report. Some of this material was provided to him last week but has not been analyzed yet.

Mr. Friend's analyzes 23 issues and concerns, some of which are disputed in the responses by HSH, while others are simply an acknowledgment of gaps to be filled in to complete the report. He does, however, identify some definite, serious issues and intersections that may not be solvable or mitigated by offers of T-passes or flex time plans by tenants for *either* a lab use or standard office space. Mr. Friend notes the insoluble bottleneck of the nearby intersection of Huntington and Washington St./Rt.9. He requests HSH carefully record the length of the queue that currently backs-up toward the site during the primetimes. He also expresses concern as to whether the 2011 Build Date will lead to a backup through the Brookline Ave. light. He also notes the current problems with the site, including congestion of Pearl Street from day care drop offs and service trucks unloading at curbside.

Our Committee was also provided with a memo from the Town's Economic Development Officer summarizing her subsequent conversation with Mr. Friend. Her memoranda summarizes Mr. Friend's conclusions as: the "traffic impacts (and assumed parking) will not be significant enough to justify approval or disapproval of this amendment. The "difference between traffic generated from a building that would be allowed under current zoning", and one that would be buildable by this change, "is quite small and can be managed with mitigation once completely understood."

It is essential to understand exactly the comparison being made in the Economic Development Officer's Memo. It does not compare the transportation impact of the proposed

development with the traffic impact of what is presently in place on the site. Instead, it compares the traffic impact of the proposed development with the transportation impact of a hypothetical building built to the maximum allowed under present zoning (i.e. a 100 foot building with an FAR of 2.5). This hypothetical building is far bigger than what is presently at the site.

Accordingly, the memo does not indicate that there would not be significant traffic impacts compared to the present if this project goes forward. Rather, it merely submits that the proposed zoning change would not create significant impacts beyond what is already allowed (but not built). This may or may not be an appropriate way to analyze the impact of the warrant article, but it is essential that one understands exactly what is being submitted. We suggest that if this is

the proper comparison then a study of the traffic impact of the maximum allowable build-out under this zoning change, not just the impact of this project might also be warranted.

We believe that this is a very complex site with respect to transportation issues. Outbound traffic must enter the loop road (Pearl) from Brookline Ave, if coming from the LMD or Huntington Ave. - complicating the workings of the day care center and adding to the inflow needed for 1BP, or join the group entering from Washington. Inbound traffic on Rt.9 has to turn at the Brookline Ave. light and go the back way too - their only choice - unless U-turns will be encouraged. One way into the site encounters trucks and T riders, the other, kids and drop-offs. We are concerned that cars entering Pearl Street off Washington and the semi's jockeying for backup position into the bays may cause backups into Washington Street. This could be exacerbated if additional loading bays may be needed for the back half of the proposed retail space.

PARKING

The developer is planning to provide 318 single car spaces plus 47 tandems (two car spaces) for a total of 365 parking spaces. They submit that the two different proposed uses generate different parking demands. Due to less people per square foot the biolab is expected to require less parking. The developer assumes required parking based on "national use averages" of 3/1000 square feet of office space and 2/5/1000 square feet of lab space. Using these multipliers in the tables provided leads of peak demand figures of 390 spaces for office use and 325 for lab use (their actual figures are 373/office and 313 for lab, but we believe this to be typographical error in their draft).

Presently under existing zoning 284 parking spaces would be required for the existing maximum FAR compared to 418 parking spaces under the proposed new FAR. Presently under the proposed lab use the numbers would be even higher, 306 under present zoning and 452 under the proposed change.

The developer's parking analysis concludes that the 365 planned spaces could make for "slightly constrained" parking for the office use and that for the lab "supply will slightly exceed

demand” and that existing “reserve parking near the site” can make up any difference. (We are advised by the Economic Development Officer that the “reserve parking” referred to are spaces in the adjacent above ground garage and not spaces on Brookline Village streets). They also theorize that the constrained parking supply will serve as an incentive for mass transit use.

The T is relied on heavily by the proponent. They estimate that 24% of peak hour trips to the site will be on public transit - both by trolley and bus. This assumption is required to reduce the required parking below the size required by our zoning. Our Committee has not yet seen, however, any convincing analytical support for this crucial assumption. The sole support for the use of this 24% figure appears to be data from the 1990 census which found that 24% of the people who commuted to census tract 4009, (which is the area bordered by the Muddy River on the east, Aspinwall on the north, Harvard/High on the West, and Allerton Street on the South) used public transportation. Moreover, as just one example of the complexities involved, Mr. French has pointed out that some commuters rely on parking their car at a T station before boarding, to travel into town. Should these new commuters be unable to find parking near their departure T stops, they may simply drive to Brookline. Others may, of course, simply find it more convenient to drive.

A report dated Oct. 20, 2003 entitled "Zoning and Parking Demand Analysis" does little to assure us that parking will not be a problem for a development of this scale at this site. Although it reiterates what our current zoning by-law *would* allow for building size and numbers of car spaces vs. if the requested increases were approved, it is largely a presentation and primer for "Transit-oriented Development" guidelines. This may well be a nationwide and sensible urban planning idea developed during the last decade, but it does not assure us that parking will not be a problem for a development on this site.

We are concerned that there may not be any “reserve parking near the site” available to make up any shortfall by the project. We do agree that a biolab may require less parking than an office building. We are presently skeptical of the claims made regarding use of public transportation which is an essential assumption of the developer. We would further note that if parking in the development is only offered at market rates to tenants, to encourage use of public transportation, that this could simply encourage on street parking.

BIOLAB SAFETY

We have been advised that the amendment to the Zoning By-Law will be changed to specify that only a Biosafety Level 1 or Level 2 laboratory can be applied for. There are four levels of biological laboratories based on the types of organisms studied. Level 1 studies agents not known to consistently cause disease in healthy adults. Level 2 studies agents associated with human disease hazards from ingestion, mucous membrane exposure, or breaking the skin. Level 3 and 4 laboratories study very dangerous organisms which can be transmitted through the air.

Dr. Alan Balsam, Director of our Health Department has had extensive experience regulating and monitoring biolabs when he worked for the City of Cambridge. Dr. Balsam put these risk levels in perspective. High school science labs are Level 1. Even level 2 labs pose only a very small risk to people outside the lab. Level 2 labs are often located near residential areas. There are, in fact, also presently a dozen Level 3 laboratories within a mile of Brookline. The greatest risk is for persons who work in or visit the labs.

Each laboratory would have to meet safety standards, would have to have a lab safety officer available to meet with town officials, and would be subject to periodic inspections by the Town.

Dr. Balsam advised us that in his opinion, the risks of a Level 2 laboratory are manageable, but would involve significantly more work for his department. His department would be required to review the proposed laboratory at three different stages: design; construction; and throughout the life of the laboratory. Each of these reviews would require the use of outside expert consultants as we presently lack personnel with the necessary credentials (with the possible exception of Dr. Balsam himself) and the available staff time. Review of laboratory operations would include examining the tenants' safety plan; site checks twice a year; and having a seat on the tenants' Internal Bio-Safety Committee. At our meeting, Dr. Balsam advised us that these services would be performed by outside consultant retained by the Town and that the cost of these services would be paid for by the developer.

Acting Fire Chief Skerry has advised us that the Fire Department is currently prepared for Level 1 and Level 2 laboratories. They would not require outside assistance from a HazMat team unless a Level 3 laboratory was contemplated.

CRIME/POLICE ISSUES

Police Chief O'Leary advised us that he is not concerned about any significant increase in crime due to the proposed development. He did note, however, that increased traffic details would be needed during construction of the project. It is our understanding that cost of these details would also be underwritten by the developer.

SHADOWS

Choi/Kobus Associates, the architects for Winn Development provided shadow studies of the proposed project in an undated report provided to us. These shadow diagrams only show shadows for the proposed building. They do not show existing condition shadows or the possible shadows for an as of right build out using the existing building height and FAR allowances.

The studies show that Station Street will be in full shadow on winter mornings, afternoons and early evenings. This includes the facades of the residential and commercial buildings on Station

Street. The value of these properties undoubtedly include the fact that they currently have south facing windows that gain sun and light throughout the year.

The studies for spring, which are similar to fall conditions, show the proposed new open space in shadow for most of the day. Late in the afternoon, the proposed new space does get some sun. Currently, the small open space with benches near Bertuccis is often used by people enjoying coffee or sandwiches in the sun at all times of the year.

The T Station will face many of the same shadows as the proposed open space and Station Street. During the winter months many people seek out the sun at the Pearl Street entrance to the T. This will be in shadow throughout winter days if the proposed project moves forward.

It is important to note that it has been well documented by numerous spatial/social planning studies that the most successful open spaces are sunny, well populated spaces. Shadowed hard-scape plazas are not generally well-loved locations. Trees also require sunlight for maximum growth. Additionally, especially at this time of year, we are well aware of the long New England winters. The presence of consistent shadows are an important indicator of less than optimal public realm spaces.

NOISE

We have conferred with an architect, who confirmed that biological laboratories require extra ventilation equipment with significant additional noise (the phrase “jet engine” was used). He advised however, that the noise can be addressed by proper design, typically by increasing the height of the building to allow additional shielding to channel the noise upwards. This could require an additional 20 feet instead of an additional 10 feet for the ventilation equipment. This should be taken into account in the initial design and be made part of the regulatory process to ensure that the necessary additional extra work (which adds additional cost) is performed. We have been advised by the Economic Development Officer that no analysis of noise impacts has been conducted in connection with this article or the proposed development nor will one be done prior to the Fall Town Meeting.

IMPACT ON BROOKLINE VILLAGE BUSINESSES DURING CONSTRUCTION

We anticipate that during construction, there may be an adverse impact on Brookline Village businesses due to traffic and parking disruption. We have been advised by the Economic Development Officer that all efforts will be made to minimize any disruptions, but have not been provided with a specific plan for doing so.

ELIMINATION OF SPECIAL PERMIT REQUIREMENT

The Warrant Article as originally inserted in the Warrant would eliminate any special permit requirement for this project. Specifically, Section I B. 4 a. of the article makes the project subject to design review by the Planning Board under Section 5.09 of the Zoning By-Law, but eliminates the requirement for a special permit also contained in Section 5.09.

Section 5.09 of the Zoning By-Law presently requires any proposed “non-residential use in a non-residential district with more than 10,000 square feet of gross floor area or with 20 or more parking spaces” to obtain “a special permit subject to the community and environmental impact and design review procedures and standards herein specified.”

Mass. Gen. Laws Ch. 40A § 9 allows municipalities to permit certain uses in zoning districts only upon the issuance of a “special permit” which may (but need not) impose

conditions, safeguards, or limitations on the proposed use. In Brookline, special permits are granted by the Zoning Board of Appeals (“ZBA”) which must vote unanimously in favor of granting the special permit. By statute the ZBA must conduct a public hearing on the special permit within sixty-five days of the date of filing of the application and must render a decision within ninety days of the date of hearing. These deadlines can be extended by agreement between the applicant (developer) and the ZBA. Although the ZBA is given broad discretion in its decision making power, any issuance or denial of a special permit is appealable in Court.

In the absence of a special permit requirement, the project would be reviewed by the Planning Board and a Design Advisory Team would likely be appointed. The Planning Board would make its recommendations, presumably in consultation with other town departments, but, the developer would be able to proceed, “as of right” with this project. Any Planning Board recommendations would not be appealable by aggrieved abutters.

At our Sub-Committee hearing, Selectman Geller justified the elimination of the special permit requirement on the basis that by voting favorable action Town Meeting would have rendered its judgment that it wanted the project to go forward and thus the special permit requirement was unnecessary. He further suggested that the requirement may well be unnecessary in other contexts. The Planning Board, in its report, recommends that the special permit requirement be added to this warrant article.

We believe that if this warrant article is passed at a future Town Meeting, it is essential that there be a special permit requirement. The special permit process provides an important additional layer of review and important legal rights to affected citizens. This is particularly important if any of the analysis of significant proposed impacts of this project will not be available to Town Meeting. We do not believe it is appropriate to exempt the tallest and most massive development in Brookline from this requirement. In fact, based on our discussions with the Director of Planning, it is our understanding that a project of this magnitude will also trigger MEPA (Massachusetts Environmental Protection Act) environmental review by the State based on its anticipated significant environmental impacts.

FINANCIAL ISSUES

The town's Economic Development Advisory Board (EDAB) has completed a financial analysis of the 2 Brookline Place proposal. EDAB is fortunate to have Ken Lewis, a real estate development professional, among its members. Mr. Lewis has applied his own experience plus some key development assumptions provided by the developer (under pledge of confidentiality) to construct a Pro Forma Summary to evaluate the project. Mr Lewis came to the following conclusions which were presented to the PRT and to the Advisory Committee:

1. The project will produce a significant tax benefit to the town.
2. New office development is not financially feasible under existing zoning
3. The proposed project will be able to support payment of the public benefit specified in the proposed bylaw change
4. The pro forma assumptions support a quality building

Our review of these conclusions is below

Important Caveat-When Do We Get Paid

It is not anticipated that this project, if approved, would generate substantial additional tax revenues until approximately FY 2009, accordingly, it is not an solution to any budgetary concerns in the immediate future.

Assertion: The project will produce a significant tax benefit to the town

Intuitively, if a larger building replaces a smaller building, there should be a net tax benefit to the town. How much additional tax benefit will, for many, be a major factor in forming an opinion on the project. The EDAB analysis estimated that the net tax benefit of a FAR of 4.0 will be \$1,000,000 per year.

In reviewing the EDAB's model, the subcommittee saw that assessed valuation was computed a bit differently than how the Assessor computes the assessed valuation. The subcommittee then asked the Assessor's office to analyze the developer's proposal to estimate the tax benefit to the town using his methods of valuation. Since both the EDAB and the assessor's forecasts attempt to predict the future, they must make a series of assumptions. If any of the assumptions change, the end result changes.

Key financial assumptions made by the Assessor (derived by taking the developer's assumptions with adjustments as necessary to bring them in line with his view of current market conditions):

-Office Rents per Square foot: \$40 gross (owner responsible for most building expenses including taxes)

- Lab Rents per Square foot: \$40 triple net (tenant responsible for most building expenses including taxes)
- Rentable Lab and Office Square Feet: 191,664
- Retail Square footage: 15,200
- Retail Rent per square foot: \$30
- # Parking Spaces: 318
- Rent per month: \$225
- Tax rate per thousand \$17.50. (Projected FY 2004 tax rate as of this writing.)

Using these assumptions, after subtracting the taxes paid by the existing building, the Assessor's office estimates approximate net revenue increases per year as:

	Estimated Value	Estimated Taxes	Net Increase
Office Use:	\$56,379,000	\$ 986,633	\$ 828,000
Lab Use:	\$81,486,000	\$1,426,004	\$1,268,000

Using conservative estimates of project start and finish, the full tax benefit may not be realized until FY 2009. Note that the Net Increase figures are rounded to highlight the fact that these are estimates 5 or more years into the future with absolutely no guarantees.

Also note that the assessor's office believes that there will not any loss of tax revenue during the period of construction because of the increased value of the land should the proposed upzoning be passed.

The large difference in estimated values between the 2 uses are due to the different kinds of leases (gross vs. triple net) between the two uses. This will be discussed further in the next section.

A change in any of these assumptions (or a change in the accepted capitalization rate) can have a profound effect on this tax benefit projection. Two examples are:

1. The tax rate has been steadily decreasing in recent years because the percentage increase in assessed valuation has been rising faster than the town's ability to increase its taxation (as capped by Proposition 2 ½..) In FY 2003, the commercial tax rate was \$18.18. It is expected to be \$17.50 in FY 2004. If this trend continues, the expected net tax benefit could be lower than indicated in this projection.
2. The Selectmen have the authority today to reduce or eliminate the tax classification shift. Currently, Brookline shifts towards commercial parcels the maximum shift allowed of 175%. Should the tax classification shift be reduced, the tax benefit to the town of this project will be reduced. On the other hand, there is a bill pending in the legislator which may permit the Selectmen to raise the classification shift. If this passes and they increase the shift, the tax benefit could be higher.

According to this analysis, the 2 Brookline Place project, if built, should produce a significant tax benefit to the town. This tax benefit will not appear, however, until approximately FY 2009. Based on the assumptions used in the analysis, it appears that a lab will produce a much higher tax benefit than an office building. Given the uncertainties of long term projections of this type, the numbers computed by the assessor should be used as an indication of magnitude.

Assertion: New office development is not financially feasible under existing zoning

The developer has asserted that new office development is not financially feasible under the current zoning. Should this assertion be true, then Town Meeting is presented with an all or nothing choice. It can either change the zoning as proposed to get a project as proposed or reject the bylaw change and maintain the status quo for the foreseeable future; or at least until any of the major market assumptions change to make a project of the scale envisioned by the current zoning financially feasible. There would be no middle ground with respect to the FAR which governs the allowed square footage.

Mr. Lewis, using his Pro Forma analysis believes that, essentially, the developer is correct. He stated that part of the reason for requirement of a high FAR is that developing on this site has high fixed costs including an existing income producing building plus the fact that the site is a filled in marsh which makes construction more complicated and thus expensive. He does state that some "marginal" reduction may be possible; a reduction in scale by about 10% (about 1 floor) or reducing height by construction of sub grade parking. He believes that both are not feasible. The design being presented is using sub grade parking as a key element (which is a requirement of the proposed bylaw.)

A key point in a determination of whether a project is financially feasible, is computing the projected return on equity (ROE) and the debt service coverage ratio. These are two key elements a lender reviews before making a decision to finance the project.

Return on equity, at its most simple level is $\text{Income}/\text{Investment}$. So if for example you have \$100 in the bank and you earn 10%, your return on equity is: $10/100$ or 10%. If you earn \$9 instead of \$10, the new equation is $9/100$ or 9%. On the other hand, if you invested \$99 instead of \$100, the new equation is $10/99$ or 10.1%. The point to remember is that the ROE equation is more sensitive to changes in the numerator. In this example, a \$1 change in the numerator (the top number in the division) changed the ROE by 100 basis points. A \$1 change in the denominator (the bottom number in the division) changed the ROI by 10 basis points. In a real estate project, determining what goes into the calculation of income and investment is quite complex and full of assumptions but in the end, it comes down to this simple equation.

The debt service ratio is $\text{Net Cash Flow}/\text{Yearly Debt Service (Principal and Interest)}$. This shows a lender how much cash a property owner will have after the debt is paid. Buildings have many expenses and the higher the projected ratio, the more viable a lender will believe the project to be.

Mr. Lewis was using a target ROE of over 9% and a target debt service ratio of over 1.30. The subcommittee also received information from John P. Sullivan, an attorney and CPA who stated that in his discussions with a banker the required ROE should be 11-13% and the required debt service ratio should be 1.40 to 1.50. (Mr. Sullivan's numbers would yield a larger project.)

Our Planning and Regulation sub-committee has reviewed the Lewis analysis. The model appears to make conceptual sense. We noted that his analysis was for the office use scenario. The subcommittee then recreated the Lewis model substituting certain numbers from the Assessor's report where available.

Some key assumptions in the subcommittee's recreation of the Lewis analysis are:

1. Office rents: \$40 Sq Ft gross (from the assessor's project projection)
2. Financing Interest: 6.5%
3. Office Shell construction costs including Tenant Improvement Allowance: \$178/ square ft (From Mr. Lewis)
4. Imputed value of existing building : \$9,050,000 (FY 2004 Assessor's Valuation)

Additionally, the construction costs built into the model assumed 2 levels of underground parking.

Using the model, we saw that the office scenario at FAR 4.0 exceeded Mr. Lewis's stated target levels. When we removed 25,000 sq feet (about 1 floor in the current proposal) which would yield an FAR of 3.55, ROE did not meet the Lewis target.

One weakness in Mr. Lewis' pro forma analysis was that it only considered the office scenario. The Assessor's report appears to indicate that the financial characteristics of a lab use are different. This is reflected in the much higher projected value and triple net rents. The triple net rents are especially significant since it dramatically increases the net operating income which is in the numerator of the ROE equation.

In fact, once you figure in triple net rents by removing the owner paid taxes and reduce expenses in line with the assessor's level from the Lewis model, if the hard construction cost of developing a lab use is only 125% more than an office then a development with the existing FAR of 2.5 would appear to be feasible. According to the developer, the hard construction cost of a lab will be somewhere in the range of about 150% more expensive to develop. If this is correct, then the Lewis model would yield approximately the same conclusion for an office vs. a lab use. Lastly we note that the Lewis model includes a 1% of hard construction cost public benefit payment in the denominator of the ROE calculation. Mr. Lewis also stated that his model includes design fees commensurate with a sophisticated architecture and engineering team.

In summary, the model used is an attempt to predict future profitability of a project which will come to completion in 3-7 years. The model appears to make conceptual sense. Mr. Lewis has applied his experience of many years in real estate development in constructing the model, so he has a high degree of credibility with respect to the office scenario. The model appears to support his conclusion that only marginal reductions in scale to the proposed project are financially feasible in today's marketplace. On the other hand, we note that it is extremely difficult to construct a financial model for a building that hasn't yet been designed. This fact requires the use of assumptions which at this point appear reasonable but as the design is firmed up could change the analysis.

With respect to the lab use scenario, the construction cost estimates were supplied by representatives of the developer without independent verification by the our committee.

LEGAL ISSUES CONCERNING RESTRICTIONS ON TRANSFER TO A TAX EXEMPT OWNER

We do not believe that any mechanism exists which can guarantee that the Two Brookline Place property is not transferred to a tax exempt owner. As of the present, no specific effective mechanism has been identified, nor has our Committee been provided with citation to any legal authority which suggests that any such restriction would be legal. In fact, our Subcommittee's research indicates exactly the opposite conclusion.

Mass. Gen. Laws Ch. 40A § 3 (the "Dover Amendment") prohibits "any zoning ordinance or by-law" from prohibiting, regulating, or restricting, "the use of land or structures for religious purposes or for educational purposes". There is a long history of municipalities (including the Town of Brookline) attempting various devices to circumvent this statute. All of them have been struck down. See, e.g., Newbury Junior College v. Town of Brookline, 19 Mass. App. Ct. 197 (1985). The Massachusetts Court of Appeals has specifically held, with respect to this provision, that "a municipality cannot achieve indirectly that which it is forbidden to achieve directly." Newbury Junior College, 19 Mass. App. Ct. at 207. The same case indicated that any "backdoor method" around the Dover Amendment is invalid. Id.

The warrant article provides that as part of the zoning change the developer execute a deed restriction or covenant running with the land which would be recorded and which would prohibit transfer of the property to a tax exempt entity. The specific language of the article is:

The owner of the Lot shall deliver to the Town of Brookline a recordable instrument benefitting the Town of Brookline which provides that the owner of the Lot, its successors or assigns, shall continue to pay property taxes or an equivalent amount in lieu of taxes with respect to the Lot and the improvements thereon, or another agreement providing for payment of an equivalent

amount to the Town of Brookline, in either case to the satisfaction of Town Counsel and the Board of Assessors.

Article 17 Section I. B. 4 b. 5.

Both Town Counsel and the real estate attorney member the PRT have indicated that they believed it was the developer's responsibility to prepare an effective deed restriction with supporting legal analysis. Accordingly, neither Town Counsel nor the attorney member of the PRT have attempted to craft such a document.

On October 24, 2003, we were provided with a draft deed restriction prepared by the attorney for the developer. This draft provides that the present owner may not convey the property to a tax exempt entity unless that entity agrees to pay the Town an amount equal to the property taxes. It also provides that the Owner and any successors must continue to pay property taxes or an amount equal to property taxes if the property (or a portion) should become tax exempt.

We have not been provided with any citation to legal authority indicating that such a deed restriction or covenant would be enforceable. We have not been provided with a single example of any instances in which such a restriction was upheld by a Massachusetts Court. As noted above, the language of Chapter 40A § 3, together with the large body of case law strongly indicates that any such restriction would be invalid and unenforceable. Town Counsel advised our Sub-Committee that in his opinion the document provided by the developer would not be effective or enforceable. Our Committee has not been provided with any further proposed documents from the developer, much less any legal analysis with citation to authority, supporting the effectiveness of such a deed restriction.

It has been suggested by the real estate attorney member of the PRT that prior case law may be distinguished on the basis that those cases dealt with situations where an attempt was made to restrict non-profits after they already owned or controlled a site as opposed to a situation where a non-profit does not presently own the site. The Sub-Committee finds no support in the case law for drawing such a distinction and does not believe this difference would change the outcome.

The proposed deed restriction was accompanied by a draft opinion letter dated October , 2003, from Attorney William S. Bonaccorso, which states that "once the Agreement is validly executed and recorded ...the obligations created therein will from a title perspective be binding on the current title holder and its successors and assigns." Mr. Bonaccorso's letter does not address, however, whether the restrictions are unenforceable as a result of the Dover Amendment. In fact, his letter explicitly excludes consideration of such issues, "The opinions expressed below are qualified to the extent that the validity or enforceability of the Agreement or any of the rights granted to any party to the Agreement may be subject to or affected by duties and standards imposed by statutory or decisional law on parties to contracts....The opinions hereinafter expressed are further qualified in that certain provisions of the Agreement may, under

applicable law, not be enforceable in accordance with their terms, but the possible unenforceability of such provisions does not impair, subject to the other assumptions and qualifications set forth herein, the validity or substantial enforceability of such Agreement.” Town Counsel advised us that he agrees that this letter does not address Dover Amendment issues.

Mr. Bonnacorso’s letter provides no citation to any specific provision of Massachusetts statutory law or to any Massachusetts court case which allegedly support his conclusions. There is nothing contained in Mr. Bonnacorso’s letter which leads our Committee to conclude that the draft property restriction provided would be enforceable.

Town Counsel has suggested that if the developer were to convey title to the property to the Town, then the Town could lease the property back to the developer. He believes this might allow the Town to continue to collect tax payments even if the lease were subsequently transferred to a non-profit entity. See Mass. Gen. Laws Ch. 59 § 2B. Alternatively, it has also been suggested that it might be possible to craft an arrangement where the lease payments included an amount equal to taxes. Town Counsel suggests this might be accomplished in conjunction with the Town’s Re-Development powers pursuant to Mass. Gen. Laws Ch. 121A. He also advised us that approval of Home Rule legislation would be required to allow the Town to execute a 99 year lease on the property. Town Counsel believes, however, that approval of such legislation by the General Court would not be difficult. Town Counsel has recently suggested that the Town might be able to use its Re-Development authority under Ch. 121A to restrict transfer to a tax exempt entity (or continue to require payments) even if the Town did not acquire title to the property.

Most of Town Counsel’s suggested approaches could not be utilized, however, unless the owner conveys title to the property to the Town of Brookline. To date the owner has expressed no willingness to convey title to the Town. Moreover, unless title was conveyed prior to Town Meeting, there would be no way to force conveyance of title after this Article is approved. Additionally, as we are zoning an entire site and not just the Two Brookline Place property, even if the developer conveyed title to Two Brookline Place, other developers could, under this article, develop large scale buildings and transfer them to tax-exempt entities. Although we agree that a lease back arrangement might allow us to preserve the revenue stream from the proposed development, this option is unavailable unless title to the property is conveyed to the Town of Brookline.

We are not persuaded that the Town could effectively use its re-development authority under Mass. Gen. Laws Ch. 121A if the owner does not convey title to the property to the Town.

This is a complex statutory scheme, which has not been previously used in exactly this manner. (For examples of the complex issues involved in using this statute, see, for example, Dodge v. Prudential Insurance, 343 Mass. 375 (1961) and Opinion of the Justices, 341 Mass. 760 (1960).) Although we cannot definitely state that this would be impossible, we have not been provided with any specific, detailed, document, using this statute or any legal memoranda citing alleged applicable legal authority.

We can state, however, that the owner has not presented the Sub-Committee or Town Counsel with any proposed deed restriction which would be effective in ensuring a continued revenue stream and that we do not believe that such a deed restriction would be effective.

PUBLIC COMMENT

We have received a significant amount of public comment, on this article, both oral and written. Most of the public comments, including those of four members of the PRT, were negative. Some of these focused on perceived deficiencies in the planning process, others on criticisms of the proposed project itself. We did receive a favorable comment on the article from a member of the Economic Development Board, who felt it was a positive step to promote economic growth. The Board of Trustees of Brook House advised us that they were taking no position on this article. The Riverway Island Neighborhood Association was strongly opposed to the article.

RECOMMENDATION

Our Committee fully supports the need to pursue potential economically viable projects in Town and we see Brookline Place as a likely location for such development. We have been surprised, however, at the rapid time frame within which the proposed zoning changes have needed to be evaluated, the scope of the changes and the methods that have been used to move the proposed project and re-zoning article forward. We are concerned about the content of this Article primarily because this zoning district is such a pivotal piece in the fabric of Brookline Village. We do not believe that enough information and analysis has been developed to allow Town Meeting to make an informed weighing of potential impacts versus anticipated revenue. We believe that should this Article (as originally submitted) pass the Fall Town Meeting, the project will go forward, in substantially its present form (i.e. a biolab of approximately 145 feet and an FAR of 4.0) regardless of any subsequent information developed regarding undesirable impacts.

We are very concerned that there is no legal mechanism identified which would ensure that this property is not conveyed to a tax exempt entity and taken off the tax rolls. We believe there is a real risk of the “flipping” of this property to a tax exempt entity should economic conditions change or any of the developer’s assumptions prove unwarranted. It strikes us that a biolab might be a particularly attractive acquisition for a tax exempt entity.

Finally, we believe that zoning issues should not be project driven, but should be considered in the complete context of Planning issues. This requires consideration of the

potential impact of zoning changes to all affected parcels, not just consideration of a specific project. It also requires consideration of the full range of interests zoning is intended to protect, rather than being solely focused on economic development issues. We are concerned that ad hoc project zoning may set an unfortunate precedent for future development. This is particularly important as what is done with this parcel may set a precedent for a future request for zoning relief at 10 Brookline Place.

It was clear that prior to the Board of Selectmen's vote to refer back to the Planning Board, a number of our members were prepared to vote No Action on this article (which had been the recommendation of our Planning and Regulation Sub-Committee) based on the concerns expressed above. We have not taken a vote on the original article, however, so we can not report what our vote would have been had an up or down vote on that article been the only choice. Instead, we voted on the language of the Selectmen's motion to refer this article to the Planning Board. Specifically, we voted whether:

"To refer the zoning amendments proposed in Article 17 to the Planning Board for study and a report to a future Town Meeting."

A substantial majority of our Committee believed that more time to consider these significant zoning changes was warranted. It is our hope that additional time will allow consideration of these changes to be more fully incorporated into our regular planning process, including the Comprehensive Plan; allow for greater public notice and input; and lead to development of more specific information addressing impacts and the other concerns expressed above. Ideally, we would have preferred to see consideration delayed at least until the Annual Town Meeting in May. Nonetheless, we believe that the additional time proposed will not put Town Meeting in any worse position to consider these zoning changes and may provide important additional information.

Accordingly, by a 17-3 margin the Advisory Committee voted **FAVORABLE ACTION** on the vote offered by the Selectmen.

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ARTICLE 17

SELECTMEN'S REPORT ON REFERRAL OF ARTICLE 17 TO THE PLANNING BOARD

The Selectmen have requested a referral of Article 17 for a future Town Meeting. We expect the zoning article to look somewhat different than the current one, as we will continue working with the PRT and others to refine the project scope and clarify ambiguities. At the moment, we expect that the major elements of a zoning change we will seek include:

- Increase in height and FAR from the current 100 feet/2.5 FAR allowed, with clearly articulated public benefits including a minimum of 60% of the parking underground, 20% of the site public open space, 25% of the parking available to residents overnight, and 1% of project costs to off-site improvements. We are, of course, reviewing these elements for further refinement.
- Parking requirements adjusted to reflect transit access and incentives.
- Expansion of our permitted uses in Town to include Level 1 and 2 laboratories, if and only if the Director of Public Health and the Fire Chief review the use and agree to its safety for each proposal, as part of a special permit process.

Referral at this Town Meeting will allow us time to refine elements of the proposed zoning change and provide answers to important questions raised by TMMs and neighbors. We do not believe we are ready to ask your support for the zoning change now, but want to keep the door open for the change which could offer the Town ultimately the following benefits:

- New urban open space in Brookline Village.
- Improvements to the T stop.
- Increased vibrancy to Brookline Village with new foot traffic to small businesses in the Village.
- A new gateway to the Town with new trees and an attractive building and plaza designed by a world-class architect.
- Significant new tax revenue, estimated by our Assessor's Office at between \$800,000-\$1.2 million/year in net new taxes.

We hope you will support referral to allow us time to develop this proposal, and that you will work with us over the next few months to make this project broadly attractive to the community. Please vote YES on the motion to refer Article 17 to the Planning Board for consideration at a future Town Meeting.

ARTICLE 18

EIGHTEENTH ARTICLE

To see if the Town will:

- A. Adopt a higher maximum qualifying gross receipts amount of forty thousand dollars, for the purposes of the elderly exemption in General Laws, Chapter 59, Section 5, Clause 41A;
- B. Accept the provisions of General Laws, Chapter 59, Section 5, Clause 17E, that allows annual adjustments, equal to increases in the consumer price index, for clause 17, 17C, 17C1/2 and 17D exemptions;
- C. Accept the provisions of General Laws, Chapter 59, Section 5, Clause 41D, that provides annual adjustments, equal to increases in the consumer price index for the gross receipts and whole estate limitations set forth in Clause 41, 41B and 41C exemptions;

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

Article 18 helps address a very important concern: the ability of elderly residents to pay their tax bills. This is a statewide issue that has started to be addressed, but, unfortunately, not to the extent we would like to see. The State has offered the tools that are being recommended in this article in an effort to help alleviate the problem of elderly residents who are finding an ever increasing portion of their fixed income being absorbed by taxes. If approved, annual cost of living adjustments (COLA's) would be applied to the income and/or asset thresholds currently in place for certain tax exemptions, and the income limit for the existing tax deferral would be doubled.

While the adoption of COLA's and the doubling of the income limit for the deferral will not, unfortunately, result in a major increase in the number of those who could take advantage of the exemptions/deferral, it is a great step forward to help the Town's elderly residents who may be having difficulty affording their tax bills. There are two exemptions and one deferral currently available to residents who meet certain criteria, as outlined below.

Exemption #1 MGL Ch. 59, Sec. 5, Clause 17D

- Age = 70
- Assets = \$40,000 (excluding residence)
- Must have owned and occupied the property for at least five years.
- Exemption amount = \$175, which is doubled annually by a vote of Town Meeting.

Exemption #2 MGL Ch. 59, Sec. 5, Clause 41C

- Age = 70
- Income = \$13,000 (single) / \$15,000 (married)
- Assets = \$28,000 (single) / \$30,000 (married), both exclusive of residence.
- Must have lived in the state for at least the past 10 years.
- Must have owned property in the state for at least the past five years.
- Exemption amount = \$500, which is doubled annually by a vote of Town Meeting.

Deferral #1: MGL Ch. 59, Sec. 5, Clause 41A

- Age = 65
- Income = \$20,000
- Must have owned property in the state for at least the past five years.
- Deferral = 100% of taxes, at 8% simple interest.

If approved, the COLA's would be applied annually to the \$40,000 asset limit for the Clause 17D exemption; to the \$13,000 and \$15,000 income limits for the Clause 41C exemption; and to the \$28,000 and \$30,000 asset limits for the Clause 41C exemption. The \$20,000 income limit for the Clause 41A exemption would be doubled to \$40,000. The COLA would be determined by the Commissioner of Revenue of the State and would be based on the consumer price index for urban consumers (CPI-U) during the previous calendar year. (For FY04, the COLA would have been 3.58%.) To show how this works, the example below is based on the \$40,000 asset limit for the Clause 17D exemption (the 2.5% COLA is used for illustrative purposes):

Year 1: $\$40,000 \times 2.5\% = \$41,000$

Year 2: $\$41,000 \times 2.5\% = \$42,025$

Year 3: $\$42,025 \times 2.5\% = \$43,076$

This would continue for each year thereafter. The COLA has the effect of protecting those who currently qualify for the exemptions against inflation, and may also, after a couple of years, enable other elderly residents to qualify.

The Clause 41A deferral is a powerful tool available to residents. However, the current income limit of \$20,000 disqualifies many who may want to take advantage of it. Simply put, if a resident chose to use the 41A deferral, his/her taxes would not be paid until the house is sold on the market or passed along to his/her heir(s). At that point, the taxes owed to the Town are paid. It gives those who qualify the ability to use the income that would otherwise go toward paying taxes for other essentials, such as groceries, medical bills, and utility bills – all of which are increasing.

The Board fully supports this initiative and hopes that our elderly residents are able to realize some relief as a result of them. We recommend **FAVORABLE ACTION**, by a vote of 5-0 taken on September 23, 2003, on the following vote:

VOTED: That the Town:

- A. Adopt a higher maximum qualifying gross receipts amount of forty thousand dollars, for the purposes of the elderly exemption in General Laws, Chapter 59, Section 5, Clause 41A;
- B. Accept the provisions of General Laws, Chapter 59, Section 5, Clause 17E, that allows annual adjustments, equal to increases in the consumer price index, for clause 17, 17C, 17C1/2 and 17D exemptions;
- C. Accept the provisions of General Laws, Chapter 59, Section 5, Clause 41D, that provides annual adjustments, equal to increases in the consumer price index for the gross receipts and whole estate limitations set forth in Clause 41, 41B and 41C exemptions;

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article was submitted by the town's Administration staff after researching different measures which the town could take to offer property tax relief to senior citizens. It contemplates three measures which offer assistance to elderly taxpayers at a modest cost to the rest of the town's taxpaying residents. The article has the support of the Board of Assessors and the Council on Aging.

DISCUSSION

The first clause of Article 18 pertains to the 41A exemption, one of three basic forms of relief available through Section 5 of MGL Chapter 59. The 41A exemption permits the deferral of property taxes. Currently, taxpayers 65 years of age or older who live in their own homes, who have lived in Massachusetts for at least the past ten years, who have owned property in Massachusetts for at least the past five years, and who have a gross income of not more than \$20,000, may defer all of their property taxes at 8% simple interest. The town collects the taxes when the property is sold. Article 18 would increase the maximum gross income level to \$40,000. There are currently seven residents who use this provision.

The second clause of the article would increase the asset limitation of the 17D exemption. This \$175 exemption is available to property owners who have owned and occupied the property for at least five years and who are 70 years of age or older, the surviving spouse, or minors with deceased parents. The exemption now imposes an asset limitation, excluding the residence, of \$40,000. Article 18 asks that the town adopt Cost of Living Adjustments for the asset limit. There are 13 residents who file and qualify for the 17D exemption which is paid for out of the Overlay account.

The third clause of Article 18 addresses the 41C exemption. Under current provisions, residents 70 years of age or older with an income of \$13,000 or less if single and \$15,000

or less if married and with assets (excluding residence) of \$28,000 or less if single and \$30,000 if married, who live in their own homes, have lived in Massachusetts for at least the past ten years and have owned property in Massachusetts for at least the past five years, qualify for a maximum \$1000 reduction of their property taxes. Article 18 asks that an annual Cost of Living Adjustment be applied to both the income and asset limits for 41C exemptions. There are currently six residents who file and qualify for the 41C exemption which is paid for out of the Overlay account.

RECOMMENDATION

The Advisory Committee believes that this article reflects a balanced approach between providing assistance in the form of tax relief to qualified elderly residents in the town without imposing a burden on the rest of the property taxpaying public and unanimously (17-0) recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

XXX

ARTICLE 19

NINETEENTH ARTICLE

To see if the town will abolish the refuse fee, for both commercial and residential refuse collection, first instituted in FY 1989, on a date specified by Town Meeting, or act on anything relative thereto.

Homeowners in neighboring communities obtain a tax deduction on their Federal Income Tax for paying their Real Estate Tax which pays for their public sanitation costs. Brookline discards this deduction with respect to sanitation by billing a "Fee" for "Refuse Disposal". "Fee's" are not tax deductible.

Further, the 15 year old "Refuse Disposal Fee" has extra costs in labor, paper, postage and complexity. For example, 266 citizens who did not pay the "Fee" had their unpaid "Fee" added to their Real Estate Tax. Tax simplicity suggests returning to the conventional Real Estate Tax for this Town service just as it is done in most neighboring communities and just as was our practice before a "temporary" change was fabricated in 1989. 15,600 home owners would simply pay 4 quarterly bills; not 8. This proposal does not change anything but the billing system. The result: a tax deduction for home owners and reduction in costs of billing.

MOTION TO BE OFFERED BY THE PETITIONER

The Selectmen and the Advisory Committee both voted **NO ACTION** on Warrant Article 19 for the November 2003 Town Meeting.

Therefore, it is necessary for me to make a motion to bring the issue to the floor of Town Meeting.

I have communicated with the Moderator and we agree that the following wording of my motion would be acceptable:

VOTED: That the Refuse Disposal Fee be abolished by reducing the \$2,100,000 it requires each year by one quarter (\$525,000) each year beginning in FY 2004 and continuing to FY 2007.

SELECTMEN'S RECOMMENDATION

This petitioned article calls for the elimination of the \$165 annual Refuse Fee. If eliminated, the Town would lose \$2.1 million in revenue. Brookline is one of more than 120 communities that charge an additional fee for sanitation services. These charges come in three types:

1. Flat annual fee for curbside pick-up;
2. Flat annual fee for transporting waste to the transfer station for dumping;
3. "Pay-As-You-Throw" (PAYT) programs, which charge residents for each bag used.

Brookline's refuse fee covers not only regular curbside trash pick-up, but also recycling, the pick-up and disposal of "white goods", and the collection of yard waste. Many private haulers do not offer these additional services.

If eliminated, in order to balance the Town budget, the Town would need to do one or some combination of the following:

1. Cut \$2.1 million of essential services.
2. Eliminate the entire sanitation operation.
3. Raise \$2.1 million through a General Override of Proposition 2 ½.

The only one of these three options that would actually result in the petitioner's stated goal of being able to realize a federal tax benefit (taxes are deductible, not fees) would be option #3, the General Override. The other two options are simply not realistic: the Town just lost close to \$3 million in Local Aid from the state, so adding another \$2.1 million of cuts would be difficult to absorb. In addition, having every household in town procure refuse removal services on their own would result in a burden on residents, many more trucks driving through neighborhoods, and an overall chaotic set of independent arrangements for trash removal.

The cost of administering the fee is minimal, contrary to the assertions of the petitioner. It cost the Town approximately \$14,400 to administer the fee, a nominal amount for the generation of \$2.1 million. In addition, it should be noted that residents do have the option of opting-out of Town service and hiring a private hauler. History has shown that few homeowners have opted-out of the fee, as the Town's fee is very competitive for the services it covers.

For those reasons, the Board recommends **NO ACTION**, by a vote of 5-0 taken on October 7, 2003, on the article.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This Article seeks to eliminate the refuse fee that has been in effect since FY89 as a means of funding all or a portion of refuse collection operations; prior to that all refuse costs were paid out of the tax levy. The fee was instituted at a time when the town was faced with a 300% increase in refuse disposal costs. It was set at \$150 per household, an amount which remained at that level through FY91. As refuse costs increased, the fee was raised to \$175 for FY92 and to \$200 for FY93-FY94. The 1994 Prop 2 1/2 override included \$460,000 to be applied to refuse disposal costs, enabling the per household fee to be reduced to \$165 where it has since remained.

In FY96 and FY97, this fee covered almost 100% of the town's refuse costs, but as these costs have increased while the fee has remained constant, the fraction of the town's refuse costs covered by the fee has declined to about 2/3. The town currently collects about \$2.1 million in fees from just over 13,000 households; the remainder of the approximately 26,000 dwelling units have arranged for private refuse collection and do not pay the town fee. These are primarily units in multifamily buildings -- condominiums and apartments -- which rely on Dumpsters (which the town does not service) or which require more frequent pickups than the once-weekly town service. Of course, all residential units have the option of using a private service if they choose to do so.

DISCUSSION

The principal petitioner raised several points in speaking for this Article. He claimed that Brookline was unique in Massachusetts in charging a fee for refuse disposal, basing this conclusion on inquiries made to 9 nearby communities. However, State Department of Revenue records show that over 130 Massachusetts communities have some form of refuse collection fees listed as a revenue source. There are over 100 communities, including nearby Lexington, Milton and Needham, which have a "pay as you throw" system where there is a per bag charge. Other communities such as Melrose, Braintree, Brockton, and Attleboro utilize quarterly billed fees similar to or larger than Brookline's. Others charge for dump permits; several use a combination of fees. Brookline is among many other communities with refuse fees and more are being added every year in the face of growing municipal budget deficits.

The petitioner stated that if all refuse costs were included in the property tax levy, property owners would be able to claim increased deductions on their federal income taxes. But having all refuse costs absorbed in the property tax levy wouldn't add a penny to federal tax deductions since we're already being taxed to the Proposition 2 1/2 maximum and hence eligible for maximum legal deductions right now. Unpaid refuse fees are eventually added to the property tax as a lien, but it is unlawful to claim this portion of the tax bill as a deduction. Only a hard-to-envision Proposition 2 1/2 override that increased property taxes to cover refuse costs would result in higher federal tax deductions.

The petitioner further asserted that Brookline was wasting town funds and taxpayers' return

postage costs by mailing out separate quarterly refuse fee bills instead of including them with property tax bills. However, the details of property tax billing are specified under Chapter 60 of the Massachusetts General Laws and by Department of Revenue regulations and do not allow other fees to be included on the property tax bill itself or even mailed in the same envelope (this would be costly to do in any case due to the need to merge data bases, adjust timings, and reprogram billing algorithms). Quarterly refuse billing brings in \$2.1 million and costs the town only about \$14,000; this cost could be reduced if the town changed to annual or semi-annual billing -- but such a change might not be popular with property owners. The return postage costs are minimal and can be avoided by paying in person or on-line; also property owners can pay for the entire year with one check if they prefer to do so. Some other communities using quarterly billing combine their refuse and water/sewer bills; perhaps this possibility should be explored in Brookline to see whether potential savings would justify startup costs.

Finally, the petitioner questioned whether the fact that only about half of the town's residential units are being billed for refuse fees indicates that the billing system is failing, resulting in a lack of equity such that some residents are getting the service for free while others get billed. But there is no evidence of any billing irregularities. The number of bills issued is consistent with the fraction of dwelling units using the town service; those opting out of the town service must provide evidence that they have contracted with a private service for refuse removal. The billing list is updated regularly and has remained stable in size for many years. To the extent that any units are getting town refuse service without paying for it, the obvious remedy is to identify them and bill them rather than to abolish the fee,

If the so-called trash fee were to be abolished, Brookline would essentially have three alternatives:

(1) Pay the entire costs of trash collection out of the tax levy, which is already at the Proposition 2 1/2 maximum. This would require at least \$2.1 million in budget cuts elsewhere to make up for the loss in fee revenue, and the amount of cutting needed would almost surely be even higher since some unknown number of those currently paying for private refuse service would likely switch to the "free" town service, thereby increasing collection and disposal costs to the town.

(2) Eliminate the town's refuse disposal operation altogether, thus avoiding sizable budget cuts but leaving residents to fend for themselves with private companies whose costs and level of service would probably be less attractive than the town's (otherwise residents would be opting for these private services right now). Another unfortunate result of this alternative would be that twenty valued town sanitation workers would lose their jobs.

(3) Make up for the lost fee revenue with a Proposition 2 1/2 override to fully cover refuse disposal costs. This would result in a tax increase -- hence more deductibility -- but it would not be easy to pass such an override since about half of town residents and almost all businesses don't use the town service and would derive no benefit from the override. Also, town refuse costs would likely rise by more than the presumed \$2.1 million override amount as described in (1) above, and so budget cuts would likely still be needed.

RECOMMENDATION

While the Advisory committee welcomes any attempts to achieve a more cost effective way of providing town services, we have found the arguments in support of eliminating the refuse fee to be flawed for reasons that have been explained in detail on several occasions by various town officials over the past year and that are outlined above. Historically, trash collection was one of the core services, along with roads and sewers, that cities found to be necessary to provide for the common welfare, and there is reason to regret the erosion of this sense communal obligation to provide for common needs that occurs when user fees substitute for what was formerly covered by tax funding, the current trash fee being a case in point. However, given the town's current fiscal realities and the severe impact on the town budget that would result if the refuse fee were to be abolished, the Advisory Committee unanimously recommends a vote of **NO ACTION** on this Article.

XXX

November 18, 2003
Special Town Meeting
Article 19 – Supplement No. 1

**MOTION TO BE OFFERED UNDER ARTICLE 19
SHEPARD A. SPUNT – TMM Precinct 14**

VOTED: To refer the abolition of the refuse fee, for both commercial and residential refuse collection, first instituted in FY 1989, to a moderator's committee for investigation and to report to a future town meeting.

EXPLANATION

There is much that is meritorious in Article 19. However, any number of complex questions are raised by this article. In order to investigate in depth the feasibility/ramifications of abolishing Brookline's trash fee, referring to a moderator's committee seems to be a sensible strategy.

November 18, 2003
Special Town Meeting
Article 19 – Supplement No. 3

ARTICLE 19

SELECTMEN’S RECOMMENDATION ON THE MOTION TO REFER ARTICLE 19

The Board of Selectmen chose not to reconsider its vote under Article 19. We believe that a No Action vote on the article is warranted and, that there is no need for a study on the subject matter. Some key points to consider include:

- Brookline cannot afford the loss of \$2.1 million in revenue.
- Brookline is not the only community in the Commonwealth with such a fee. At least 120 cities and towns charge users a fee above and beyond their tax bill – and some do so without even offering curbside pick-up.
- The program is administered fairly and efficiently. The current \$165 rate was set by the voters in the 1994 Proposition 2 ½ Override.
- The only way residents can actually realize the tax benefit the petitioner has referenced is if another Proposition 2 ½ Override is approved by the voters of Brookline to increase the tax levy to offset the loss in fee revenue.

Vote **NO ACTION** on the motion to refer and on the Article as moved by the petitioner.

ARTICLE 20TWENTIETH ARTICLE

To see if the Town will raise and appropriate \$200,000 or appropriate from available funds, a sum of money, to be expended under the direction of the Chief of the Fire Department, with the approval of the Board of Selectmen, for the purpose of retrofitting all Brookline Fire Station apparatus bays, with a 100% encapsulation source capture emergency vehicle exhaust fume removal system.

EXPLANATION

The purpose of this amendment is to retrofit the fire station bays with an encapsulating exhaust fuel removal system to adequately improve the air quality and no longer subject the firefighters to the diesel fumes emitted by the apparatus.

SELECTMEN'S RECOMMENDATION

This petitioned article requests \$200,000 for the retro-fitting of all Brookline Fire Station apparatus bays with a 100% encapsulation source capture emergency vehicle exhaust fume removal system. The current system consists of a series of automatic fans that activate when the overhead doors are opened. This system is approximately 10 years old and served its purpose; unfortunately, it is now considered by many Fire and Health professionals to be obsolete. The system operates on the premise that all diesel exhaust contaminants will be exhausted to the outside.

Two air quality tests have been conducted at Brookline fire stations in this calendar year. The first was requested by Local 950 and was conducted by the Commonwealth of Massachusetts' Division of Occupational Safety. The results of this test revealed that diesel contaminants spread throughout the building when the fire trucks were started. The Building Department made several required repairs which met state requirements but did not resolve the situation. The second test, requested by the Town, was conducted by FLI Environmental Co. The results of this test indicated that additional measures were warranted.

Both reports indicate that the situation could be greatly improved by the installation of "source capture vehicle exhaust systems". The Commonwealth's report also states that "diesel exhaust contains 30-100 times more particles than gasoline exhaust"; "exposure to diesel and gasoline exhaust in fire stations should be reduced to the lowest possible level"; and "flexible hoses attached to the vehicles exhaust pipes and venting directly to the outside are the most effective methods of removing exhaust and minimizing accumulation in the fire station".

The fact that no report or agency supports the exhaust fan methods that we currently use indicates that the current system is outdated. In addition, the fact that the large majority of

Metro Boston Fire Departments use the "source capture", or Plymovent, systems is indicative of industry standards and the move to cleaner, healthier work environments. Therefore, the Fire Chief, as part of his FY05 Capital Improvement Program (CIP) submission, requested \$200,000 for this system.

The Town Administrator intends to include \$200,000 in the FY05 CIP for the "source capture" system. As a result, the Selectmen recommend **FAVORABLE ACTION**, by a vote of 3-0 taken on October 14, 2003, on the vote offered by the Advisory Committee.

ROLL CALL VOTE:

Favorable Action

Goldberg

Hoy

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Warrant Article 20 results from a petition filed by a firefighter Paul Canney, who is at Fire Station 1 in Brookline Village, seeking \$200,000 to be expended by the Chief of the Fire Department with the approval of the Board of Selectmen, to retrofit all Brookline Fire Station apparatus bays, with an encapsulation vehicle exhaust system.

DISCUSSION

Presently, we have large exhaust fans that are supposed to move all the fumes and residue from the diesel fire trucks and any other vehicles that are in the apparatus bays to the exterior of the fire stations. Fireman Canney and other firefighters stated that the fans are not taking all the exhaust out of the building and that in areas where the firefighters sleep and eat (often right above the apparatus bays) they get a considerable amount of fumes and black residue on the walls. We also presently have gaskets around some of the fire poles, but other poles were not suitable for the gaskets and they only have a plywood cover for the opening that pulls up and which does not keep out exhaust fumes.

The vast majority of cities and towns in Massachusetts have the Plymovent Vehicle Exhaust System in which pliable hoses attach directly of the exhaust pipes of the fire trucks and pull the exhaust to the outside of the building. Our system of large exhaust fans was installed in 1993. At that time, Chief English, the former Fire Department Chief, and the Building Department looked at the Plymovent system which was then fairly new. They decided to go with the exhaust fans because some towns were having maintenance problems with the Plymovent system, in particular with breaking hoses. Since then many more towns and cities have moved to Plymovent and the system has improved.

Recently, in response to complaints from Brookline Firefighters, the Massachusetts Department of Labor & Industries tested the air quality in one or more substations and found air quality to be below its standards. The Building Department made some adjustments to the exhaust system and hired an independent company to retest. Some of the air quality problems are persisting and need to be addressed. The Division of Occupational Safety recommends a closed system with

hoses, like the Plymovent system, as does the association of Fire Chiefs. No one recommends the exhaust fans, such as our present system. Our Town Garage presently has a closed hose exhaust system for working on trucks and cars indoors.

A Captain at the Andover Fire Department says that they were the first in the state to get the Plymovent system and they have had some problems with the sensors that determine when the hose should automatically release from the exhaust pipe. His understanding is that nearby Towns with newer versions of the system haven't had the same problems. This problem with the sensors has necessitated fairly frequent repair/maintenance calls to Air Cleaning Specialists, the company that sells the Plymovent systems, repairs are usually covered by the warranty. Even with the problems, however, the Captain thinks the system is worthwhile and has noticeably reduced the deposits on the walls and exhaust in the air when it is in good repair. Andover is building a new station and intends to install Plymovent in the new station.

Deputy Chief Rizzo of Needham indicated that Needham just got Plymovent 2 or 3 years ago and that, "it was the best thing we ever did." It makes a big difference in air quality in the station houses and greatly improves the safety of the firefighters who spend a substantial amount of time breathing the air there. They have had an excellent relationship with Air Cleaning Specialists and have had no problem with the sensors. They have had occasional problems with the hoses, mostly with small sections getting breaks due to human error in putting them in the places where they shouldn't be put. However, the company gave them some extra hose then they installed the system and often the Town's own mechanics can fix the problem. Otherwise, Chief Rizzo calls the company, they come right out and fix things and as far as he knows, they have not billed the Town for any of these repairs.

Both the Andover Captain and Chief Rizzo indicated that the training to use the system is very simple. The firefighters have to remember to take the trucks out of the station slowly so the hoses can disconnect, rather than speeding out as they used to, and they have to remember to reconnect the hoses as the trucks come back in, and finally, the system doesn't work too well if you leave the doors open. Acting Chief Skerry stated that it is already the policy of the Brookline Fire Department to take trucks out slowly for pedestrian safety reasons.

This system is highly likely to significantly improve air quality in the station houses and should be installed as promptly as possible. Acting Chief Skerry believes that the sum of \$200,000 should be sufficient to retrofit all the stations.

RECOMMENDATION

The Advisory Committee by a vote of 12-0 recommends Favorable Action on the following vote:

VOTED: That the Town Administrator place \$200,000, or an appropriate amount of money, on the Capital Improvements Plan for FY05 expenditure under the direction of the Chief of the Fire Department, with the approval of the Board of Selectmen, for the purpose of retrofitting all the Brookline Fire Station apparatus bays with a closed hose vehicle exhaust removal system, subject to the consideration of the Annual Town Meeting in May 2004.

XXX

ARTICLE 21

TWENTY-FIRST ARTICLE

To see if the Town will amend that portion of the Town By-Law concerning the Preservation Commission and local historic districts, Sections 5.6.3 through 5.6.10, by adding thereto Section 5.6.11 as follows:

“Section 5.6.11 Review Procedures

- (a) Any person aggrieved by a determination of the Preservation Commission may, within twenty (20) days after the filing of the notice of such determination with the Town Clerk, file a written request with the Commission for review by a person or persons of competence and experience in such matters, designated by the Regional Planning Agency of which the Town is a member. If the Town is not a member of a Regional Planning Agency, the Commonwealth’s Department of Community Affairs shall select the appropriate Regional Planning Agency.
- (b) The Preservation Commission shall, promptly following the filing of a determination by the Preservation Commission with the Town Clerk, notify in writing the applicant and all persons notified by the Commission with respect to the applicant’s application of the filing of such determination, such notice to include review procedures pursuant to this By-Law and G.L. Chapter 40C available to a person who may be aggrieved by such determination.”

or act on anything relative thereto.

“The language in subsection (a) of the proposed Section 5.6.11 tracks the language contained in § 12 of G.L. Chapter 40C, permitting for a form of review of a determination by the Preservation Commission that does not involve a court, which can be less formal, less time consuming and less expensive than a review by a court. (A review by a court would remain available to an aggrieved party under § 12A of Chapter 40C.)

“The language in subsection (b) of the proposed Section 5.6.11 provides for prompt notice from the Preservation Commission to interested persons of a Commission determination so that a person aggrieved by such a determination will become aware thereof on a timely basis to consider a review thereof that may be available pursuant to the By-Law and Chapter 40C. This notice procedure is similar to a notice requirement in connection with the filing of a Zoning Board of Appeals decision with the Town Clerk, except that (1) the Preservation Commission, not Town Clerk, would provide such notice and (2) the review procedures available would be included in the notice.”

Report of the Brookline Preservation Commission

A request to modify the Local Historic District Bylaw has been introduced for Town Meeting, as Article 21. It would require the Town add the provision allowed under M.G.L. Chapter 40C, Section 12 that provides an additional method of appeal of decisions made by the Preservation Commission under the Local Historic District By-Law. As of now, the only course of appeal for Brookline is for a “person aggrieved” to go to the Superior Court sitting in equity for the county in which the city or town is situated, as per Section 12A.

The proposed new grievance procedure would permit any “person aggrieved” to appeal to “a person or persons...designated by the regional planning agency of which the city or town is a member.” This would be the Metropolitan Regional Planning Council (MAPC). This procedure has been adopted in only a few municipalities in the Commonwealth, including the City of Newton.

Under the 40C and the present by-law language, the Superior Court’s review is not limited to procedural issues. It can rehear the case in total. Under the proposed amendment any “person aggrieved” would have the option of having a comparable new hearing based on the Brookline Preservation Commission’s published guidelines before the MAPC, and then a second new hearing in Superior Court, in effect granting two opportunities and two venues for a rehearing.

Under 40C a “person aggrieved” can be the applicant, any abutter within 100 feet of the property and within the district, or any charitable corporation within the state whose purposes is historic preservation of structures.

The proposed warrant article includes a second part (B) that requires notification of the commission’s decisions be sent to all persons originally notified as a result of an application for a Certificate of Appropriateness in a local historic district. This notification requirement would even include the routine “10 day letter” procedure in which no hearing is held if abutters do not object. This provision is not required by MGL Chapter 40C and would entail a substantial additional administrative burden as notice of every decision by the commission would have to be mailed to the abutters and abutters of abutters, even if there were no concerns or objections raised in connection with the case.

At its regularly scheduled meeting on October 7, 2003, the Preservation Commission voted separately (1) to recommend “No Action” on the Warrant article as a whole and (2) to recommend that, even if Town Meeting were to adopt the provisions of MGL 40C Section 12, there be “No Action” with respect to the additional notification provision included in section B of the Warrant Article.

The following is an explanation of the appeals based upon information provided by the MAPC.

PROCEDURES FOR HOLDING AN HISTORIC DISTRICT APPEAL

BACKGROUND

State law (M.G.L. Chapter 40C Section 12) provides that " a city or town may provide in its ordinance or by-law... for a review procedure whereby any person aggrieved by a determination of the commission may, within twenty days after the filing of the notice of such determination with the city or town clerk, file a written request with the commission for a review by a person or persons of competence and experience in such matters, designated by the regional planning agency of which the city or town is a member. The finding of the person or persons making such review shall be filed with the city or town clerk within 45 days after the request, and shall be binding on the applicant and the commission, unless a further appeal is sought in the superior court".

HOW THE PROCESS IS INITIATED

- 1) **Historic Commission Decision** - An historic commission makes a decision on a matter before it and files the decision as a Record of Action with the city or town clerk. The date of the decision is not the date that the Commission made the decision but the date on which the Commission filed the decision with the city or town clerk.
- 2) **Decision to Appeal** - If the applicant or an abutter objects to the decision, they have 20 days after the filing of the official decision in which to file an appeal. The appeal must be filed with the Historic District Commission, not with MAPC.
- 3) **Notification of Appeal** - Once an appeal has been filed, MAPC will be notified either directly by the Historic District Commission, the party bringing the appeal or the city/town solicitor or historic preservation planner.
- 4) **Filing Fee** - There is a \$100 filing fee for bringing an appeal.

SCHEDULING THE HEARING

1) **Deadline for Hearing** – The deadline is 45 calendar days from the date the appeal was filed. MAPC recommends that the hearing be held at least one week before the deadline so that there is time to write up the decision, fax it to the panelists for review and comment and do a final copy and time to file it with the city or town clerk.

PUBLIC NOTICE

1) **Advertise in the Paper** - There are no legal requirements for advertising these hearings but it has been MAPC policy to publish a legal notice in a local newspaper at least one week before the hearing date.

2) Post the Meeting at City/Town Hall – This is the responsibility of the local commission. Some commissions routinely send notice of an appeal to abutters. This is a policy decision that is up to the commission.

SITE VISIT

MAPC typically holds a site visit at the property (with the property owner’s agreement) in the late afternoon or early evening of the night of the hearing. These site visits usually last about 45 minutes.

HOLDING THE HEARING

The MAPC conducts the hearing by first asking the applicant to make a presentation. The local commission is then asked to respond. Finally, comments from the public are taken. The decision is debated at that time and taken at the hearing. The final decision is filed with the city or town clerk to meet the 45 day review period. Copies are sent to all parties.

SELECTMEN’S RECOMMENDATION

This article, submitted by petition, asks Town Meeting to modify the Town’s Local Historic District By-law by adopting an additional provision for appeal as provided for in Chapter 40C, Section 12. This additional provision would permit a “person aggrieved” to appeal to a body designated by the regional planning agency of which the city or town is a member.” In Brookline’s case, this is the Metropolitan Regional Planning Council (MAPC). As it stands now, any person aggrieved may appeal to the Superior Court for a hearing. This new provision would add an additional road to appeal to the MAPC. It also would require the Town to inform all those previously notified of the LHD hearing of the resolution of the case and the means of appeal.

Although on first impression the proposed amendment to the Town's Historic District By-Law appears to give aggrieved parties a means of resolving disputes out of court, the proposed amendment has more far reaching implications. The proposed amendment would change the burden of proof in establishing that the Preservation Commission acted illegally. In an appeal brought before the Superior Court, the burden is on the aggrieved party to establish that the Preservation Commission's decision was unsupported by the evidence or that the Commission exceeded its authority. MGL, Ch. 40C, Section 12A. However, if the proposed change is enacted, the local determination by the Preservation Commission would, upon an administrative appeal, be replaced by the Decision of the MAPC. The Decision of the MAPC would become the subject of any court review. If the MAPC decision was contrary to the determination made by the Preservation Commission, the Commission and those in support of the Commission’s decision would see the burden of proof and presumptions change. The proposal would, in essence, substitute the Decision of the MAPC for local action and determination and, on appeal to the Court, make it far more difficult to uphold the local determination of the matter.

The Selectmen feel that the system for appeal provided for in the existing Town By-Law is adequate and allows opportunity for a re-hearing. While the Commission does not notify the abutters and abutters of the final resolution, there is opportunity to contact the office for information without the additional burden of re-notification.

The Selectmen recommend **NO ACTION**, by a vote of 4-1 taken on October 21, 2003, on the article.

ROLL CALL VOTE:

No Action

Favorable Action

Goldberg

Sher

Geller

Hoy

Allen

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article requests that the town amend the portion of the Town By-Law concerning the Preservation Commission and local historic districts, Sections 5.6.3 through 5.6.10, by adding Section 5.6.11 Review Procedures.

The first part of Section 5.6.11, (a), would allow Brookline to provide in its by-law a review procedure whereby any person aggrieved by a determination of the town's Preservation Commission could within twenty days after the filing of the notice of such determination with the town clerk, file a written request with the Preservation Commission for a review by person/s of competence and experience in such matters, designated by the regional planning agency of which Brookline is a member. These people would hear the case using Brookline's guidelines. The finding of the person/s making such review would be filed with the Town Clerk within forty-five days after the request and the determination would be binding on the applicant and the commission unless a further appeal is sought in the Superior Court as provided in Chapter 40C, section 12A.

The second part of Section 5.6.11, (b), concerns subsequent notification of anyone who was initially notified that the Preservation Commission was going to discuss and consider a request from a property owner. The petitioner would like every decision reported to these same homeowners and wants to ensure that clear information is provided on how to appeal the Preservation Commission's findings.

DISCUSSION

To date, Brookline has not included the review procedure described above in its by-laws. The petitioner requests that Town Meeting vote to include this option in its by-laws. He stated that at the present time, the only option available to someone aggrieved by a decision of the Preservation Commission is to go to Superior Court and that this process requires a lawyer and could be costly. He feels that this option allows a simpler and less costly option for an aggrieved person and if this problem still can't be resolved in this manner, the option of going to Superior Court still exists.

The Advisory Committee was made aware that Newton is one of only a few municipalities in the Commonwealth to adopt section 12A as described in the preceding paragraph. Laura Kritzer, a Preservation Planner, reported that Newton has not had an appeal in the past year. She reported that concerns usually get settled before the MAPC gets involved.

Dennis DeWitt, speaking on behalf of the Preservation Commission, advised the Advisory Committee that in a local historic district, when an applicant wants to make changes to the exterior of his/her house that are visible to a public way, they have to come to the Commission to obtain a certificate of appropriateness before the Building Department can issue a permit for the intended work. Some requests are so simple that the staff can handle it without sending it to the Preservation Commission for a hearing. He reported that the Preservation Commission is split about whether to support adoption of Section 12A. He also reported Town Counsel's concern that the Town would have to defend any decision by the outside planning council in Superior Court.

Regarding the second part of Section 5.6.11, (b), the Preservation Commission is unanimously opposed to the proposed notification process. The Commission does not feel it is needed and thus, an unwarranted, unfunded burden on staff time.

Although Newton adopted 12A, they do not notify interested parties a second time. They refer anyone who calls to inquire about the appeal process to information available on line.

RECOMMENDATION

Although some members of the Committee find some merit in allowing a lower cost option to a Superior Court appeal, we were not convinced that there is a problem with the present system warranting this change. It does not appear that there is a problem with the work of the Preservation Commission that would necessitate the additional step of changing the By-Laws and allowing an aggrieved party to go to an independent three-person commission. The experience in Newton in the past year does not include a single case that was not resolved by the parties and the Preservation Commission working together. In both Brookline and Newton it appears that this is not a big problem and that both Preservation Commissions work very hard to reach amicable decisions that all parties can live with. Going to Superior Court still remains an option for anyone who is aggrieved.

We also did not find any evidence of a problem that would justify the additional burden of the proposed change in the notice requirements.

The Advisory Committee unanimously (20-0) recommend **NO ACTION** on this article.

As a footnote, the Advisory Committee would like to encourage the Preservation Commission to be sure that the appeal process is clear to all interested parties and that citizens of Brookline are aware of the entire process should they want to appeal a decision of the Preservation Commission. Internet access describing the entire process via the Town web site would be optimal.

XXX

ARTICLE 22

TWENTY-SECOND ARTICLE

To see if the Town will amend the By-Laws of the Town of Brookline by adding to the end of SECTION 4.2.9, SELECTMEN'S REPORT, the following additional sentence:

It shall also contain an accounting of the townwide traffic calming program, including: (a) the manner of expenditures of prior years' appropriations; and (b) the current status of each pending request and project.

or act on anything relative thereto.

For at least two years, in spite of repeated annual appropriations by Town Meeting, the townwide traffic calming program has been stalled, due in part to difficulties filling one particular vacant position in the Transportation Department. In the meantime several neighborhood requests for traffic calming, all in specific areas perceived by citizens as significant safety hazards, sometimes especially to children, have been languishing unheard and without any action. In the vicinity of Coolidge Park, where cars routinely speed in immediate proximity to many areas of entrance and egress, often with views obstructed by trees and shrubs, Petitioners' repeated requests, beginning in the summer of 2001, for action by the Transportation Board have proven fruitless. Last February, four Park & Recreation Commissioners who served as representatives to last year's Coolidge Park Design Review Committee wrote a letter saying that they "share the concern of the neighborhood that the configuration of the park relative to the traffic patterns makes it a very significant hazard especially for children" and that they "strongly endorse" the Coolidge Park neighborhood's traffic calming request.

Since Town Meeting decisively voted in 2000 to seek authority to effectuate transportation policy, but the Board of Selectmen disagreed and helped defeat the Home Rule legislation sought by the vote of Town Meeting, it seems fair to now mandate accountability and oversight by the selectmen, with the specific hope for some significant progress towards appropriate traffic calming measures where needed for public safety.

SELECTMEN'S RECOMMENDATION

Article 22 is a petitioned article that, as originally proposed, would have required that the Selectmen's section of the Town's Annual Report include an accounting of the townwide traffic calming program and the current status of each pending request and project. After reviewing the

article with the petitioner, it was determined that this could be accomplished without an amendment to the Town's By-Laws.

The proposed resolution urges the Selectmen to have the Commissioner of Public Works publish a quarterly update on all traffic calming projects. The Town's robust website (townofbrooklinemass.com) is a perfect place to publish this update so all residents can view it. For those without Internet access, the update will be available at the Engineering and Transportation Division office on the fourth floor of Town Hall. The resolution also urges that the next Annual Report, and all those following, include a section within the DPW report that details the status of all traffic calming projects.

The Board appreciates the efforts of the petitioner and town staff that resulted in this resolution. By a vote of 3-0 taken on October 14, 2003, the Selectmen recommend **FAVORABLE ACTION** on the following vote:

VOTED: That the Town adopt the following resolution:

RESOLVED: this Town Meeting urges: (1) that the Board of Selectmen direct the Commissioner of Public Works to publish, on a quarterly basis, an update on all traffic calming projects; and (2) further, beginning with the 2003 Annual Report which is to be published in the Spring of 2004, that the Commissioner of Public Works shall include a section that details the status of all traffic calming projects in the DPW report.

ROLL CALL VOTE:

Favorable Action

Goldberg

Hoy

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 22 requires the Town to publish information about the town wide traffic calming program in the Annual Report. The information would include the manner of expenditures of the prior years' appropriation as well as the current status of each pending request and project.

The petitioner notes that while there have been appropriations for traffic calming by Town Meeting in the last two years, the traffic calming program seems to have stalled. He believes this

article will help shed both light and heat on the subject. There is currently \$350,000 appropriated for traffic calming projects.

DISCUSSION

The Town receives more requests for traffic calming each year than can possibly be listed in the Annual Report – not to mention that year-old information runs the risk of being stale rather than informative. The Annual report is fast becoming so large and complicated that placing more information on traffic calming requests does not assist the people interested in potential projects.

It should be mentioned that there are several reasons that the pace of traffic calming projects has slowed. While many citizens perceive traffic in their neighborhoods as a significant safety hazard, and are eager to begin projects, others claim that traffic calming plans installed in their neighborhoods, after lengthy input, were totally unsatisfactory. They maintain the neighborhood, not the general public, is subjected to the major problems with the traffic calming approach. Anecdotal evidence can be gathered on either side. But, it points to the complexity of traffic calming. The Transportation Department stated that merely installing raised sidewalks or speed bumps is not the solution. These things must be properly spaced and configured. In some cases neckdowns may be useful. Whatever the approach, traffic calming projects are not a panacea and must be done cautiously.

Another reason for the slowed progress in traffic calming projects is that there has been difficulty in filling a vacant position in the Transportation Department. That position has just recently been filled.

One solution may be to publish all traffic calming projects on the Town website. This could include two years worth of information. The first year could include both the priority and status of each project determined by the Transportation Department, and in the second year out the priorities. Priorities are based on location, number of requests, engineering issues, community involvement and need. This information would be available to all residents twenty-four hours a day, seven days a week. People without computer access could receive a copy of the web page directly from the Transportation Department.

According to the Transportation Department this would alleviate many phone calls and represents an acceptable solution for the department.

RECOMMENDATION

In considering what it would take to qualify, quantify and publish an appraisal of all pending requests and projects, the Advisory Committee was not convinced this was a workable or reasonable approach. The Committee did appreciate the desire to have access to timely information and the petitioner's desire to use this process as a prod. However, we found the wording to be such that it would create a counter-productive burden on the department. We, therefore, could not support it. However, we believe we have a more productive approach.

The Advisory Committee recommends (11-6) **FAVORABLE ACTION** on the following vote:

RESOLVED: this Town Meeting urges: (1) that the Board of Selectmen direct the Commissioner of Public Works to publish on the Town webpage, in a timely manner, an update of all traffic calming projects; and (2) further, beginning with the 2003 Annual Report which is to be published in the Spring of 2004, that the Commissioner of Public Works shall include a section that details the status of all traffic calming projects in the DPW report.

XXX

November 18, 2003
Special Town Meeting
Article 22 – Supplement No. 3

ARTICLE 22

SELECTMEN'S RECOMMENDATION ON ARTICLE 22

The Board of Selectmen reconsidered the vote originally taken under Article 22 and chose to support the language offered by the Advisory Committee by a vote of 4 – 1.

ROLL CALL VOTE

Favorable Action

Goldberg
Hoy
Allen
Sher

No Action

Geller

ARTICLE 23

TWENTY-THIRD ARTICLE

To see if the town will amend the By-Laws of the Town of Brookline by renumbering Articles 8.17 through 8.24, inclusive, to Articles 8.18 through 8.25, inclusive, and by adopting a new Article 8.17, to read as follows:

ARTICLE 8.17 FOCUSED RESIDENCE PICKETING

It is unlawful for any person to engage in picketing focused on, and taking place in front of, a particular residence in the town of Brookline. Focused picketing taking place solely in front of a particular residence is prohibited.

or act on anything relative thereto.

SELECTMEN'S RECOMMENDATION

The Town of Brookline has a long history of supporting a woman's fundamental constitutional rights to make decisions about her own body, including the decision whether or not to give birth to a child. Planned Parenthood v. Casey, 505 U.S. 833, Roe v. Wade, 410 U.S. 113 (1973). In FY95, Town Meeting appropriated funds to support increased police security measures at reproductive healthcare centers in Brookline following the tragic murders that took place in two clinics located in Brookline. Those who oppose a woman's right to choose now seek to prevent abortions by engaging in so-called "focused residence picketing," in which protesters picket in front of or about the homes of physicians for the purpose of intimidating and preventing physicians from performing abortions. A. Phelps, "Picketing and Prayer: Restricting Freedom of Expression Outside Churches," 85 Cornell L. Rev. 271, 274 (1999) ("A widespread strategy in this new battlefield is the exposure campaign designed to make life uncomfortable for abortion providing doctors and their families. Such tactics range from the relatively peaceful to outright harassment").

Several physicians who reside in Brookline have been the subject of such focused residence picketing. The physicians' lawyers contacted Town Counsel to request that the Town consider adopting a focused residence picketing ordinance similar to ordinances adopted in communities across the country. See City of Davis, California Municipal Code Section 35.06.020 ("It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual where such picketing is focused on that

particular residence or dwelling”); City of Edina, Minnesota, City Code Section 1065.03 (“Picketing is prohibited in front of, or on or about, any dwelling in the City”).

In Frisby v. Schultz, 487 U.S. 474 (1988), the U.S. Supreme Court expressly held that a municipality may enact an ordinance that bans focused residence picketing. The Frisby case itself involved focused residence picketing in front of the home of a Brookfield, Wisconsin doctor who performed abortions. Id. at 476. Although, as is the case with the proposed By-Law, the legislative history of the Brookfield ordinance suggested that it was intended to prevent the intimidation of physicians who provide abortions, Justice Stevens (joined by Justices Souter, O’Connor, Ginsberg and Breyer) in a more recent case held that so long as a proposed by-law applies equally to all those who would picket outside a particular residence (and not just anti-abortion protesters), such an ordinance was “content neutral” and the ordinance need only be evaluated under the First Amendment to determine whether it places a reasonable time, place or manner restriction on free speech. Hill v. Colorado, 530 U.S. 703, 724 (upholding a Colorado statute making it illegal for any person within 100 feet of the entrance to a healthcare facility to knowingly approach within 8 feet of any other person without that person’s consent).

Every member of the current U.S. Supreme Court, whether considered conservative, liberal, or moderate, has joined in Justice Brandeis’ view that the “right to be left alone is the most comprehensive of rights and the right most valued by civilized men.” Id. at 716-717 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)). “The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings.” Id. at 717 (citing Frisby). Although the Supreme Court has jealously guarded the right to protest, see New York Times v. Sullivan, 376 U.S. 254, 270 (1964), it has clearly held that “the protection afforded to offensive speech does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.” Hill, supra at 716 (citing Frisby).

Focused residence picketing, including picketing outside the homes of physicians who work in women’s reproductive healthcare centers, is precisely the type of speech that is so intrusive that a municipality may enact a reasonable by-law to regulate or prevent it. Focused residence picketing has been used in Brookline to harass the children of healthcare providers in their own homes and to cause physicians to fear for their safety while at home.

The purpose of the proposed By-Law is two-fold: (1) to protect a woman’s fundamental Constitutional right to choose by helping to ensure that abortion services will be available within the Greater Boston area; and (2) more fundamentally to protect all citizens, regardless of their profession or point of view, from unwelcome speech in the privacy of the homes. Id. at 717.

The proposed By-law is narrowly drawn and its text has been expressly upheld by the U.S. Supreme Court. Id. at 717 (citing ordinance forbidding picketing in the home and its immediate surroundings). See also Veneklase v. City of Fargo, 248 F.3d 738, 740 (8th Cir. 2001) (relying on Hill and Frisby to uphold a Fargo ordinance prohibiting picketing

“in front or about any premises”). The proposed By-law only restricts speech in front of or about a particular residence within the Town. The By-law allows picketing in all other parts of the Town and provides ample outlets for protest, whether regarding abortion, union-related issues, or any other issue for that matter. The only place in which picketing is restricted is in front of about a particular residence in Brookline. The by-law is not only constitutional, but it is good policy. It protects all Brookline residents from being targeted from picketing while at home, while preserving the rights of protesters to exercise their First Amendment speech rights in a reasonable manner and at reasonable times and locations within our Town.

Therefore, the Board of Selectmen recommends **FAVORABLE ACTION**, by a vote of 5-0 taken on October 7, 2003, on the following vote, which modifies the original proposal so that corner residential lots and residential lots with frontage on more than one street are protected under the by-law.

VOTED: That the Town amend the By-Laws of the Town of Brookline by renumbering Articles 8.17 through 8.24, inclusive, to Articles 8.18 through 8.25, inclusive, and by adopting a new Article 8.17, to read as follows:

ARTICLE 8.17 FOCUSED RESIDENCE PICKETING

It is unlawful for any person to engage in picketing focused on, and taking place in front of **or about**, a particular residence in the town of Brookline. Focused picketing taking place solely in front of **or about** a particular residence is prohibited.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 23 proposes to amend the Town's by-laws to include an Article 8.17 which would make it “unlawful for any person to engage in picketing focused on, and taking place in front of, a particular residence in the town of Brookline...” It would only ban picketing of single residences, not of neighborhoods or places of business.

DISCUSSION

This Article was filed by Town Counsel on the request of several residents who have had their homes specifically targeted by pickets in the past. The picketing of an individual home is known as “focused picketing.” Police Chief Daniel C. O’Leary reports that past incidents in Brookline have included the picketing of the homes of several doctors

identified as having performed abortions; the owner of a pharmaceutical company; and, most recently, the threat to picket the home of a member of the board of directors of a company that was involved in a labor dispute.

In 1988, the US Supreme Court expressed the opinion that “the devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.” Frisby v. Schultz, 487 U.S. 474, 486 (1988). In that case, the Court upheld an ordinance, which was similar to the by-law proposed in this article, adopted by Brookfield, Wisconsin, for the “protection and preservation of the home.” Id. At 478.

The First Amendment to the Constitution protects freedom of speech in a public forum and, as determined by previous Supreme Court rulings, public fora would indeed include “public streets and sidewalks in residential neighborhoods.” Carey v. Brown, 447 U.S. 455 at 460-461 (1980). However, in Frisby v. Schultz, the Supreme Court does subscribe to a ban with a narrowly-tailored view of picketing. This would be “having the picket proceed on a definite course or route in front of a home.... The picket need not be carrying a sign but in order to fall within the scope of the ordinance the picketing must be directed at a single residence.... General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance.... Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.”

Protesters will still be able to enter residential neighborhoods alone or in groups; they can march through residential neighborhoods; and they can proselytize their views and distribute literature door-to-door or through the mails and by telephone, short of harassment. Therefore, “ample alternative channels of communication are left open,” to meet the First Amendment right to disseminate information to the public. Perry Education Assn. V. Perry Local Educators’ Assn., 460 U.S. 37 at 45 (1983).

The Court held that individuals are not required to welcome unwarranted speech into their own homes and that the government may protect this freedom. They found that picketing targeted at a particular home does intrude on the privacy of the residents of that house, because they are a “captive” audience and cannot avoid the objectionable speech. Frisby, id. at 487.

The Advisory Committee was persuaded that the proposed by-law is narrowly tailored along the lines of what the Supreme Court has said is acceptable that that it does meet a need in Brookline.

RECOMMENDATION

The Advisory Committee by a vote of 13-3 recommends **FAVORABLE ACTION** on the vote offered by the Selectmen.

November 18, 2003
Special Town Meeting
Article 23 – Supplement No. 1

MOTION TO BE OFFERED UNDER ARTICLE 23
VIRGINIA LaPLANTE – TMM Precinct 6

MOVED: to refer the subject of this article to a Moderator's Committee, which includes at least one representative of Planned Parenthood or other abortion providers, one of the A.C.L.U., and one of the AFL-CIO or other broad-based labor union representative, to review and report to a future Town Meeting on the following two issues:

- 1. the need for this article, as opposed to merely attempting other strategies to address the perceived problem; and*
- 2. if the prohibition is needed, how to draft a narrowly-tailored and well-defined by-law which attempts to both address the problem and to protect civil liberties.*

EXPLANATION

Brookline PAX has always supported and defended the fundamental constitutional right of women to obtain an abortion. We accept the assertions that there's at least a perceived and potential, and maybe even a real and serious, problem of harassment of abortion providers; and that, while existing laws may already bar some such conduct, additional community support and/or remedies may need to be considered. However, Brookline's commitment to civil liberties and the 1st Amendment dictate great caution in curbing speech, picketing, and protesters.

Although the Supreme Court [*Frisby v. Schultz*, 487 U.S. 474 (1988)] has apparently (at least in federal courts) authorized laws such as this article, that does not obviate our obligation to be careful that it is (a) necessary and (b) "narrowly tailored" to curb only illegitimate behavior, not legitimate speech or picketing -- including by unions. The 6-3 *Frisby* decision by the Rehnquist Court was opposed by both ACLU and the AFL-CIO, and included eloquent dissents by Justices Brennan, Marshall, and Stevens. The latter offered, at p. 499: "it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose."

We are not convinced that the proposed By-Law has been sufficiently studied or narrowed; and it might even run afoul of the state constitution, since Massachusetts' S.J.C. is more protective of civil liberties than the U.S. Supreme Court. For example, does "in front of" or especially "*about* [... a particular residence]" include silent protest across the street?; in the street?; how far into the street? what if there's no sidewalk?; what if the "picket" is supportive and friendly? When we curb speech and especially protests, it is no answer to say, "common

sense will prevail” or “we’ll know it when we see it.” If such laws are not very narrowly tailored, then (1) protesters must guess at their peril as to the legal (and physical) boundary; and (2) law enforcement discretion is open to capricious decisions, even content-based decisions, theoretically unconstitutional.

PAX has received a November 11, 2003 letter from ACLU of Mass., saying:

“[We] urge that Brookline PAX oppose Warrant Article 23. ... Given that as a practical matter such a restriction cannot really do anything about picketing except right in front of the targeted house, it doesn’t seem like a very good idea to restrict expressive activities in this way – a restriction that will be applied across the board, regardless of the subject matter of the protest. This will cover labor, environmental, housing and other political issues. As drafted, the warrant article would also prevent supportive picketing outside a particular house. ... People need to think long and hard before taking such a step, investigating first the extent of the problem in Brookline and whether this is a useful way of dealing with it. ... To reject such a law is not to ignore the fears and concerns of those who put their lives on the line to provide reproductive health care to women. Our energy and resources should be put into thinking of measures that may in fact be more useful as a practical matter without limiting peaceful expression.

November 18, 2003
Special Town Meeting
Article 23 – Supplement No. 1

MOTION TO BE OFFERED UNDER ARTICLE 23
MARTIN R. ROSENTHAL – TMM Precinct 9

MOVED: to amend the vote proposed at p. 23-3 of the Combined Report by adding, after its second (and last) sentence:

“This by-law shall expire on January 1, 2005. The selectmen shall by January 31, 2004 constitute a study committee, which includes at least one representative of Planned Parenthood or other abortion providers, one of the A.C.L.U., and one of the AFL-CIO or other broad-based labor union representative, to review and report to the selectmen on the following two issues:

“1. the need for this article, as opposed to merely attempting other strategies to address the perceived problem; and

“2. if the prohibition is needed, how to draft a narrowly-tailored and well-defined by-law which attempts to both address the problem and to protect civil liberties.”

EXPLANATION

Brookline PAX has always supported and defended the fundamental constitutional right of women to obtain an abortion. We accept the assertions that there's at least a perceived and potential, and maybe even a real and serious, problem of harassment of abortion providers; and that, while existing laws may already bar some such conduct, additional community support and/or remedies may need to be considered. However, Brookline's commitment to civil liberties and the 1st Amendment dictate great caution in curbing speech, picketing, and protesters.

Although the Supreme Court [*Frisby v. Schultz*, 487 U.S. 474 (1988)] has apparently (at least in federal courts) authorized laws such as this article, that does not obviate our obligation to be careful that it is (a) necessary and (b) “narrowly tailored” to curb only illegitimate behavior, not legitimate speech or picketing -- including by unions. The 6-3 *Frisby* decision by the Rehnquist Court was opposed by both ACLU and the AFL-CIO, and included eloquent dissents by Justices Brennan, Marshall, and Stevens. The latter offered, at p. 499: “it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose.”

We are not convinced that the proposed By-Law has been sufficiently studied or narrowed; and it might even run afoul of the state constitution, since Massachusetts' S.J.C. is more protective of civil liberties than the U.S. Supreme Court. For example, does “in front of” or especially “about [... a particular residence]” include silent protest across the street?; in the

street?; how far into the street? what if there's no sidewalk?; what if the "picket" is supportive and friendly? When we curb speech and especially protests, it is no answer to say, "common sense will prevail" or "we'll know it when we see it." If such laws are not very narrowly tailored, then (1) protesters must guess at their peril as to the legal (and physical) boundary; and (2) law enforcement discretion is open to capricious decisions, even content-based decisions, theoretically unconstitutional.

PAX has received a November 11, 2003 letter from ACLU of Mass., saying:

"[We] urge that Brookline PAX oppose Warrant Article 23. ... Given that as a practical matter such a restriction cannot really do anything about picketing except right in front of the targeted house, it doesn't seem like a very good idea to restrict expressive activities in this way – a restriction that will be applied across the board, regardless of the subject matter of the protest. This will cover labor, environmental, housing and other political issues. As drafted, the warrant article would also prevent supportive picketing outside a particular house. ... People need to think long and hard before taking such a step, investigating first the extent of the problem in Brookline and whether this is a useful way of dealing with it. ... To reject such a law is not to ignore the fears and concerns of those who put their lives on the line to provide reproductive health care to women. Our energy and resources should be put into thinking of measures that may in fact be more useful as a practical matter without limiting peaceful expression.

ARTICLE 23

SELECTMEN'S RECOMMENDATIONS ON MOTIONS TO REFER TO A MODERATOR'S
COMMITTEE (VIRGINIA LAPLANTE) AND TO SUNSET AND PERMIT A STUDY
AFTER ENACTMENT (MARTIN ROSENTHAL)

The Selectmen, by a unanimous vote of 5-0, voted **NO ACTION** on the motion to refer Article 23 to a Moderator's Committee and instead by a unanimous vote of 5-0 voted **FAVORABLE ACTION** on the Amendment offered by Mr. Rosenthal, a long-time leader in the Civil Rights Movement.

Under Mr. Rosenthal's amendment, as adopted by the Selectmen, the proposed focused residence picketing by-law would expire on January 1, 2005. During this period, the by-law which is clearly constitutional, see Frisby v. Schultz 487 U.S. 474 (1988); Hill v. Colorado, 530 U.S. 703 (2000), would protect physicians, other providers of women's reproductive health services, their children and their families from being threatened and harassed in their own homes. The Planned Parenthood Federation of Massachusetts strongly supports Mr. Rosenthal's amendment as adopted by the Selectmen.

The Selectmen, mindful of the fundamental rights of association and protest protected under the First Amendment, believe that it is important to convene a committee comprised of interested parties, such as the American Civil Liberties Union, Planned Parenthood and others, to monitor enforcement of the focused residence picketing by-law and to consider whether the by-law might be more narrowly drawn.

The Selectmen and Town Meeting Members have a duty to protect the safety of all Brookline residents, but especially those who help protect a woman's fundamental right to choice. Unable to overturn Roe v. Wade, 410 U.S. 113 (1973), Operation Rescue has embarked on an aggressive campaign to make it difficult, if not impossible, for women to receive abortion services by threatening and harassing clinic workers, physicians and their families in their homes through the use of focused residence picketing. This campaign has succeeded in denying women access to abortion services in cities and towns in the West and Midwest and now this campaign has come to Brookline. For example, children of doctors in Brookline must leave their homes each morning to go to school only to hear shouts that their parents are "baby killers."

The Selectmen respect those who, for religious or other reasons, oppose abortion. There are, however, legal and peaceful means of protesting against abortion. Unfortunately, those on the fringes of the pro-life movement are now threatening our neighbors. Time is of the essence. Our neighbors and their children are being threatened as is a woman's fundamental right to choice.

The Selectmen commend Mr. Rosenthal for crafting this careful compromise and urge Town Meeting to vote **NO ACTION on the Motion to Refer** and to vote **FAVORABLE ACTION on Article 23 as amended**.

ARTICLE 24

TWENTY-FOURTH ARTICLE

To see if the town will request the Preservation Commission to write a Local Historic District designation for the historically and architecturally significant site located at 158 Pleasant St. and 207 Freeman St., for consideration by Town Meeting, or act on anything relative thereto.

No Preservation Easement Agreement has been signed since negotiations between the Town and the Owner began over two years ago, concerning the former Saint Aidan Parish property including the church building, the forecourt with its trees, and public pedestrian access through this historic and beautiful building and its grounds. Even with very considerable assistance from the Preservation Commission, the Town and the Archdiocese have been unable to arrive at a mutually acceptable agreement. Where it is not the Preservation Commission's function to enter into such an agreement, it is most certainly the duty of the Preservation Commission to draw up a Local Historic District Designation, since by statute it does have the authority to do so, and since this place, located at 207 Freeman St. and 158 Pleasant St. in North Brookline, is a national treasure and a likely National Historic Landmark, according to public testimony at Zoning Board of Appeals hearings by the National Park Service. LHD designation would provide the minimum statutory protections under the authority of the Preservation Commission. Since the property is no longer operating as a Parish, and is presently not in use by the owner, and since LHD designation would not at all interfere with the present plan approved by the ZBA, and since this case is unique because of its historical and architectural significance to Brookline, the Commonwealth, and the nation, it seems appropriate to ensure the preservation of this property – especially if no Preservation Easement Agreement is signed. In the event that such an agreement is signed between the Town and the Archdiocese, this Warrant Article, and any LHD Article, may be either withdrawn, or else rescinded by a Town Meeting subsequent to the enactment of such Warrant Articles.

Knowing that the construction of the 50 units of affordable housing would not be prevented, this present approved plan going forward without hindrance, the owner could not object to LHD designation of the property. As proposed, the economic benefits from the sale of the site and the rental or sales of the units constructed there would accrue to St. Mary's Parish, in any case. Any "undesirable precedent", feared by the owner in regard to other properties, is baseless both as to facts and to fears, because it is the one, only property of the Archdiocese associated so intimately with the only Roman Catholic ever elected President of the United States, and because it is an unusual and rarely lovely example of "village church" design by the noted architect Charles D. Maginnis, who was a founding Parishioner of St. Aidan's. The Petitioner very respectfully raises the question, whether or not our posterity will thank us for what we do.

Report of the Brookline Preservation Commission

The Commission understands the language of this article to be a request for the Establishment of a St. Aidan's Local Historic District under MGL 40C consistent with the St. Aidan's Local Historic District Study Report dated February 12, 2002. Because the proposed creation of a St. Aidan's Local Historic District has been before two recent Town Meetings the Commission assumes it is unnecessary to review here the issues relating to the creation of a St. Aidan's Local Historic District except to note that since that last time this issue came before Town Meeting 1) a comprehensive 40B permit has been granted for the St. Aidan's property and 2) the Supreme Judicial Court has ruled that 40C Local Historic Districts are not exempt from the 40B process. Therefore the Commission feels that at this time no useful purpose would be served by establishment of a St. Aidan's Local Historic District.

At its regularly scheduled meeting on October 7, 2003, the Preservation Commission voted to recommend No Action with respect to this article.

SELECTMEN'S RECOMMENDATION

This petitioned article requests that Town Meeting consider the establishment of the St. Aidan's Church property as a Local Historic District. Town Meeting has considered this twice and both times referred the issue back to the Preservation Commission. As a result of the Chapter 40 B application for this site, a sub-committee has been working with the proposed owner to modify the building for residential units. Prior to this issuance of any building permit, a preservation easement will be recorded to oversee any future changes to the building.

The Selectmen recommend **NO ACTION**, by a vote of 5-0 taken on October 21, 2003, on the article.

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

The warrant article, as crafted, would not create a Local Historic District but would only direct the Preservation Commission to insert a Warrant article at the Spring 2004 Town Meeting to create a Local Historic District for the St. Aidan's site. The proponent of Article 24 filed this article because she was not optimistic about getting a preservation easement agreed to for the St. Aidan's site before the Fall 2003 Town Meeting. The proponent believes that St. Aidan's is a treasure and an unusual example of Charles Maginnis' architectural work. The proponent wants Town Meeting to have an opportunity to vote on a Local Historic District for the St. Aidan's property.

At the last Town Meeting consideration of a Local Historic District was deferred on the basis that a preservation easement would provide more protection than a Local Historic District. It was anticipated at that time that a preservation easement would be promptly agreed to, executed, and held in escrow. The Zoning Board of Appeals explicitly made a preservation easement a requirement for this 40B project. The easement has only recently been negotiated and signed by the Selectmen, the Preservation Commissioners and by representatives of the Archdiocese. The preservation easement will be recorded when the property changes hands on December 1, 2003 and the easement will apply to the St. Aidan's property when construction is complete and will protect any further changes to the building exterior in perpetuity.

As background, many in the community have previously supported the creation of a Local Historic District on the St. Aidan's property. A Local Historic District can be created under Mass. Gen. Laws Ch. 40C. This would require Preservation Commission review and approval of any changes to the exterior of any buildings within the Local Historic District. Presently, there are two Local Historic Districts in Brookline: Pill Hill and Cottage Farm. The proponent of this article is hoping that a Local Historic District will be created for St. Aidan's Church and the surrounding land presently owned by the Archdiocese of Boston. Proponents of the creation of the Local Historic District noted the architectural and historic significance of the property, particularly its association with the Kennedy family (and, in particular, as the site where President Kennedy was baptized). Inclusion of the site in a Local Historic District would only preserve the exterior features of the church structure. Creation of such a district requires a 2/3's vote of Town Meeting. It was originally on the warrant at the Spring 2002 Town Meeting following a recommendation from the Preservation Commission for creation of such a district and again on the warrant of the Spring 2003 Town Meeting. Each time, Town Meeting voted no action on a Local Historic District because Town Meeting felt that it would create animosity which would impede progress that had been made toward negotiating a preservation easement which, it was suggested, would provide greater protection to the church and surrounding grounds.

DISCUSSION

Dennis DeWitt, representing the Preservation Commission, told the Advisory Committee that it doesn't seem necessary to put a Local Historic District (Chapter 40C) in place at this point. The current situation is that legally Chapter 40B overrides Chapter 40C so that ultimately 40C might not apply to the St. Aidan's project. He also told the Advisory Committee that if St. Aidan's were to be sold to a private non-40B developer, the Preservation Commission could enact a one-year demolition freeze, giving Town Meeting a chance to consider adopting a Local Historic District for the non-40B development.

Representatives from the Archdiocese (Planning Office for Urban Affairs) suggested to our Committee that the Archdiocese has been working collaboratively with the Preservation Commission for the past four months, that there have been eight meetings, and that the Preservation Commission voted unanimously for the easement and that the process was a good one. They believe that if Town Meeting were to adopt a Local Historic District for St. Aidan's, even if it would have no legal effect, it would be a slap in the face to the negotiation process for the recently concluded negotiations for a preservation easement.

The proponent believes that the designation of a Local Historic District would be an important symbolic statement of the Town's commitment to preservation of St. Aidan's. She felt that a public discussion should take place at Town Meeting regarding preservation and present plans to alter the church's exterior. She wants to find out if Town Meeting believes it got what it expected from the current design. Mr. DeWitt pointed out to the Advisory Committee that the St. Aidan's project is an adaptive reuse and not a preservation project. Maurice Childs of the Preservation Commission indicated that changes to the exterior were necessary so that the church building met Building Code requirements for habitation.

Recently there has been dissatisfaction expressed by some members of the public with the exterior changes to the Church that will be permitted by the preservation easement. They do not feel that enough of the historic exterior of St. Aidan's is being preserved. They supported adoption of this warrant article as an important symbolic statement.

It is important to note that the St. Aidan's project is currently being reviewed by HUD (the federal department of Housing and Urban Development) to see if it qualifies for federal funding (an important potential source of funds for the project). Part of this review concerns whether the current plans for historic preservation are appropriate. The proponents argue that by passing the article, we express our disapproval of the present easement in a manner which may be noted by HUD, which may put pressure for greater preservation than the easement calls for.

Even the proponents of a designation of a Local Historic District concede that a special permit issued under 40B would override the Town's ability to protect the structure as part of a Local Historic District. Accordingly, it is unclear if adoption of an LHD at this point would change anything.

RECOMMENDATION

The Advisory Committee recommends no action on this article because the majority of its members believe that the enactment of the article would not have any substantive effect on the design of the St. Aidan's housing project. A minority of our members believed that adoption of this article would make an important symbolic statement of dissatisfaction with present plans to modify the church exterior. Some of those who voted No Action shared some of the concerns with the adequacy of the easement which was negotiated, and might have supported a carefully crafted resolution expressing these concerns, but felt that adoption of this article was not an effective symbolic gesture.

Accordingly, a large majority of the Advisory Committee, 19 -2, recommends **NO ACTION** on this article.

XXX

November 18, 2003
Special Town Meeting
Article 24 – Supplement No. 1

MOTION TO BE OFFERED UNDER ARTICLE 24
STANLEY L. SPIEGEL – TMM Precinct 2

MOVED that Town Meeting requests that the Preservation Commission bring a warrant article to the next annual or special Town Meeting that would designate St. Aidan's Church as a Local Historic District in the Town of Brookline and that, in the event that the Preservation Commission acts on such request, until such Local Historic District designation shall become effective, Town Meeting encourages the developer and all relevant Town boards and officials to use their best efforts to ensure that, to the maximum extent possible, St. Aidan's Church be afforded the level of protection that a Local Historic District designation would provide.

Explanation

A Town Meeting vote in favor of this motion is of critical importance. It would recognize the architectural and historical significance of St. Aidan's Church, dispel the notion being propagated to the state and federal authorities reviewing current construction plans for St. Aidan's that the Town is solidly behind the planned renovations with only a fringe group of malcontents voicing criticisms, and could have the practical result of obtaining greater historic preservation for the church. This vote will probably be Town Meeting's last chance to have a say in determining the fate of St. Aidan's

St. Aidan's Church, designed as a medieval village church by renowned architect Charles Maginnis, the baptismal site of the nation's first Catholic president, John F. Kennedy, and the church of the Kennedy family during their years of residence in Brookline, is a structure of impressive architectural beauty and of important historical significance to its North Brookline neighborhood, the Town of Brookline, the Commonwealth of Massachusetts and the United States.

Its historical significance has been attested to by its inclusion on the National and Massachusetts Register of Historic Places and by unanimous vote of the Brookline Preservation Commission, which stated in its report of February 12, 2002 that "The establishment of a St. Aidan's Local Historic District would, therefore, provide both recognition and protection for a property that is an important part of the architectural and historical heritage of Brookline," thus confirming that St. Aidan's Church is deserving of the protections that a Local Historic District designation is intended to provide.

On two previous occasions, Town Meeting has been persuaded to defer voting on a Local Historic District for St. Aidan's upon being assured that a preferable, more protective easement would be forthcoming. However, contrary to these assurances, the easement

that has been negotiated fails to provide adequate protections for the church and permits all of the significant Preservation Commission guidelines regarding the church to be violated. In particular, the planned construction will enlarge almost all of the windows, construct new doors, irreparably cut into the historic stonework, enlarge the existing modest dormers, and remove virtually all of the beautiful stained glass. The resulting structure will no longer resemble Maginnis' medieval village church. The beauty and architectural integrity of this historic church will be forever lost.

Because St. Aidan's has national historic status, compliance with Section 106 of the National Historic Preservation Act is required before federal (HUD) funds may be released to support the project. Applying published criteria, State and federal officials have already concluded that the project as currently proposed will "adversely affect" the St. Aidan's complex. If and how that adverse effect can be mitigated is what the Section 106 historic preservation review process will soon address. Thus, over and above whatever protections a Local Historic District designation might provide, a Town Meeting vote in favor of this motion would alert federal and state authorities to our dismay at the current situation, and influence them to insist on a design more sympathetic to the historic and architectural values of this important building. One such plan, offering far greater historic preservation, already exists.

So the choice is clear. A vote for this motion would signal Town Meeting's dissatisfaction with the easement and could result in a better outcome for St. Aidan's. A vote for no action would indicate Town Meeting's acceptance, both of the unnecessary defacement of St. Aidan's and of being twice misinformed about the level of protection to be provided by the easement.

ARTICLE 24

SELECTMEN'S RECOMMENDATION ON ARTICLE 24

The Selectmen chose not to reconsider its vote taken under Article 24, as the proposed motion being offered by Stanley Spiegel does nothing to change the Board's original recommendation of NO ACTION on the original article. The Selectmen's report on the original article articulates the reasons for supporting the important balance struck over the years of public process and good faith negotiations to create the current plan for the St. Aidan's site. The reasons for recommending No Action on the resolution are as follows:

- **It upsets the current balance between important, but competing, Town objectives.** Town and neighborhood goals included low density, greater affordability, building preservation and conservation of existing private open space for public use. The plan preserves the church building, retains the forecourt and historic beech tree, entails modest height on Pleasant Street and low height on Crowninshield Road, and provides 50 units of much-needed affordable housing. The current program to put 9 market rate units into the church, which involves some carefully planned changes to the façade, is an economic necessity to fund these other objectives. Requiring fewer façade changes means less money for the project overall, and something else will need to be sacrificed—such as putting higher density on the remainder of the site or reducing the number of affordable units offered. Thus, making strict preservation of all façade features the key to this project at the 11th hour negates the effective compromises between various interests that have been reached.
- **It invalidates the long, open, participatory process that generated the current plan.** Town residents and officials have been working on this project since the middle of 2001. The Town asked the Planning Office of Urban Affairs (POUA) and St. Mary's Parish to engage in this lengthy process rather than exercise their rights through the 40B process. The Town first conducted its own study through the St. Aidan's Study Committee. Through that study, adaptive reuse, rather than demolition, of the church building emerged as a feasible path. Those recommendations framed the next phase, an interactive project review team process with the POUA and the Town. The work of that committee shaped the design, which generated a comprehensive permit that specified this balanced approach. Finally, the Preservation Commission followed the guidelines of the comprehensive permit to conduct its own review leading up to its

recommendation of a preservation easement for the site. The plan does a great job in responding to all parties, and reflects agreements and understandings that have evolved throughout these years of process.

- **It endangers our ability to attract affordable housing developers to other sites in Brookline.** Affordable housing developers do not have deep reservoirs of cash available to them. Watching the length of the St. Aidan's process and the seemingly never-ending quality to it sends a message that Brookline is hostile to affordable housing. This project followed all appropriate protocol and was thoughtfully considered. We must move on and get it built, and send the message to future affordable housing developers that the Town lives up to the commitments that come out of its processes. Furthermore, if we are to be effective as a community in rebuffing poorly designed 40B applications, and hope to continue using our Trust Fund to leverage state assistance, we need credibility with the state government that we are amenable to affordable housing when it is well designed. If this resolution is passed at Town Meeting, it threatens that image.
- **It puts at risk our ability to get federal money into this project.** The Town has already committed \$3.5 million to this project. Some of this money (\$1.2 million) could come from federal HOME funds, saving our Affordable Housing Trust money for future projects. The Town has commenced the Section 106 review process, which is necessary for the federal funds to be released. This resolution potentially complicates that work, and could lengthen the process to the point at which the Town would have to consider withdrawing its application for federal funds to keep the project moving forward in time to meet project deadlines.

Therefore, the Selectmen continue to recommend **NO ACTION** on Article 24.

ARTICLE 25

TWENTY-FIFTH ARTICLE

TO SEE IF THE TOWN WILL ADOPT THE FOLLOWING RESOLUTION:

Section 1: Town Meeting recommends that former Selectmen and members of their immediate family not appear personally before any boards, commissions, committees, departments, and divisions of the town as agent or attorney for anyone other than the town in connection with any particular matter in which the town is a party or has a direct and substantial interest and which include members who were appointed during their service on the Board of Selectmen.

Section 2: Candidates for Selectman shall be given an opportunity to publicly commit to the recommendation in Section 1 or to decline ever acting as agent or attorney in the future as described above if they become former Selectmen. At the time that a person files for elective office he or she shall be provided with a form prepared by the Town Clerk. Said form will request a response of the candidates to this voluntary condition. Said form shall also inquire which boards, commissions, and committees candidates are interested in appearing before after they leave office. Said form shall be returned to the Town Clerk within two weeks of the final filing date for office. In the event a candidate fails to return the form to the Town Clerk, said refusal shall constitute a refusal to provide the requested information.

Section 3: Within three weeks from the final filing date for office, the Town Clerk shall make public, by posting an announcement on the Town Clerk's official bulletin board, those candidates, their prior responses on said forms, boards, commissions, and committees of interest, and those candidates who have not responded to the request for this information.

Section 4: If a former Selectman acts as agent or attorney as described above in conflict with his or her publicly declared position on said form, or if he or she appears before a board, commission, or committee that is not mentioned on said form, the Town Clerk shall note such events and the prior responses on said form by posting an announcement on the Town Clerk's official bulletin board.

OR ACT ON ANYTHING RELATIVE THERETO

Proposed Form Submitted by Petitioner:

FORMER SELECTMEN ACTING AS ATTORNEY OR RECEIVING COMPENSATION

Name of candidate for Selectman _____

Town Meeting recommends that former Selectmen and members of their immediate family not appear personally before any boards, commissions, committees, departments, and divisions of the town as agent or attorney for anyone other than the town in connection with any particular matter in which the town is a party or has a direct and substantial interest and which include members who were appointed during their service on the Board of Selectmen.

(Please respond to either #1 or #2 by circling your response.)

1. As a possible future agent or attorney as described above, I agree to voluntarily comply with the above recommendation. YES NO

2. I do not intend to be an agent or attorney in the future as described above. YES NO

If you responded to #1, please respond to #3.

3. (If I am elected) I am interested in appearing before the following boards, commissions, and committees after I leave the Board of Selectmen.

Signed _____

Date _____

There is an inherent problem with former municipal employees who appear before municipal boards as attorneys representing private clients after they leave office. For this reason, State law on the conduct of public officials and employees addresses this situation and requires a one year waiting period. The length of this period is unsatisfactory to many citizens because it still makes it relatively easy for a Selectman to participate in appointments (which can continue to serve for over

ten years) to Town boards and then appear before these boards seeking favorable decisions for their clients after leaving office. This state of affairs raises doubts about integrity of the system.

MOTION TO BE OFFERED BY THE PETITIONER

WHEREAS the appearance of former Selectmen and their professional associates before any boards, commissions, committees, departments, and divisions of the town as paid agent or attorney for anyone other than the town in connection with any particular matter in which the town is a party or has a direct and substantial interest and which include members who were appointed during their service on the Board of Selectmen has the appearance of a conflict of interest,

Be it hereby RESOLVED that Town Meeting urges former Selectmen and their professional associates to avoid such apparent conflicts of interest.

SELECTMEN'S RECOMMENDATION

The present proposal under Article 25 requests that Town Meeting declare that "the appearance of former Selectmen and their professional associates before any boards, commissions, committees, departments, and divisions of the town as paid agent or attorney for anyone other than the town in connection with any particular matter in which the town is a party or has a direct and substantial interest . . . has the appearance of a conflict of interest." The declaration, if adopted, will not have the force and effect of a town By-Law, will not be published as a part of the ordinances and by-laws of the town and will state a standard which is not the same as the requirements set forth in the Massachusetts Conflict of Interest Law, so-called, General Laws, Chapter 268A, specifically Sections 17 and 18, which are below:

CHAPTER 268A. CONDUCT OF PUBLIC OFFICIALS AND EMPLOYEES

Section 17 Municipal employees; gift or receipt of compensation from other than municipality; acting as agent or attorney

Section 17. (a) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a municipal employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a municipal employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, unless such employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

Section 18 Former municipal employee; acting as attorney or receiving compensation; from other than municipality; partners

Section 18. (a) A former municipal employee who knowingly acts as agent or attorney for or receives compensation, directly or indirectly from anyone other than the same city or town in connection with any particular matter in which the city or town is a party or has a direct and substantial interest and in which he participated as a municipal employee while so employed, or (b) a former municipal employee who, within one year after his last employment has ceased, appears personally before any agency of the city or town as agent or attorney for anyone other

than the city or town in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest and which was under his official responsibility as a municipal employee at any time within a period of two years prior to the termination of his employment, or (c) a partner of a former municipal employee who knowingly engages, during a period of one year following the termination of the latter's employment by the city or town, in any activity in which the former municipal employee is himself prohibited from engaging by clause (a), or (d) a partner of a municipal employee who knowingly acts as agent or attorney for anyone other than the city or town in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest and in which the municipal employee participates or has participated as a municipal employee or which is the subject of his official responsibility, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

If a partner of a former municipal employee or of a special municipal employee is also a member of another partnership in which the former or special employee has no interest, the activities of the latter partnership in which the former or special employee takes no part shall not thereby be subject to clause (c) or (d).

Notwithstanding the provisions of clause (b), a former town counsel who acted in such capacity on a salary or retainer of less than two thousand dollars per year shall be prohibited from appearing personally before any agency of the city or town as agent or attorney for anyone other than the city or town only in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest and in which he participated while so employed.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

The declaration, if adopted, will have a chilling effect upon potential future candidates for the board and a retroactive impact upon the future representation of citizens and town employees by both past and present members of the Board of Selectmen. Present Selectpersons Allen, Goldberg, Hoy and Sher are lawyers. A partial listing of lawyers who have served the town as Selectmen includes:

Abrams, Allen, Ames, Crowley, Goldenberg, Kaplan, Kassler, May, Merrill, Rosenthal and Sydney.

The declaration includes former selectmen and their professional associates. Since the term professional associates includes members of many law firms and professional associations, the declaration, if adopted, will have far reaching and difficult to determine consequences.

The Massachusetts Conflict of Interest Law, General Laws, Chapter 268A, specifically applies to persons performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consulting basis [excluding only elected members of the town meeting]. All selectpersons and former selectpersons in Brookline are subject to the law. Section 18 in Chapter 268A sets forth state wide standards and prohibitions for former municipal employees [including former selectmen] from acting as attorney or agent in certain town matters and from appearing before any agency of the town within specified time cycles.

The declaration and resolution proposed under Article will add an ambiguous, unnecessary and conflicting layer to an area of public concern adequately governed and regulated by the Massachusetts Conflict of Interest Law. Therefore, the Board of Selectmen recommends **NO ACTION**, by a vote of 4-0 taken on October 28, 2003.

ROLL CALL VOTE:

No Action

Goldberg

Hoy

Allen

Sher

ADVISORY COMMITTEE’S RECOMMENDATION

BACKGROUND

The revised version of Article 25, a citizen’s petition, calls for a resolution by Town Meeting stating that the appearance of former Selectmen and their professional associates personally before any boards, commissions, committees, departments and divisions of the town as agent or attorney for anyone other than the Town in connection with any particular matter in which the Town is a party or has a direct and substantial interest and which include members who were appointed during their service on the Board of Selectmen has the appearance of a conflict of interest and that Town Meeting urges former Selectmen and their professional associates to avoid such apparent conflicts of interest.

DISCUSSION

Former Selectmen are prohibited under the State’s Conflict of Interest Law, MGL c. 268A, sec. 18 from knowingly acting as agent or attorney for or receiving compensation, directly or indirectly, from anyone other than the same city or town in connection with any particular matter in which the city or town is a party or has a direct or substantial interest and in which he participated as a municipal employee while so employed, for one year after they have ceased employment with the Town. Violation of this statute is punishable by a fine of not more than three thousand dollars or by imprisonment for not more than two years. This has been interpreted by Town Counsel and by the State Ethics Commission to mean that they shall not

appear as an agent or attorney at all before Town Boards, Commissions, or Agencies, during that one year period.

Ron Goldman, the citizen petitioner of Article 25, feels that the one-year period of abstention is not long enough. Mr. Goldman cited the State Ethics Commission, "In general, sec. 18 of the conflict of interest law is designed to prevent municipal employees from making official judgments with an eye toward their personal future interests, or from profiting by their participation in particular decisions or controversies after they leave municipal service. Furthermore, the law keeps former employees from using their past friendships and associations within government to derive an unfair advantage for themselves or others." Those who favor the Warrant Article did not have any particular instances in which they had seen a conflict of interest, but they felt that there was an appearance of impropriety.

The earlier version of this warrant article called for candidates for Selectman to publicly commit as to whether or not they would abide by this wish of Town Meeting. Their commitment would have been posted on the Town Clerk's official bulletin board. The Town Clerk strongly objected to having his office involved in such an activity which would exceed the requirements of the state law concerning the governance of elections. Mr. Goldman has eliminated the public commitment and posting requirement in response to those concerns. And the change does make the Resolution a true Resolution that would be voluntary on the part of the Selectmen, without the elements of official action that made it in essence a "de facto" by-law, which potentially conflicted with state law.

There is a valid public policy goal in having our Town government appear to be fair, as well as actually being fair. Further, as rewritten, the Resolution does not impose any penalty on Selectmen who decline to make this commitment. However, the Advisory Committee feels that this Resolution was unnecessary and that it may discourage qualified candidates from running for the office.

Our Selectmen currently put in hours and hours at meetings and hearings. They receive \$2,500/year (\$3,500/year for the Chair). Those who are attorneys cannot represent anyone before the Town Boards and Commissions during their tenure in office and for the additional year required by the State Conflicts of Interest Law. Since many members of our Boards and Commissions remain on them for years, and if not originally appointed might be reappointed by any Selectman during the course of the term, this Resolution is effectively suggesting to Selectmen candidates who practice law in Brookline to indefinitely give up a number of areas of practice that are often the bread and butter of local attorneys. Former Selectmen may, of course, simply disregard the Resolution, but it is making a statement by Town Meeting that it disapproves of such action. The resolution makes an assumption that such former Selectmen may not be acting in good faith and we did not feel that such an assumption was warranted.

The one year period of restriction imposed by the State Ethics law seems sufficient since we do not appear to have any real instances of Conflicts of Interest. In addition, the people who serve on the Town's Boards and Commissions are unpaid and do not appear to feel beholden to the Selectmen.

RECOMMENDATION

The Advisory Committee by a vote of 16-2 with 1 abstention recommends **NO ACTION** on Warrant Article 25.

XXX

November 18, 2003
Special Town Meeting
Article 25 – Supplement No. 1

**REVISED MOTION TO BE OFFERED BY THE PETITIONER (RONALD
GOLDMAN) UNDER ARTICLE 25**

WHEREAS the appearance of former Selectmen ~~and their professional associates (a)~~ before any boards, commissions, committees, departments, and divisions of the town as paid agent or attorney for anyone other than the town in connection with any particular matter in which the town is a party or has a direct and substantial interest and (b) which include members who were appointed during their service on the Board of Selectmen has the appearance of a conflict of interest,

Be it hereby RESOLVED that Town Meeting urges former Selectmen and their professional associates to avoid such apparent conflicts of interest.

November 18, 2003
Special Town Meeting
Articles 25-27 – Supplement No. 3

ARTICLES 25 - 27

SELECTMEN'S RECOMMENDATION ON ARTICLE 25-27

The Board of Selectmen chose not to reconsider their votes under Articles 25 and 26. The amendments put forth by the petitioner did not warrant a change from the recommended vote of **NO ACTION**.

The Selectmen did reconsider its vote under Article 27 to discuss the motion to refer the Article to a Moderator's Committee. By a vote of 3 – 2, the Board recommends **NO ACTION** on the motion to refer.

ROLL CALL VOTE

No Action

Goldberg
Geller
Sher

Favorable Action

Hoy
Allen

ARTICLE 26TWENTY-SIXTH ARTICLE

TO SEE IF THE TOWN WILL ADOPT THE FOLLOWING RESOLUTION:

Section 1: The acceptance or receipt by any member of the Board of Selectmen or School Committee or anyone in his or her immediate family, or an organization formed to support the candidacy of that member, of any thing of value in excess of one-hundred dollars (\$100) from any person, organization, or agent of such person or organization, shall create a conflict of interest with regard to that member's debate and vote on any issue or matter coming before the Board of Selectmen or School Committee involving the contributing person, organization, or agent, unless such interests are merely incidental to an issue or question involving the common public good.

Section 2: Candidates for Selectman and School Committee shall be given an opportunity to publicly commit to avoiding such conflicts of interest. At the time that a person files as a candidate for the Board of Selectman or School Committee, he or she shall be provided with a form prepared by the Town Clerk (example enclosed).

Section 3: Should a conflict of interest arise for any member of the Board of Selectmen or School Committee under Section 1, said form will inquire of each candidate, if elected, whether he or she is voluntarily willing to (a) state the grounds for the conflict of interest on the record immediately prior to the Board of Selectmen's or School Committee's debate and vote, (b) withdraw from debate on the issue, and (c) abstain from voting on the matter, notwithstanding any duty to vote provided for elsewhere in the Town bylaws, except as stated in Section 4.

Section 4: In the event a quorum cannot be obtained for any issue or matter to be acted on by the Board of Selectmen or School Committee because of abstentions pursuant to Section 3, any abstaining member of the Board of Selectmen or School Committee may vote as long as the abstaining members have disclosed the nature and the monetary amount of the conflicting interest, and such other information as may be necessary to describe the interest.

Section 5: Any member of the Board of Selectmen or School Committee may question the existence of a conflict of interest for another member pursuant to Section 1 prior to the Board of Selectmen's or School Committee's vote, but not thereafter. In the event such question is raised, the question shall be decided by the Board of Selectmen or the School Committee.

Section 6: For purposes of Section 1, the following terms shall be defined as:

(a) "Thing of value" means money, employment, goods, services, or objects with any intrinsic value, including but not limited to, campaign contributions, loans, offsets to expenditures, contributions in kind, and independent expenditures by any person or organization on behalf of the candidacy of a member of the Board of Selectmen or School Committee, provided that such thing of value was received during the member's current term of office or anytime within one year prior to the commencement of the member's current term of office.

(b) "Immediate family" means the spouse, partner, children, and the spouse of any child of any member or candidate for membership on the Board of Selectmen or School Committee.

OR ACT ON ANYTHING RELATIVE THERETO

Proposed Form Submitted by Petitioner:

CONFLICTS BASED ON PRIOR PECUNIARY BENEFITS

Name of candidate for Selectman or School Committee

Town Meeting passed a resolution that states, in part,

Section 1: The acceptance or receipt by any member of the Board of Selectmen or School Committee or anyone in his or her immediate family, or an organization formed to support the candidacy of that member, of any thing of value in excess of one-hundred dollars (\$100) from any person, organization, or agent of such person or organization, shall create a conflict of interest with regard to that member's debate and vote on any issue or matter coming before the Board of Selectmen or School Committee involving the contributing person, organization, or agent, unless such interests are merely incidental to an issue or question involving the common public good. (See Section 6 for definitions.)

Please respond to the following voluntary conditions by circling your answer.

Be it hereby RESOLVED that should such an apparent conflict of interest arise for any member of the Board of Selectmen or School Committee, Town Meeting urges said member to (a) state the grounds for the conflict of interest on the record immediately prior to the Board of Selectmen's or School Committee's debate and vote, (b) withdraw from debate on the issue, and (c) abstain from voting on the matter, notwithstanding any duty to vote provided for elsewhere in the Town bylaws, except in the event that a quorum cannot be obtained.

For purposes of this resolution, the following terms shall be defined:

(a) "Thing of value" means money, employment, goods, services, or objects with any intrinsic value, including but not limited to, campaign contributions, loans, offsets to expenditures, contributions in-kind, and independent expenditures by any person or organization on behalf of the candidacy of a member of the Board of Selectmen or School Committee, provided that such thing of value was received during the member's current term of office or anytime within one year prior to the commencement of the member's current term of office.

(b) "Immediate family" means the spouse, partner, children, and the spouse of any child of any member or candidate for membership on the Board of Selectmen or School Committee.

SELECTMEN'S RECOMMENDATION

Article 26, if adopted, would express Town Meeting's resolve that a Selectman or School Committee member would have an apparent conflict of interest in debating or voting on any matter that is of direct or indirect interest to any person who makes a campaign contribution of \$100 or more to any such a member of the Board or the School Committee. In addition, the Resolution, if adopted, would express the sense of Town Meeting that any member of the Board of Selectmen or School Committee "with such an apparent conflict of interest" should (a) state the grounds for the conflict, (b) withdraw from debate on the issue and (c) abstain from voting on the matter.

The Board commends the Petitioner, Ronald Goldman, for his efforts to bring before Town Meeting important issues relating to the ethical conduct of elected officials. Each member of the Board and the School Committee is a guardian of the public trust. When we discharge our duties, we must do so to advance the interests of the entire community, and not just special interests. With each vote we cast and each decision we take as a Board, it is incumbent upon us to preserve the public trust.

Although we join with the Petitioner in supporting the centuries-old doctrine of the public trust, we believe that Article 26 is over-broad and unworkable. If the Petitioner's standard were adopted, it would create an appearance of a breach of this trust if a Selectman or School Committee Member cast a vote on any matter of interest to a contributor of \$100 or more to a Selectman's or School Committee Member's campaign.

A simple example demonstrates the well-intended but overreaching nature of the proposed resolution. Most recently, the Selectmen have been asked to vote on various matters, including settlement agreements, in an effort to accelerate the renovation of the Lawrence School following the contractor's breach of contract. If the Petitioner's standard for a conflict-of-interest were to apply, each Selectman would be required to determine whether he or she received a campaign contribution of \$100 or more from any parent of a Lawrence School student. There is no doubt that Lawrence School parents have a direct interest in the renovation of their children's school.

If the Petitioner's conflict standard were applied in this case, any Selectman who received a contribution of \$100 or more from a Lawrence School parent would be presumed to have a conflict of interest in voting on any matter relating to the renovation of the school. Moreover, the resolution suggests that Selectmen with such an apparent conflict should withdraw from the debate or abstain from voting. The Petitioner's standard, if adopted, would in this case, most likely require every member of the Board to abstain from voting and would thus disable the Board from taking the steps necessary to renovate the Lawrence School in the wake of the contractor's failure to perform.

The example given is not isolated. Virtually every matter that comes before the Board involves an issue in which at least one campaign contributor has a direct or indirect interest, but also involves the public interest.

For the reasons stated and because the Petitioner's conflict-of-interest standard is incompatible with the Commonwealth's statutory scheme regulating conflicts of interests and campaign finance (See Massachusetts Conflict of Interest Law, G.L.c. 168A, and the Campaign Expenditures and Contributions Law, G.L.c. 55), we respectfully recommend, with our thanks to the Petitioner for bringing this important matter for debate before Town Meeting, that Town Meeting vote **NO ACTION**, by a vote of 4-0 taken on October 28, 2003, on the Resolution.

ROLL CALL VOTE:

No Action

Goldberg

Hoy

Allen

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

Article 26 is the result of a citizen's petition seeking a resolution that attempts to reduce conflicts of interest or perceived conflicts of interest in the voting of the Board of Selectmen and the School Committee based on influence due to campaign contributions.

DISCUSSION

This resolution springs from the best of intentions on the part of the citizen petitioner, Ron Goldman. In an effort to provide reassurance that the Board of Selectmen and the School Committee are engaged in independent decision-making, the resolution, as revised, states that members of those boards should not participate in any vote involving an issue that affects any person or organization that gave that member more than \$100 in cash or anything else of value.

Again as with the resolution proposed under Warrant Article 25, the Advisory Committee has not heard of any specific instances in which a donor is believed to have influenced a vote. The Petitioner, however, believes that it is best to act prophylactically, and that there is value in eliminating even the appearance or suspicion of undue influence in our local government.

The Petitioner's revised version eliminates the prior provisions which had the Town Clerk's office provide forms to candidates so they could affirm that they would follow the resolution. The current version also eliminates the provisions by which one member of the Board of Selectmen or School Committee could raise the question of a conflict of interest for another member. The Town Clerk's office objected to being involved with providing forms during an election that were not part of the State's election requirements. The elimination of this provision takes away the "by-law" aspect to the resolution, which would probably not be permissible under State law and renders the proposed Resolution voluntary, which is a more appropriate form for a Resolution. Presumably, even without any resolution, members of the Board of Selectmen or the School Committee could question another member's apparent conflict of interest.

The Advisory Committee does not feel that members of the Board of Selectmen or the School Committee have demonstrated any motives other than the greater good of the Town

in their voting patterns. While we may have disagreements with individual votes, there does not seem to be any pattern of voting according to the wishes of donors. However, several other communities around the country have implemented similar wording to this resolution and they seem to be pleased with the result. Such a resolution may have the effect of encouraging candidates to limit individual contributions to the \$100 limit. There is an ongoing debate over whether limiting campaign contributions works to the disadvantage of the lesser known outsider or not. However, if there is a perception, even if not a reality of influence peddling in Town politics, this resolution may serve a useful purpose.

The Advisory Committee was concerned about Town Meeting urging elected officials not to vote on matters in which their vote may be critical. Therefore, we discussed a revision to the wording of the Resolution which would have such officials state when there is an apparent conflict of interest and then make a decision as to whether there is such a conflict of interest before taking themselves out of the voting. This revision appealed to a substantial minority of the Advisory Committee with a vote of 8 in favor and 10 opposed. Mr. Goldman's proposed wording in his revised version gained less support.

RECOMMENDATION

The Advisory Committee by a vote of 16-2 recommends No Action on Warrant Article 26.

XXX

REVISED MOTION TO BE OFFERED BY THE PETITIONER (RONALD GOLDMAN) UNDER ARTICLE 26

WHEREAS the acceptance or receipt by any member of the Board of Selectmen or School Committee or anyone in his or her immediate family, or an organization formed to support the candidacy of that member, of any thing of value in excess of one-hundred dollars (\$100) from any person, organization, or agent of such person or organization, could appears to be a conflict of interest with regard to that member's debate and vote on any issue or matter coming before the Board of Selectmen or School Committee particularly involving the contributing person, organization, or agent, unless such interests are merely incidental to an issue or question involving the common public good,

Be it hereby RESOLVED that should such an apparent conflict of interest arise for any member of the Board of Selectmen or School Committee, Town Meeting urges said member to (a) state the grounds for the potential conflict of interest on the record immediately prior to the Board of Selectmen's or School Committee's debate and vote, and if that member determines that he or she has a conflict of interest, he or she should (b) withdraw from debate on the issue, and (c) abstain from voting on the matter, notwithstanding any duty to vote provided for elsewhere in the Town bylaws, except in the event that a quorum cannot be obtained.

For purposes of this resolution, the following terms shall be defined:

- (a) "Thing of value" means money, employment, goods, services, or objects with any intrinsic value, including but not limited to, campaign contributions, loans, offsets to expenditures, contributions in-kind, and independent expenditures by any person or organization on behalf of the candidacy of a member of the Board of Selectmen or School Committee, provided that such thing of value was received during the member's current term of office or anytime within one year prior to the commencement of the member's current term of office.
- (b) "Immediate family" means the spouse, partner, children, and the spouse of any child of any member or candidate for membership on the Board of Selectmen or School Committee.

November 18, 2003
Special Town Meeting
Articles 25-27 – Supplement No. 3

ARTICLES 25 - 27

SELECTMEN'S RECOMMENDATION ON ARTICLE 25-27

The Board of Selectmen chose not to reconsider their votes under Articles 25 and 26. The amendments put forth by the petitioner did not warrant a change from the recommended vote of **NO ACTION**.

The Selectmen did reconsider its vote under Article 27 to discuss the motion to refer the Article to a Moderator's Committee. By a vote of 3 – 2, the Board recommends **NO ACTION** on the motion to refer.

ROLL CALL VOTE

No Action

Goldberg
Geller
Sher

Favorable Action

Hoy
Allen

ARTICLE 27TWENTY-SEVENTH ARTICLE

TO SEE IF THE TOWN WILL ADOPT THE FOLLOWING RESOLUTION:

Section 1: Candidates for Selectman shall be given an opportunity to publicly commit to spending and contribution limits. At the time that a person files as a candidate for Selectman, he or she shall be provided with a form prepared by the Town Clerk (example enclosed).

Section 2: Said form will inquire of each candidate whether he or she is voluntarily willing to (a) limit total campaign spending to \$15,000* or less; (b) limit total campaign donations from any one donor to \$100* or less; (c) limit contributions or contributions in kind from himself or herself to \$4000* or less; (d) limit donations from outside Brookline to \$2000* or less; (e) return donations over \$200 if donors do not provide their occupation and employer; (f) refuse donations from agents, real estate interests, political action committees (PACs), other selectman campaigns, and other entities which face a substantial likelihood of having matters under consideration by the Town during the upcoming three years; and (g) agree to participate in all public debates sponsored by a neutral group prior to the election.

* or other limit as voted by Town Meeting

Section 3: Limits shall be indexed and published biennially for inflation, not later than December thirty-first of each odd numbered year, using the federal consumer price index for the Boston statistical area. Individual donation limits shall apply to all contributions in kind, whether made directly to a candidate or authorized political committee or indirectly via earmarked gifts passed through an intermediary, except that this limitation shall not apply to the value of volunteer services by individuals on behalf of a candidate or a political committee. Candidates may agree to any or all voluntary conditions.

Section 4: Said form shall be returned to the Town Clerk within two weeks of the final filing date for office. In the event a candidate fails to return the form to the Town Clerk, said refusal shall constitute a refusal to abide by any of the above voluntary conditions. A candidate may also indicate that he or she shall agree to spend or accept less in contributions than the amounts listed above.

Section 5: Within three weeks from the final filing date for office, the Town Clerk shall make public, by posting an announcement on the Town Clerk's official bulletin board, which conditions were accepted by which candidates, and those candidates who have not accepted any voluntary conditions.

Section 6: On the 8th day preceding the general election, the Town Clerk shall post on the Town Clerk's official bulletin board the status of compliance of candidates who agreed to voluntary limits, based on the contents of candidates' pre-election campaign finance reports. The announcement shall include candidates' names, recommended (or candidates' lower) limits on said forms, and an indication of compliance or non-compliance with each voluntary condition with amounts from reports, as applicable.

Section 7: Within 35 days after the general election, the Town Clerk shall post on the Town Clerk's official bulletin board the status of compliance of candidates (as above) who agreed to voluntary limits, based on the contents of candidates' post-election campaign finance reports.

OR ACT ON ANYTHING RELATIVE THERETO

Proposed Form Submitted by Petitioner:

VOLUNTARY SPENDING AND CONTRIBUTION LIMITS FOR SELECTMAN CAMPAIGNS

Name of candidate for Selectman _____

Please respond to the following voluntary conditions for your campaign for Selectman by circling your answer.

(a) I shall limit total campaign spending to \$15,000 or less.

YES NO

(b) I shall limit total campaign donations from any one donor to \$100 or less.

YES NO

(c) I shall limit contributions or contributions in kind from myself to \$4000 or less.

YES NO

(d) I shall limit donations from donors outside Brookline to \$2000 or less.

YES NO

(e) I shall return donations over \$200 if donors do not provide their occupation and employer. YES NO

(f) I shall refuse donations from agents, real estate developers, political action committees

(PACs), other selectman campaigns, and other entities which face a substantial likelihood of having matters under consideration by the Town during the upcoming three years. YES

NO

(g) I shall agree to participate in all public debates sponsored by a neutral group prior to the election.

YES

NO

Signed _____

Date _____

The Clean Elections Law was passed by two-thirds of Massachusetts' voters, demonstrating that the principles of limiting campaign spending and donations have strong public support. Spending and donation limits and disclosure statements similar to those in this article have been successfully implemented in municipalities across the country.

A review of recent campaign finance reports of candidates for Selectman shows patterns of incomplete information, increasingly excessive spending, participation of real estate interests, and a high proportion of donations from outside the Town. Brookline voters want elections for the highest offices to be as open as possible and to minimize the influence of special interest money from outside Brookline on campaigns for Selectman. Brookline has a long reputation for espousing values that serve the public rather than special interests. This article is consistent with these values. It is voluntary and does not cost the Town anything to implement. Furthermore, it provides valuable information for voters about Selectman campaigns and allows candidates to spend more time discussing issues with voters and less time raising money.

MOTION TO BE OFFERED BY THE PETITIONER

WHEREAS it is in the public interest to minimize the influence of special interest money on campaigns for Selectman,

Be it hereby RESOLVED that Town Meeting urges candidates for Selectman to voluntarily (a) limit total campaign donations including total donations in-kind from any one donor (in a calendar year) to \$100' or less; (b) limit total donations including donations in-kind from himself or herself to \$5000* or less; (c) limit total donations including donations in-kind from outside Brookline to \$3000* or less; and (d) return donations of \$200 or more (in a calendar year) if donors do not provide their occupation and employer. Candidates may agree to any or all voluntary conditions.

* or other limit as voted by Town Meeting

Limits are not intended to apply to the value of volunteer services by individuals on behalf of a candidate or a political committee and the value of a candidate's time.

SELECTMEN'S RECOMMENDATION

The Resolution proposed in Article 27 "urges" candidates for Selectman voluntarily to limit the amount of campaign contributions from any one donor to \$100 or less in any calendar year and to limit certain other types of contributions, including contributions from the candidate and from outside Brookline.

We commend the Petitioner, Ronald Goldman, for amending the petitioned Warrant Article to clarify that it is intended only to express the sense of Town Meeting, rather than to create a local system of campaign finance regulation that would be inconsistent with, and superceded by, state campaign finance law.

Even as a non-binding resolution, however, we find the amended Warrant Article to be impracticable and off the mark.

For example, limiting to \$3,000 donations to any one candidate from outside Brookline presumes wrongly that donations from outside Brookline are from those seeking to obtain official actions by Selectmen in return for contributions. This presumption lacks merit for at least two reasons. First, it is illegal for any elected official in the Commonwealth of Massachusetts to take any act as quid pro quo for a campaign contribution. Second, the \$3,000 limitation on contributions from outside Brookline ignores the factual record presented in the campaign finance reports filed by recent candidates for Selectmen. Many of the candidates for Selectmen received donations in excess of the proposed voluntary limit from family and friends who live outside Brookline and whose only interest is in supporting the efforts of a loved one to serve his or her community.

Moreover, the Massachusetts Clean Elections Law permits candidates for state office who accept a \$100 limit on contributions from a single donor in any calendar year to receive a certain amount of public funding for their campaigns. The intent of the \$100 limit in the Clean Elections Law, as in the Petitioner's resolution, is to limit the influence or the appearance of influence of large donors. The Clean Elections Law, however, recognizes that running a campaign for state representative, for example, is an expensive undertaking. The Clean Elections Law, therefore, provides public funds to candidates for state office to make up for the reduction in contributions resulting from the cap on donations.

The proposed resolution does not envision any public financing of local campaigns that would offset the voluntarily limits on campaign contributions that it urges. Every Selectman would like to see the cost of local elections reduced. The U.S. Constitution, however, clearly permits any individual candidate to spend as much of his or her own money as he wishes to run for office. Buckley v. Valeo 424 U.S. 1, 59 (1974) ("the First

Amendment simply cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy"). Therefore, a candidate for Selectman who voluntarily agrees, in the absence of public financing for local campaigns to limit his or her own spending or to limit contributions to \$100 per donor is at a disadvantage. Indeed, without public financing of local campaigns and unless all candidates agreed to the Petitioner's voluntarily limitations, the Board of Selectmen could become the preserve of those with the financial resources to finance their own campaigns.

We believe that the Petitioner's arguments are better addressed to the Legislature. If limits on local campaign contributions are to have any real meaning, the Clean Elections law, including public financing for candidates who accept limits on contributions, should be extended to races for local offices.

Therefore, the Selectmen recommend **NO ACTION** by a vote of 4-0 taken on October 28, 2003.

ROLL CALL VOTE:

No Action

Goldberg

Hoy

Allen

Sher

ADVISORY COMMITTEE'S RECOMMENDATION

BACKGROUND

This article, a citizen petition, is a resolution that attempts to limit campaign contributions by asking candidates for Selectman to accept voluntary limits on contributions from individual contributors, contributions from the candidate, and contributions from outside Brookline. It also asks candidates for Selectman to return contributions of \$200 or more if contributors do not provide their occupation and employer. Current Massachusetts state law requires candidates to ask for this information from contributors who make contributions of \$200 or more.

The limits urged by the article are voluntary because the Town of Brookline does not currently have the authority under state law to impose such limits. Massachusetts state law does not permit cities and towns to regulate elections or the financing of political campaigns.

Other U.S. cities and towns have adopted voluntary limits similar to Article 27. Various similar limits on either contributions or overall campaign spending have been enacted in, for example, Tucson, Arizona, Richland, Washington, Crested Butte, Colorado, Chapel Hill, North Carolina, Boulder, Colorado, Alta, Utah, Austin, Texas, San Francisco, California, Akron, Ohio, and Oakland, California. In some cases, candidates who accept voluntary spending or contribution limits are offered public financing. No cities and

towns in Massachusetts have imposed such limits on campaign contributions and expenditures.

DISCUSSION

The current motion to be made under Article 27 is a significant revision of the petitioner's original proposed article.

Members of the Advisory Committee, the Town Clerk, and Town Counsel, expressed significant reservations about many aspects of the article as originally proposed by the petitioner.

The most significant problem with the earlier version of Article 27 was that it was almost certainly unconstitutional under Massachusetts law. Town Counsel pointed out that the Massachusetts Constitution specifically limits the power of cities and towns to regulate elections. The original version of Warrant Article 27, which requested that the Town Clerk perform specific duties related to the conduct of elections, would implement a policy that is unconstitutional. Further, Town Counsel suggests that if a Resolution in fact, imposes a duty or obligation, it actually serves as a by-law of the Town and must meet the requirements of MGL c. 40, section 21. That law authorizes Town by-laws. It requires review and approval by the Attorney General and notice and publication. The Court has held that municipal regulations not directly authorized by Statute but under Home Rule legislation, will be deemed void if they are inconsistent with any portion of the general laws.

In addition, the Town Clerk and members of the Advisory Committee objected to several provisions of the petitioner's original proposal.

The Town Clerk indicated that he was uncomfortable about being required to collect and post information related to voluntary limits that would be unconstitutional if the limits were mandatory. He also said that requiring a town official to post information about candidates on a Town Hall bulletin board "smacks of intimidation" and might not be an appropriate role for the Town Clerk to play in contested elections. The Town Clerk made clear, however, that he was not necessarily taking a position against the substantive portions of the article.

Members of the Advisory Committee also felt that Section 2(f) of the article should not attempt to enumerate particular groups from which candidates for Selectman should not receive campaign contributions. Leaving aside the problem of defining and identifying "real estate" interests, it is not clear that contributions from any given category of group will necessarily have a negative influence on Brookline politics and government. The list of groups targeted in this manner could change according to political fashion or preference.

The Advisory Committee also felt that Section 2 (g) of the original proposed article, which asks candidates to agree to participate in debates sponsored by a "neutral group" was not germane to the overall purpose of the article.

The petitioner's revised motion addresses many of the objections to the original proposal. It now is presented as a resolution instead of a by-law cast in the form of a resolution.

Town Counsel has not indicated that the article is likely to be declared unconstitutional. Nevertheless, a majority of the Advisory Committee could not support the revised article. Although the idea of limiting the influence of special interests and generally reforming the current campaign finance system is very appealing, Article 27 may not be the best way to address these issues. Massachusetts state law already regulates how campaigns are financed and imposes limits on contributions. No other city or town in Massachusetts has adopted voluntary limits on campaign contributions. A majority of the Advisory Committee felt that Brookline should not be the first. It is not clear that the petitioner has identified a problem that is significant enough to justify changing the current system, even on an ostensibly voluntary basis.

The proposed limits on campaign contributions are voluntary, but they would still tend to influence candidates for Selectman. Several members of the Advisory Committee were uncomfortable with the idea of attempting to limit contributions from individuals to \$100 when the state has set a higher limit of \$500. Although the resolution merely “urges” candidates to agree to the lower limit, it is nevertheless encouraging adherence to a limit that would be unconstitutional if it were adopted in a by-law.

The article’s limits on contributions from outside Brookline also may be too low. Limiting contributions from outside Brookline to \$3,000 could prevent friends and family of the candidate from making contributions. Such contributions would not necessarily represent an attempt by “special interests” to influence Brookline politics and government.

It also is possible that the article would give incumbents an even greater advantage than they enjoy in most elections, because challengers often need to raise larger amounts to finance effective campaigns. Imposing “voluntary” but equal limits on campaign contributions of various kinds would thus favor incumbents, although it is also possible that such limits would prevent incumbents from raising the maximum amount of campaign funds.

A significant minority of the Advisory Committee, as well as members of the public who attended the subcommittee’s public hearing on the article, thought that the proposal deserved support. Several felt that too much is spent in campaigns for Selectman in Brookline and that public concerns about the influence of campaign contributions from “special interests” need to be addressed. Some even expressed support for attempting to limit the overall amount spent in campaigns for Selectman.

Proponents of Article 27 invoked the general arguments that have been advanced for campaign finance reform at the state and national level. As Representative Barney Frank has argued: “As money has become more and more influential in politics, the inequality of the economic system has damaged the ability of the political system to function.” This logic suggests that the “one person, one vote” principle of political equality is undermined by large campaign contributions. Limits like those in Article 27 attempt to reduce the influence of individuals and groups that can make large campaign contributions.

Proponents of Article 27 suggest that it would reduce the public perception that special interests that can make the maximum legal campaign contribution exert undue influence

in Brookline politics. At the very least, asking candidates to accept voluntary limits would encourage candidates to work harder to collect many small (\$100) contributions from within Brookline, thereby developing a broader base of support in the town.

Proponents of Article 27 also argue that voluntary limits may limit the influence of interests outside Brookline. Candidates for Selectman often have received significant contributions from outside Brookline. The petitioner reported that one recent candidate received \$17,976 from outside Brookline and another received \$10,389. Although some of these contributions are almost certainly from friends and family members, a high level of contributions from outside Brookline creates the impression that, if elected, the candidate might be more responsive to interests outside Brookline than to the residents of the town.

The article's voluntary limits on contributions from candidates also may encourage candidates to rely on contributions and support from many voters instead of financing a large portion of their own campaign spending. Such limits would be a modest step toward dispelling the impression that candidates of independent means have a greater chance of being elected to the Board of Selectmen.

Finally, the article's provision that urges candidates to return contributions over \$200 if contributors do not provide their occupation and employer may foster greater transparency in the political process by encouraging candidates to collect this information from contributors.

In all cases, candidates would be free to accept the voluntary limits, leaving it to the public to decide whether or not to vote for candidates who refused to accept those limits. Whether Article 27 changes politics and campaign financing in Brookline Selectman elections ultimately depends on whether Brookline voters elect candidates who accept voluntary limits or not. If candidates who do not accept such limits are elected to the Board of Selectmen, it will be clear that Brookline voters regard other issues as more important than how campaigns for Selectman are financed. Regardless of the outcome of future elections, urging candidates to accept voluntary limits on campaign contributions helps voters to make an informed choice.

RECOMMENDATION

Although many members of the Advisory Committee agreed with some of the principles behind limits on campaign contributions, the Committee concluded that the voluntary limits proposed in Article 27 were not the best way to address any problem that might exist.

The Advisory Committee by a vote of 10-8 recommends **NO ACTION** on Article 27.

XXX

November 18, 2003
Special Town Meeting
Articles 25-27 – Supplement No. 3

ARTICLES 25 - 27

SELECTMEN'S RECOMMENDATION ON ARTICLE 25-27

The Board of Selectmen chose not to reconsider their votes under Articles 25 and 26. The amendments put forth by the petitioner did not warrant a change from the recommended vote of **NO ACTION**.

The Selectmen did reconsider its vote under Article 27 to discuss the motion to refer the Article to a Moderator's Committee. By a vote of 3 – 2, the Board recommends **NO ACTION** on the motion to refer.

ROLL CALL VOTE

No Action

Goldberg
Geller
Sher

Favorable Action

Hoy
Allen



TOWN OF BROOKLINE
Massachusetts

DEPARTMENT OF PUBLIC WORKS
ENGINEERING & TRANSPORTATION DIVISION
OCTOBER 28, 2003

A. Thomas DeMaio
Commissioner
Peter M. Ditto, PE
Director

STATUS REPORT FROM THE SELECTMEN'S COMMITTEE ON
UNDERGROUND WIRES (No. 2)

The seven member Selectmen's Committee has been meeting monthly throughout the summer and fall. A partial list of key information gathered to date includes: percent of overhead wires in Town (by miles), how by-laws have been structured in other Towns, range of costs to underground wires, funding source, and success and issues other communities have had with this program. The Committee is at a point where a draft by-law will be developed for review by Town Counsel. A public review process will begin to inform and educate the general public on the proposed by-law and process for under grounding of overhead wires. It is anticipated that the Committee will be prepared to present the by-law for Town Meeting approval in Spring, 2004.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

October 2003
Underground Wires Committee Progress Report

Executive Summary..... 2

Purpose of Report..... 3

Formation of Committee..... 3

Committee Appointed..... 3

Reason for Committee..... 3

Meetings held the Committee..... 5

Status of Overhead Wiring in Brookline..... 8

Current Laws (MGL 166 Ch 22)..... 9

Undergrounding Time Frame..... 9

Committee's Continuing Agenda..... 9

The Undergrounding Framework..... 9

Supporting Documentation ***..... 10

Appendix A - What are other towns doing?..... 11

 Town of Reading..... 11

 Town of Lexington..... 11

 Town of Concord..... 11

 Town of North Andover..... 12

 Town of Canton..... 13

 Town of Westwood..... 14

 Town of Wellesley..... 14

*** Copies of these documents are on file and available at the
Town of Brookline Engineering office.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Executive Summary

- **Mandate** of the Committee
- **Vision:** Over a period of years, free all Brookline streets from overhead wires
 - Prevent installation of new overhead wires
 - Underground existing wires
- **Major Findings**
 - 1) **Legal structure:** Massachusetts's law (Chapter 166, Section 22) provides a mechanism through which cities and towns may require electrical and telephone utilities to place wires underground. The law also provides a mechanism for financing undergrounding through a surcharge on electrical and telephone bills.
 - 2) **Precedent:** Nationally interest in undergrounding is widespread. Other towns in MA have introduced programs that provide a useful framework for establishing a program in Brookline. Particularly helpful is a recent bylaw enacted in North Andover.
 - 3) **Scope of Problem:** We have worked with the Engineering Department and have analyzed the problem. The Town of Brookline has approximately 100 miles of streets, and about 76 miles of these streets have overhead wires. Based on estimates obtained from other Towns, the cost to underground can range from \$500,000 to as much as \$2,000,000 per mile. Using this estimate range, the cost to underground all these wires could range from \$38M to \$150M.
 - 4) **Time frame:** Undergrounding will take many years because the surcharges on utility bills will yield annual revenues that are modest in relation to the overall cost of the program.
- **Continuing committee agenda**
 - Estimate annual revenues from surcharges on utility bills.
 - Estimate the number of years required to complete the program.
 - Recommend a structure for implementing an undergrounding program.
 - In concert with the Town Counsel, draft a bylaw to permit initiation of an undergrounding program.
 - In collaboration with the Planning Department, hold the public hearing mandated by state law.
 - Carry out a public education program to explain the proposed undergrounding program.

**Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003**

Purpose of Report

This report has been prepared as part of a presentation to the Selectmen to update them on the activities that have been undertaken and are pending for the Selectmen's Committee formed at the end of 2002.

Formation of Committee

In the fall of 2002, Article 21 was submitted for Town Meeting. It proposed a Selectmen's Committee to review the fact that a significant portion of the Town was not serviced by underground-wired utilities. The recent addition of new wired-services for cable and Internet services had exacerbated the unsightliness of those areas of Brookline that currently have overhead wiring.

After review, the Selectmen voted 4-0 and the Advisory Committee voted 16-1 in support of Article 21 as follows:

Whereas, a significant portion of the town of Brookline is not serviced by underground wired utilities;

Whereas, above ground wired utility facilities are subject to weather relate injury and interruption and constitute visual blight within the community;

NOW, THEREFORE, this town meeting request that the Board of Selectmen appoint a seven person committee to investigate and report to the Spring 2003 Town Meeting the Town's options with regard to the issues associated with overhead wiring, including the possibility of placing all wired utilities underground with its recommendations concerning the adoption of a By-law that requires all public utility companies within the community to place their distribution systems underground within the Town.

Committee Appointed

After advertising for committee volunteers, and the subsequent interview process with the Board of Selectmen, Richard Kelliher announced the appointment of the seven-member committee on February 27th 2003. The committee was constituted as follows:

Selectman Gilbert Hoy
Helen Braun
Francis G. Caro
Melvin Clouse, M.D.
Richard Farwell
Wei-Lee Shia, P.E.
Peter Ditto, Staff

The first meeting of the committee was convened on March 21st 2003.

Gilbert Hoy and Richard Farwell were subsequently elected by the committee to serve as Co-Chairs.

Reason for Committee

Utility poles supporting a network of wires that deliver telephone and electrical service are a familiar part of the Brookline streetscape. In recent years, with the advent of cable television and, more recently, the introduction of fax, e-mail, and Internet services, this network has become denser and more intricate within Brookline. It is also certain that this trend will continue, as the web becomes a standard means for doing commercial and household business.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Brookline residents feel strongly that they have already reached a saturation point in the overhead wiring system with a result that it is unsafe and unsightly. They also believe that it is unnecessary.

Unsafe: Overhead utility wiring is especially subject to wind, rain, lightning and other storm-related damage and deterioration. Overhead electrical wiring endangers in particular wood-built structures and in addition may prevent rapid and effective access to buildings by fire engines and other protection equipment.

Unsightly: The proliferation of aerial utility wires overhead detracts significantly from the historical integrity of the architectural character of Brookline and may also be detrimental to specific and overall property values in the entire Town.

Unnecessary: Other communities have shown that it is currently possible to lay appropriate conduit for underground wiring throughout the Town. A number of individuals and buildings have already opted for underground wiring to private houses and businesses. In a significant portion of Brookline, all wires are already underground.

We believe that "undergrounding", as the relocating of wires underground is colloquially called, would substantially reduce the costs in time, materials and manpower for maintaining aerial utility lines, protect us from natural disasters and weather-related deterioration of aerial wiring, improve the infrastructure of the town of Brookline by permitting quicker, cheaper, and more responsive technological upgrades, reduce the dangers of fire and increase access for fire-protection equipment and personnel.

The opportunity for Brookline is to explore the feasibility of undergrounding utilities across the whole town over a long period of time while minimizing the associated costs by coordinating the undergrounding effort with the utility infrastructure upgrades and street repairs that would be undertaken (and paid for) anyway, independently of undergrounding. If we never start such an effort, the problem of ever-larger quantities of unappealing poles and wires along our streets will never go away.

In recent years, the communications industry has become more competitive and have been offering an increasing number of "new services" (e.g. telephone over cable, Internet access over cable, Internet access via [telephone] ADSL lines, etc.). These services are now available from various companies (RCN, Cablevision, Verizon), and have substantially increased the quantities of "boxes" (e.g. amplifiers, batteries, splitters) and wires on the existing poles along our streets, and in some cases are installing additional poles and cabinets.

The impact on our townscape is clear: we are unfortunately witnessing a degradation of Brookline's appearance. The visual pollution will only get worse, unless we can correct the problem. Brookline residents look at the poles and wires along our streets are disturbed that our views of the sky are obstructed by ever increasing volumes of unappealing wires and equipment.

While Brookline residents are appalled by the increasing burden of wires, pole owners are collecting additional fees from the rental of their poles as more wires are added.

Brookline's Town government currently lacks strategies to manage the growth of utility equipment on our streets. The DPW is challenged to keep its maps of the poles, wires and cabinets already installed in town up to date. Additional requests by utilities to install equipment are handled on a case-by-case basis by the Selectmen via individual hearings, without a long-term multi-year view of the

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

anticipated additions. Unfortunately, the Selectmen without a global longer term strategy available to deal with individual requests will be left with limited options.

While the problems posed by overhead wires, poles and equipment along our streets are becoming quite real for many citizens (particularly the ever increasing visual pollution), the utility companies may be experiencing maintenance costs that are higher than necessary in Brookline (because some of the substations, poles, wires and equipment are very old). This may create a strong incentive for the utilities to plan substantial upgrades of their infrastructure in Brookline. In parallel, Brookline can review their multi-year program to repair or rebuild our streets.

In this context, now is the appropriate time for Brookline to move forward and adopt a By-Law that requires all public utility companies within the community to place their distribution systems underground within the Town. This practice is commonly referred to as "undergrounding". Because the costs of undergrounding would be substantial, we must take a long-term view and aim at accomplishing the undergrounding in perhaps 50 to 100 years to make it affordable.

The net result of having all our utilities underground would be a dramatic improvement in the aesthetics of our Town and a substantial improvement in the reliability of our electric service (if nationwide outage statistics for overhead vs. underground distribution networks also apply to Brookline). If undergrounding turns out to be feasible across town, Brookline, along with other towns like Lexington and North Andover, could show leadership in addressing an issue that will undoubtedly become more acute in many other towns across the Commonwealth.

Meetings held the Committee

At the March 21st 2003 kickoff meeting, the committee reviewed their charter given them by Town Meeting through the Board of Selectmen, and then outlined areas to be investigated:

- Review current town practices for granting permission to place wires on poles, set new poles and place conduits in streets.
- Check with other Cities and Towns who might have studied this issue or have actually put overhead wires underground.
- Contact Town counsel with respect to legality of requiring wires to be placed underground.
- Look into what legal framework (perhaps MGL Chapter 166, Section 22) would be relevant.
- Determine what the costs would be and how they would be financed (including the cost to connect each house to the underground networks).
- Identify design and engineering issues (including planning for available underground capacity for future services [electric distribution, communications, metering, other] and for services the Town may want to offer directly).
- Determine how undergrounding could be synchronized with street repairs and rebuilding and with upgrades by the utilities of their physical plant (to minimize the combined costs and the disruptions to citizens).
- Establish a procedure for determining the sequence of undergrounding in various parts of Town .

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Over the next months, the committee met ten more times to review collected material and most importantly to understand what other Towns were doing in the undergrounding area. Appendix A details what we learned from other Massachusetts Towns.

In particular, three of these meetings involved in person or conference calls with representatives from some of the Towns most active in undergrounding. The highlights of these meetings are as follows:

On June 6th, we had a conference call with Patrick Mehr, Lexington Town Meeting member:

- Patrick gave a brief historical perspective and what cities & towns faced based on his research.
- Patrick's estimate to bury the power lines was \$.5 to 3 million per mile of street, his survey showed Lexington had about 155 miles of street. Pro-rated over 100 years, that would mean an average increase in electricity of about \$20 per family /month on average for the 100 years.
- It was unclear that people would pay for 'undergrounding' - Lexington tried to have an override on taxes and it failed this year. So he started researching how others handled, and found that Concord was one of the most active in the US.
- Further research showed that one reason was that Concord owned their MLP since 1898. They were undergrounding and electric cost to homeowners was 25% less than comparable in Lexington. Concord was undergrounding for about \$500k per mile.
- Bedford had horror stories about their project on Great Road where they ended up paying \$3M per mile.
- Patrick came to the conclusion that 'undergrounding' would never happen when served by a public electric utility like MSTAR. Two main reasons 1) they don't care to go through the hassles associated with that and they being a monopoly level did not have much incentive, and 2) too expensive and would cost homeowners more than they would be willing to pay.
- Faced with these forces, Patrick began researching Lexington becomes a 'muni' and taking over their electric service similar to Concord. Turned out that no new 'muni' have been established since 1926 or so, even though there were laws providing for it. Lexington has been leading the charge to get the laws clarified to make it more probable that if Lexington decided to go ahead that they would have laws supporting them in their negotiations with MSTAR

On June 13th, Dan Sack, Superintendent of Concord Municipal Light Plant (MLP) joined our meeting.

- Dan briefly reviewed their experience with undergrounding. Adopted the bylaw back in late 1980's (we have a copy) allowing utilities to collect 2% surcharge. Verizon started collecting back in 1987 timeframe.
- Verizon has continued to collect the 2% and have been operating with the philosophy that the 2% is what funds capital improvements. The statute and bylaw state '2% is a contribution to capital improvements'.
- Verizon has not really done any undergrounding in the last 5 years. They have used as an excuse that Concord had no 'plan'.
- Dan hoped to solve that by introducing a new 2003 Bylaw with specific projects that needed to be completed by the end of 2004 & others by the end of 2005.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

- In 1992 when Concord was installing a new sub-station, they undergrounded 3.5 miles. They undergrounded the supply lines and service to each house along the way. At the same time, they got plans for cable and telephone and buried conduit for that usage. Charge back to Verizon was a little more than \$1M. Verizon has never used this conduit.
- Note - Concord MLP pays for installing the underground cable to the meter on the private home or business.
- Dan's recommendations for Brookline are:
 1. Pass an 'enabling bylaw' that allows the town to move ahead with 'undergrounding' projects under the State statute including the collection of the 2% surcharge.
 2. Identify specific projects to undertake, and pass an article regarding the project with specific timeframes. Dan indicated that it was very important when working with utilities to have specific projects and timeframes that must be met - open-ended situations invite 'no activity.'
- When identifying projects, use as criteria some or all of the following:
 1. **Reliability** issues that utility also would agree needs addressing (Peter believes that Brookline has already addressed many of these)
 2. **Esthetics** (big issue for Brookline, but must be careful to target priority projects and keep politics out of it)
 3. **Code violations** (too many wires on a pole, double poles, separation of services)
 4. **Co-ordination with Town work** being done on other projects like water, sewer and street improvements

On August 7th meeting, we had a conference call with John Shortsleeve, a consultant that helped draft the Town of North Andover bylaws

- The call helped the committee members learned a lot about the 'nuts & bolts' involved in working with the state legislation and the utilities. The following notes highlight some of the points made by John.
- Chapter 22 - wording leaves a lot to be desired relative to the 'underground statute'. John felt it important that they first looked at the terminology and to define exactly what is meant by each of the critical terms. For example, 'the law requires ... to file a plan. Their question was 'what is a plan?' 'when is it effective?' For example their plan is effective in Jan. 2005. So North Andover and John did their best to go through the law and clear up any ambiguities.
- North Andover brought on a Project Coordinator (paying about \$24,000 for part-time Project Manager funded 25% each by Town, and 25% each from the three utilities). His name is Jeff Martin, a consultant from the South Shore who has also done work for Nantucket & Canton.
- John saw one approach that Brookline could take is to schedule for May 2004 meeting, but that would mean that the earliest it could be effective would be Jan. 1, 2006. Ordinance goes to Attorney General (AG) for approval. Overall, John said that we should lift words from the State statute and define them. One of the biggest areas of ambiguity is that the statute has no timeframe for filing. Might require filing a plan by 1/1/06, use the first 6 months of '06 to negotiate and if not negotiated, North Andover had control in their case. They would be then spending the 2% collected in 2005.
- Scope of the North Andover projects. Two sections were focused on 1) downtown commercial (less than ½ mile of streets), and 2) town common (700

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

lineal feet of street). Overall, it was a very small portion of the town streets.

- Where does the money come from? Electric power & telephone can each collect 2% of total town revenues. The Cable Company cannot collect the surcharge!
- Scope of Brookline project. John recommended that you look at sequencing the sections of the Town even if the goal is to underground the whole town.
- North Andover History. Andover passed their original law back in '99, and amended it in 2001. Nothing really happened with the original laws. Utilities ignored the drafting of the new North Andover ordinance, and they never really heard from them until after the AG had approved it. John has no continuing relationship with North Andover because they brought in the Project Manager mentioned above at about ½ John's rates. John does recommend that Brookline do sit down with North Andover, Mark Reece, as we proceed forward.
- What does the MGL 22M say relative to collections and spending? Talks about spending 2% of the previous year revenues. Questions came up about 'only collecting what they spend'. The answer really is that the utilities have to spend at least what they collect under the 2% but nothing stops them from spending more. John brought up another point that we need to keep in mind - statute does say 2% collected plus the salvage value of what is removed must be spent. Obviously, the utilities will want to minimize the 'salvage value' for these purposes. This 'extra salvage value' would be valued at the utilities' depreciated book value, but could be another 5% or more. It is worth testing this feature.
- Co-operation among the Parties. There is a co-operation agreement in the statute - so that there is nothing saying that the 2% could be collected by the utility, and spent by the Town.
- North Andover gave their project manager control over the permitting and easement processes.
- Utilities Reaction. In general, utilities hate undergrounding projects. Contrary to what we may have thought about it being more cost effective, utilities believe that 'what they can see, they feel they can fix easier'.
- Summary Points By John & Committee
 - i. See no problem in doing the undergrounding project, Town under state statute has the authority
 - ii. Select and push a few projects, do not try to do the whole Town at one time
 - iii. Some specific areas that John recommends exploring a) compounding of the 2% like Canton is trying, and 2) pushing the salvage value issue
 - iv. One approach would be to pass a simple undergrounding bylaw this fall, and amend it later - that way it could be effective for 1/1/2005.

In the next meetings we reviewed the status of overhead wiring in the Town of Brookline, and prepared a status report to be given to the Selectmen's meeting on October 21st.

Status of Overhead Wiring in Brookline

We have worked with the Engineering Department and have analyzed the problem. The Town of Brookline has approximately 100 miles of streets, and about 76 miles of these streets have overhead wires. Based on estimates obtained from other Towns, the cost to underground can range from \$500,000 to as much as \$2,000,000 per mile. Using this estimate range, the cost to underground all these wires could range from \$38M to \$150M.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Current Laws (MGL 166 Ch 22)

- Massachusetts General Laws (Chapter 166, Section 22) that provides a framework for towns (via the Selectmen and the Planning Board) to require that utilities underground their networks. Open question was why were more towns not utilizing these bylaws to force utilities to underground utilities.
 - Chapter 166 covers everything to do with telephone and electric companies, and lines for their transmission.
 - Section 22 deals with the alteration or construction of lines within the municipality
 - The law permits the electric and power utilities to collect a surcharge of 2% of the monthly bills to be allocated to undergrounding projects.
 - The law requires that the utilities provide the city / town with an estimate for all work necessary to underground their equipment (including excavation, manholes, conduit, wires, transformers...).

Undergrounding Time Frame

- Undergrounding will take many years because the surcharges on utility bills will yield annual revenues that are modest in relation to the overall cost of the program.

Committee's Continuing Agenda

- o Estimate annual revenues from surcharges on utility bills
 - o Need to get revenue figures from utilities for Brookline bills
- o Estimate the number of years required to complete the program
- o Recommend a structure for implementing an undergrounding program
- o Draft a bylaw to permit initiation of an undergrounding program
- o In collaboration with the Planning committee, hold the public hearing mandated by state law
- o Carry out a public education program to explain the proposed undergrounding program

The Undergrounding Framework

The Underground Wiring Committee must detail a suitable framework for the implementation of undergrounding activities in parallel with the drafting of the By-Law controlling the process. This framework will include the following:

- o Criteria for establishing priorities in establishing a sequence of areas for undergrounding
 - o Must be based upon defensible principles
 - o Based on new service, safety, Town's street work, etc
- o Identification of the entity responsible for administering the process including coordination of work involving several utilities

**Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003**

- o Determination of the manner in which undergrounding will be linked to the Town's street work programs
- o Determination of the manner in which these projects will be factored into the Town's annual planning
- o Determine what Town resources will be required, and their availability
- o Identification of an entity responsible for monitoring progress of the program
- o Identification of an entity responsible for seeking additional resources to accelerate the progress of the program

Supporting Documentation ***

- A) Town of Brookline - Article 21
- B) Committee appointed by Selectmen
- C) Typical Utility Pole layout used in Brookline
- D) MGL Chapter 166 Section 22 laws
- E) Town of North Andover - Amended version of their Chapter 170 - Underground Utilities
- F) Cape Cod Underground utilities Workshop
- G) Undergrounding Wiring Committee Status report to Spring 2003 Town Meeting
- H) Overhead Wires Legislation amending MGL 166 Section 22D
- I) Cape Cod Underground Utilities Workshop
- J) Dan Sack letter summarizing Meeting on Underground Wiring
- K) Dan Sack correspondence supporting Undergrounding Legislation Change

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Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Appendix A - What are other towns doing?

Town of Reading

- They have not done any formal investigation regarding placing all of their overhead utilities underground. The downtown area of Reading has underground utilities, the contact was not sure when they were put underground, most likely it was quite a long time ago. The Town does require all new subdivisions to have underground utilities.

Town of Lexington

- Had conference call with Patrick Mehr, Town Meeting member
- Patrick gave a brief historical perspective and what cities & towns faced based on his research.
- To bury the power lines, he estimate \$.5 to 3 million per mile of street, his survey showed Lexington had about 155 miles of street. Pro-rated over 100 years, that would mean an average increase in electricity of about \$20 per family /month on average for the 100 years
- It was unclear that people would pay for 'undergrounding' - Lexington tried to have an override on taxes and it failed this year. So he started researching how others handled the problem, and found that Concord was one of the most active in the US.
- Further research showed that one reason was that Concord owned their MLP (Municipal Light Plant) since 1898. They were undergrounding, and their electric cost to homeowners was 25% less than comparable in Lexington. Concord was undergrounding for about \$500k per mile.
- Bedford had horror stories about their project on Great Road where they ended up paying \$3M per mile.
- Patrick came to the conclusion that 'undergrounding' would never happen when served by a public electric utility like MSTAR. Two main reasons 1) they don't care to go through the hassles associated with that and they being a monopoly level did not have much incentive, and 2) they believed because it was expensive and would cost homeowners more than they would be willing to pay.
- Patrick then began researching Lexington becomes a MLP and taking over their electric service. Turned out that no new MLP's have been established since 1926 or so, even though there were laws providing for it. Lexington has been leading the charge to get the laws clarified to make it more probable that if Lexington decided to go ahead that they would have laws supporting them in their negotiations with MSTAR
- Lexington is promoting the new bill, getting it publicity, having meetings with other cities and towns around MA to get the bill passed.

Town of Concord

- On June 13th met with Dan Sack, Superintendent of Concord Municipal Light Plant (MLP)
- Dan briefly reviewed their experience with undergrounding. Adopted the bylaw back in late 1980's (we have a copy) allowing utilities to collect 2% surcharge. Verizon started collecting back in 1987 timeframe.
- Verizon has continued to collect the 2% and have been operating with the philosophy that the 2 % is what funds capital improvements. The statute and bylaw state the 2 % is a contribution to capital improvements.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

- Verizon has not really done any undergrounding in the last 5 years. They have used as an excuse that Concord had no 'plan'.
- Dan hoped to solve that by introducing a new 2003 Bylaw with specific projects that needed to be completed by the end of 2004 & others by the end of 2005.
- Back in 1992 when Concord was installing a new sub-station, they undergrounded 3.5 miles. They undergrounded the supply lines and service to each house along the way. At the same time, they got plans for cable and telephone and buried conduit for that usage. Charge back to Verizon was a little more than \$1M. Verizon has never used this conduit.
- Note - Concord MLP pays for installing the underground cable to the meter on the private home or business.
- Recommendation that Dan has for Brookline. Pass an 'enabling bylaw' that allows the town to move ahead with 'undergrounding' projects and identify specific projects to under take, and pass article regarding the project with specific timeframes. Dan indicated that it was very important when working with utilities to have specific projects and timeframes that must be met - open ended situations impede 'no activity'
- When identifying projects, use as criteria a) Reliability issues, b) Esthetics, c) Code violations, and d) Co-ordination with other Town.

Town of North Andover

- August 7th meeting, we had a conference call with John Shortsleeve who helped draft the Town of North Andover bylaws
- Primary purpose of this meeting was to have a conference call with Mr. John Shortsleeve, who had previously done a lot of work with North Andover to prepare and draft their article. The call went very well and the committee members learned a lot about the 'nuts & bolts' involved in working with the state legislation and the utilities. The following will be notes that I jotted down during the conference call, and are meant to be a refresher as apposed to a detailed and professional treatise of the material covered.
- Chapter 22 - wording leaves a lot to be desired relative to the 'underground statue'. John felt it important that they first looked at the terminology and defined exactly what is meant by each of the critical terms. For example, 'the law requires ... to file a plan. Their question was 'what is a plan?' 'when is it effective?'. For example their plan is effective in Jan. 2005. So North Andover & John did their best to go through the law and clear up any ambiguities.
- Another area that they strived to get control over was the 'schedule' - try to get it so that it was 'date certain'.
- Where does the money come from? Electric power & telephone can each collect 2% of total town revenues. Cable Company cannot!
- North Andover brought on a Project Coordinator (paying about \$24,000 for part-time Project Manager - funded 25% by Town, and 25% each from the three utilities. His name is Jeff Martin, a consultant from the South Shore and has also done work for Nantucket & Canton.
- Scope of the North Andover project - Two sections were focused on 1) downtown commercial (less than ½ mile of streets), and 2) town common (7000 lineal feet of street). Overall, it was a very small portion of the town streets.
- John saw a couple of approaches that Brookline could use, one of which follows.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

- Schedule for May 2004 meeting, but that would mean that the earliest it could be effective would be Jan. 1, 2006. Ordinance goes to Attorney general (AG) for approval. Overall, John said that we should lift words from the State statute and define them. One of the biggest areas of ambiguity is that the statute has no timeframe for filing. Might require filing a plan by 1/1/06, use the first 6 months of '06 to negotiate and if not negotiated, North Andover had control in their case. They would be then spending the 2% collected in 2005.
- Scope of Brookline project. John recommended that you look at sequencing the sections of the Town even if the goal is to underground the whole town.
- North Andover History. Andover passed their original law back in '99, and amended it in 2001. Nothing really happened with the original laws. Utilities ignored the drafting of the new North Andover ordinance, and they never really heard from them until after the AG had approved it. John has no continuing relationship with North Andover because they brought in the Project Manger mentioned above at about ½ John's rates. John does recommend that Brookline do sit down with North Andover, Mark Reece, as we proceed forward.
- What does the MGL 22M say relative to collections and spending? Talks about spending 2% of the previous year revenues. ? Came up about 'only collecting what they spend'. Answer really is that the utilities have to spend at least what they collect under the 2% but nothing stops them from spending more. John brought up another point that we need to keep in mind - statute does say 2% collected plus the salvage value of what is removed must be spent. Obviously, the utilities will want to minimize the 'salvage vale' for these purposes. This 'extra salvage value' would be valued at the utilities' depreciated book vale, but could be another 5% or more. Worth really testing this feature.
- Co-operation among the Parties. There is a co-operation agreement in the statute - so that there is nothing saying that the 2% could be collected by the utility, and spent by the Town.
- North Andover gave their project manager control over the permitting and easement processes.
- Utilities Reaction. In general, utilities hate undergrounding projects. Contrary to what we may have thought about it being more cost effective, utilities believe that 'what they can see, they feel they can fix easier'.
- Summary Points By John & Committee
 - i. There does not seem to be any problem in doing the undergrounding project, Town under state statute has the authority.
 - ii. Town should select and push a few projects, do not try to do the whole Town at one time.
 - iii. John recommended exploring some specific areas: a) compounding of the 2% like Canton is trying, and 2) pushing the salvage value issue.
 - iv. one approach would be to pass a simple undergrounding bylaw this fall, and amend it later - that way it could be effective for 1/1/2005.

Town of Canton

- Per John Shortsleeve -Canton hired the consultant (Jeff Martin, Martin Associates, Duxbury, MA) that worked on the North Andover projects. They are doing about a mile stretch of downtown. They are about six (6) months ahead of North Andover. In Canton's case, Jeff drafted the request for proposal (RFP). Interestingly, Canton does not have a By-law - they have done it strictly through negotiations.

Underground Wiring Committee
Progress Report to Brookline Board of Selectmen
October 2003

Town of Westwood

- Per John Shortsleeve - Westwood (under the direction of Mike Gillette, Town Administrator) tested a different approach. Westwood put through separate ordinances for each piece of Town. They believed that the utility could then collect 2% for each section of town. It seems that this is within the statute, but still may be challenged.

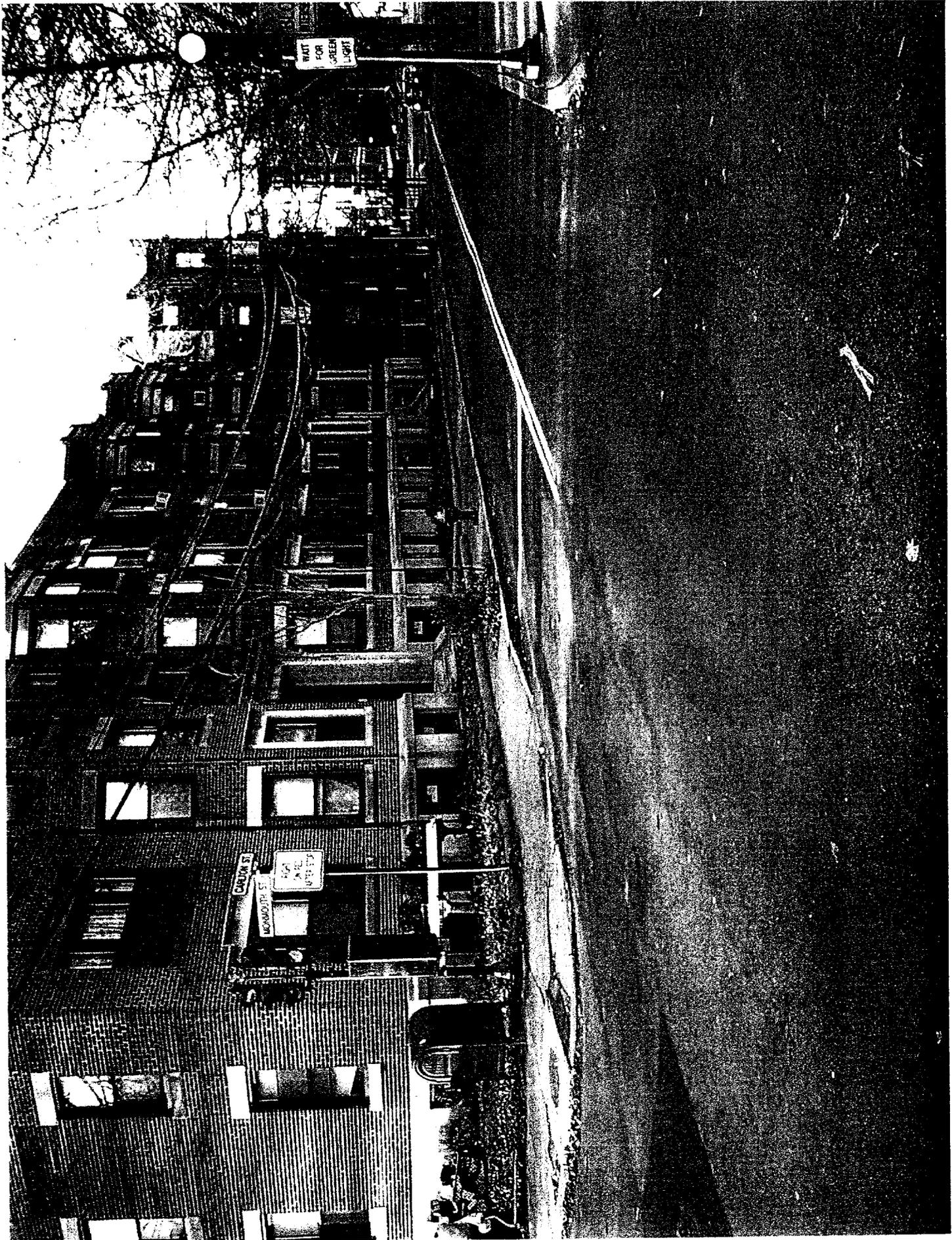
Town of Wellesley

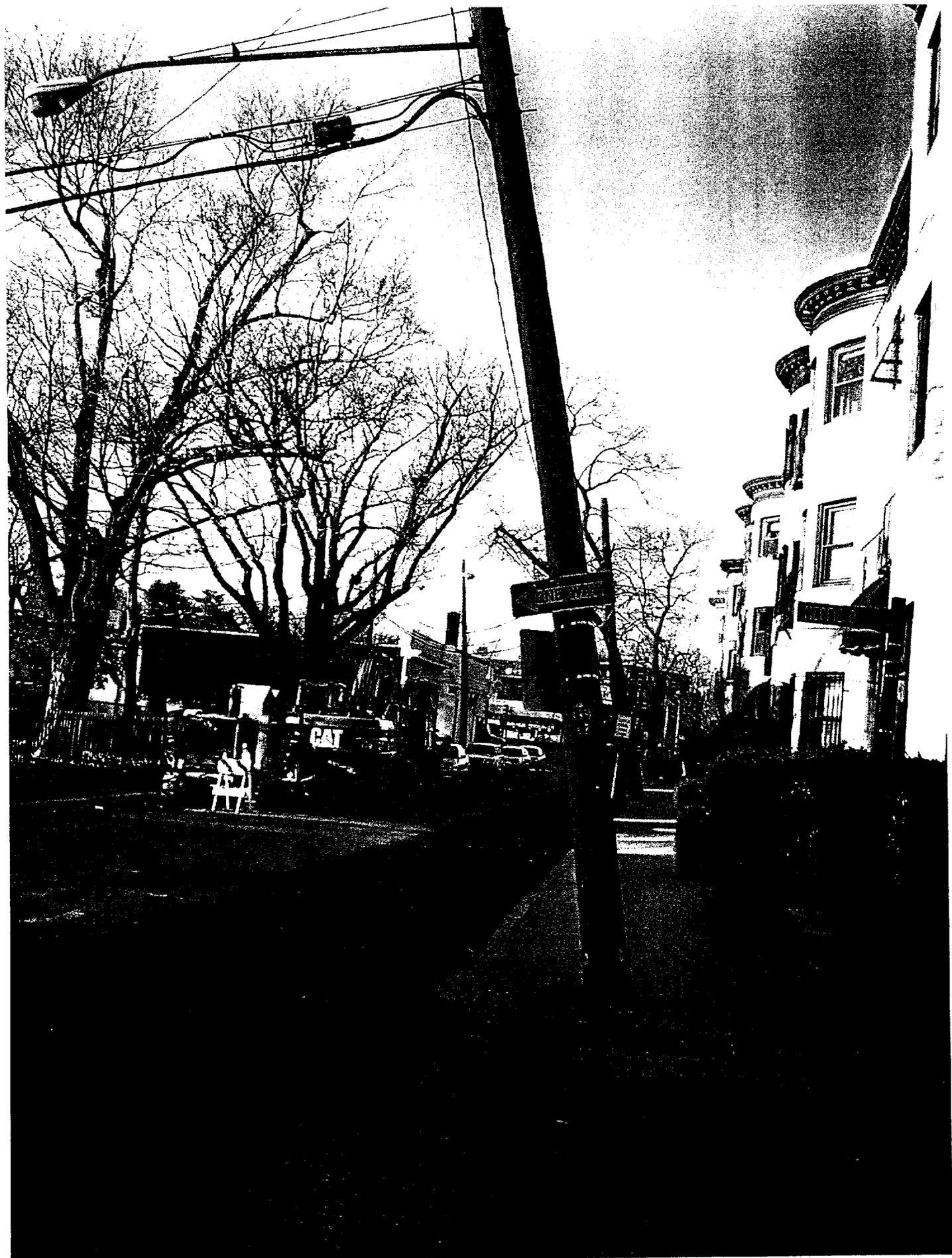
- Most of the older sections of the town have overhead utilities located on wood utility poles. The Wellesley Municipal Light Plant (WMLP) owns those poles north of Route 9 (Worcester Street) while those located south of Route 9 are owned by VERIZON.

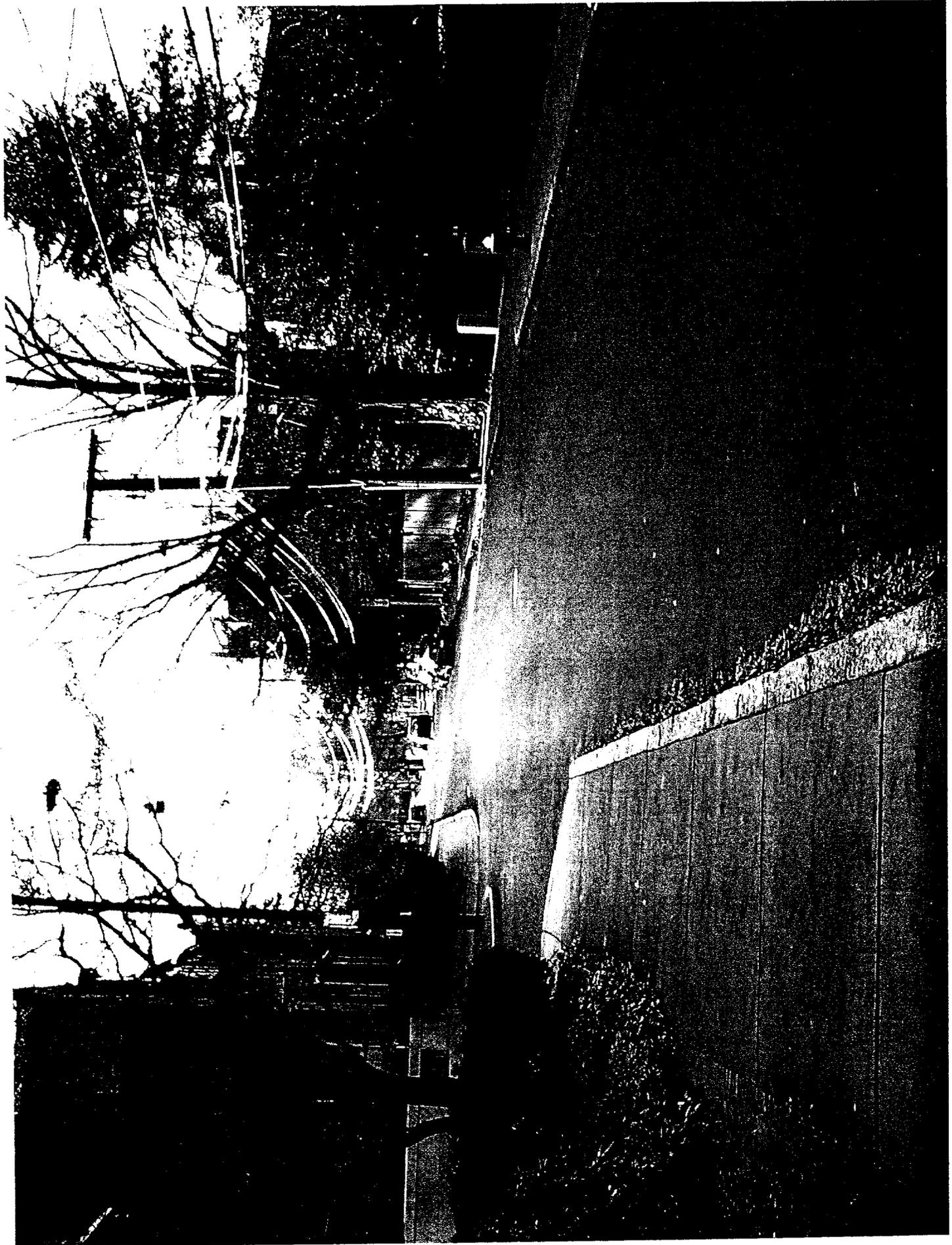
In newer sections of the town, the utilities are located underground. The Planning Board's rules and regulations regarding subdivision construction require that all new subdivisions construct utilities underground. The underground utilities, which otherwise might be overhead, consist of electric (town owned WMLP), telephone, cable television, and possibly fire alarm. The Planning Board regulations for subdivisions have been in effect since 1971. Much of the new house services for each of these utilities are now underground.

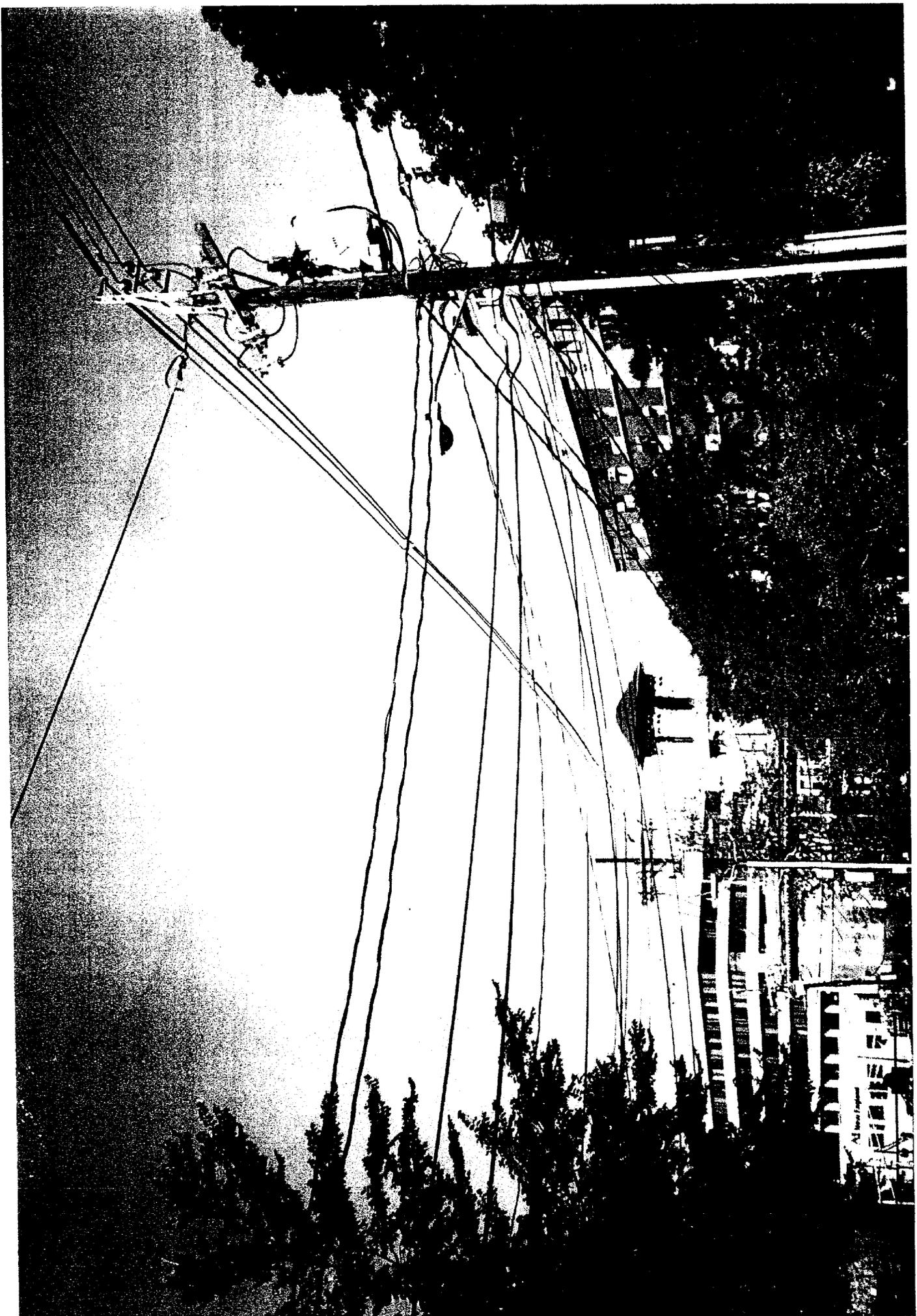
The Town is in the process of considering the undergrounding of a one-mile section of Weston Road, prior to reconstruction of the roadway and sidewalks. The retrofit of utilities underground can be an expensive proposition. In addition, the cooperation received from the various utilities can be difficult. The WMLP is an exception to this because it seeks to follow the goals of the town toward this end. However, there have been a number of issues with some of the other utilities regarding the undergrounding of their facilities.

In short, wherever possible as relates to new construction, the town seeks to place all utilities underground. However, there is no specific plan to retrofit the town's entire overhead utility system to underground. They also stated that this is not work that most utilities are looking for, so expect delays, lack of cooperation and high initial estimates from most.









Underground Wiring Committee

A Selectmen Committee

Progress Report
To
Board of Selectmen

October 28th 2003

Underground Wiring Committee

Gilbert Hoy

- Town of Brookline - Article 21
- 7 Member Selectmen's committee
- Appointed February 27th 2003
- First meeting 3/21/03
- Elected co-chairs
 - Gilbert Hoy
 - Richard Farwell

- Selectman Gilbert Hoy
- Helen Braun
- Francis G. Caro
- Melvin Clouse, M.D.
- Richard Farwell
- Wei-Lee Shia, P.E.
- Peter Ditto, Staff

Background

Helen Braun

- Why there was a need for the committee!
- Why bury the lines?
- Why study the issues?

Executive Summary

Richard Farwell

- Mandate of the Committee
- Group Vision
- Major Findings
 - Legal structure
 - Precedent
 - Scope of problem
 - Time frame
- Undergrounding framework
- Continuing Committee agenda
- Supporting Documentation

Mandate of Committee

- Investigate and report Town's options
 - Issues with overhead wiring
 - Possibilities to place wired utilities underground
- Make recommendations for adopting a By-law requiring utility companies to underground their distribution cabling

Group Vision

- Over a period of years, free all Brookline streets from overhead wires
- Must be accomplished by working on two fronts:
 1. Prevent installation of new overhead wires
 2. Underground existing wires

Legal Structure

- Massachusetts General Laws (Chapter 166, Section 22) provides a framework for towns (via the Selectmen and the Planning Board) to require that utilities underground their networks.
- Requires utility to get Selectmen approval for new poles & wires within the municipality
- MGL 166-22 permits a Town to adopt a bylaw requiring all utilities to convert all overhead wires, poles and equipment to underground
- Permits the electric and telephone utilities to collect a surcharge of 2% of the monthly bills to be allocated to undergrounding projects

Precedent

- Nationally interest in undergrounding is widespread
- Other towns in MA have introduced programs that provide a useful framework for establishing a program in Brookline
 - Lexington, North Andover, Concord, Canton, Burlington, ...
- Particularly helpful is a recent bylaw enacted in North Andover
 - Initially adopted in 1999, amended in 2001
 - Clarifies MGL Chapter 166 Section 22 terminology

Scope of Problem

- With Engineering Department, we analyzed the problem
- Town of Brookline has approximately 100 miles of streets
- About 76 miles of these streets have overhead wires
- New wires and poles continue to be installed
- Cable companies added to a bad situation

Time Frame

- Undergrounding will take many years
 - Overhead wires are wide spread
 - Undergrounding is expensive
 - Surcharges on utility bills yield modest annual revenues
- Based on estimates obtained from other Towns, the cost to underground can range from \$500,000 to as much as \$2,000,000 per mile
- Using this estimate range, the cost to underground all these wires could range from \$38M to \$150M
- Timeframe could be 50 to 100 years

Undergrounding Framework

- Framework must provide details for implementing undergrounding projects
 - Criteria for prioritizing sequence of areas – defensible & based on new service, safety, Town's street work, etc
 - Identity of administration authority
 - Linkage to Town's street work programs
 - Incorporation into Town's annual planning
 - Town resources required and availability
 - Oversight responsibility to monitor progress

Continuing Committee Agenda

- Estimate annual revenues from 2% surcharges on utility bills
 - Need to get revenue figures from utilities for Brookline bills
 - Refine estimate of number of years required to complete the program
- Recommend a structure for implementing an undergrounding program
- Draft a By-law to permit initiation of an undergrounding program
- In collaboration with the Planning committee, hold the public hearing mandated by state law
- Carry out a public education program to explain the proposed undergrounding program
- Present Bylaw and framework to Spring 2004 Town Meeting

Supporting Documentation

- MGL Chapter 166 Section 22 laws
- Typical Utility Pole layout used in Brookline
- Cape Cod Underground utilities Workshop
- Town of North Andover By-law
- Senate Bill 407 clarifying Chapter 166 Section 22
- House Bill 1468 dealing with Town owning the electric utility
- Committee meeting minutes

*** Copies of these documents are on file and available at the Town of Brookline Engineering office

Q & A

Senate Bill 407

- Sponsored by Senator Susan Fargo
- Chapter 166 Section 22 passed in 1969
- Only one telephone company, AT&T
- After breakup, 2% surcharge only collected on local telephone service
- Bill clarifies:
 - Expanded definition to include all intelligence transmitted over wires
 - Clarify how & when utility spends collected monies
 - Requires utilities to report in detail how they spend the money

House Bill 1468

- 41 municipal light plants exist in Massachusetts, none formed since 1926
- Why? – the process needs clarification
- Bill amends Chapter 164 Section 43:
 - Spells out utility obligation to sell assets
 - Provides for determining the price
 - Requires utilities to maintain accounts for asset valuation
 - Discusses the transfer process from the existing utility
 - Provides time lines
- Endorsed by 84 municipalities and organizations
- Expected to go to public hearings in Jan'04

Interim Status Report of the Town Meeting Procedures Committee

Last Fall's Town Meeting created the Town Meeting Procedures Committee to study other representative Town Meetings and compare them to the procedures followed in Brookline. The persons appointed to the Committee are: Harry Bohrs; Bob Stein; Betsy DeWitt; Jesse Mermell; Betsy Shure Gross; Cathleen Cavell; and Jonathan Karon.

To date, the Committee has met four times: on January 15, 2003; February 26, 2003, April 30, 2003; and July 17, 2003. In addition to these meetings of the full committee, members have also met in smaller groups to attend and gather information on Town Meetings in other communities as a springboard for examination of the procedures followed in Brookline, both prior to and on the floor of Town Meeting. These have included:

- Visit to Framingham's Town Meeting, together with interviews of the Chair of Framingham's Finance Committee; the Chair of its Standing Committee on Rules; and one of its Selectmen;
- Attendance at Concord's Town Meeting Workshop;
- Informal inquiries into procedures in Needham and Plymouth;
- Review of published literature on representative town meetings;

The committee has also identified Arlington, Lexington, Wellesley, Stow, and Belmont as additional potential town meetings of interest.

In light of information learned and the committee's own deliberations, the following issues have been identified as key to any changes in Town Meeting procedure we might ultimately suggest:

- How to best balance the inevitable tension between a fully inclusive Town Meeting process and one that is efficient in terms of the expenditure of members' time and the overall length of Town Meeting;
- How best to manage the debate on the floor of town meeting, including how best to ensure meaningful debate on the floor of Town Meeting without leading to adoption of proposals which have not been properly reviewed;
- How to create incentives and lower barriers, either perceived or real, to Town Meeting member participation throughout the year and not just during the nights of Town Meeting;
- How to most effectively develop and provide accurate information on the budget and other warrant articles to Town Meeting members. Included in this issue are the relative roles, deliberations and hearings of the Selectmen, the Advisory Committee, involved Boards and Commissions and the summaries of these that appear in the Combined Reports;
- How to provide Town Meeting members with any necessary historical context for consideration of warrant articles;

- Sources of Town Meeting member frustration, including such issues, again whether real or imagined, as feeling “left out,” the process being little more than a “rubber stamp,” having insufficient time to review material, complaints about members never reviewing mailed material prior to Town Meeting, “the same people” always dominating the discussion at Town Meeting, the closure of debate process, etc.

Following this Fall’s Town Meeting, the Committee plans to hold a public hearing to solicit comments on what topics are of greatest concern to Town Meeting members and/or the general public. The Committee intends to conduct further Town Meeting visits (including potentially visits to other towns’ Finance Committees) and/or interviews as necessary to pursue those topics, continue our deliberations and prepare a detailed final report, together with what procedural changes we might recommend, to the Spring Town Meeting.

If you would like copies of the Committee’s minutes or would like to make any suggestions concerning its inquiries please feel free to contact Committee Chair Jonathan Karon at Kdlaw@worldnet.att.net or by telephone at 617-367-3311.