

OFFICE OF TOWN COUNSEL

NINTH SCHOOL SITING

LEGAL SUMMARY

April 30, 2018

Ninth School Legal Summary

Our office has been asked to provide a legal summary identifying all existing and potential restrictions on 9th school sites being considered that could impact the selection of a site as the partial or full solution to the PSB's projected school capacity needs.

Please note that a statement as to the existence of a potential restriction is not and cannot be a commentary on whether it could be a means of preventing the use of a site. Many of the restrictions described below require review by a state or local agency. The stringency and impact of that review vary depending on the restriction. Further, decisions by state and local agencies are often subject to appeal, which creates another layer of legal uncertainty. This list is intended to provide a list of what we have determined are site-specific restrictions based on the plans that have been provided to us. If the parameters of the use of a particular site change then additional restrictions could, theoretically, come into play. In addition, certain of the restrictions listed below are purely theoretical and would require additional investigation to determine how they might affect a potential Ninth School.

The final section of this summary deals with certain legal issues that are not site-specific, but should be taken into account nonetheless.

We have made this summary based on the plans for each parcel provided to us by Joe Connelly in March 2018. If further information is brought to our attention, this document may need to be amended.

PIERCE

Eminent Domain: If neighboring parcels at 60-62-64 Harvard Street or 68 Harvard Street are acquired by eminent domain, the owners of the parcels would have the right to challenge the validity of the taking. In addition, the owners would have the right to challenge the valuation used by the Town in determining the amount to pay as compensation for the taking. A challenge based on valuation would not undo the taking, but it could lead to a significant increase in the cost of acquisition if successful.

Title: The title exam for the property known as 60-62-64 Harvard Street has revealed a number of ambiguities as to what entity currently owns the property.

Title: No title exam has been prepared for the 68 Harvard Street property.

Historic Preservation: The Pierce School and neighboring buildings are all either on the National Register of Historic Places or eligible for listing on the National Register of Historic Places. Applications for demolition permits for these buildings will trigger an 18-month demolition delay pursuant to the Town By-Law unless the Preservation Commission elects to reduce the stay.

MEPA review: Demolition of a historic structure will trigger MEPA review. The Town would need to either file an Environmental Notification Form (ENF) or seek to consult with the Massachusetts Historical Commission in an effort to obtain a “no adverse effect” determination or a MOA with the MHC in lieu of filing an ENF.

Zoning: The Pierce site proposals all exceed the zoning allowed for the G-2.0 district. As currently crafted, the proposals all exceed the height allowed for the zoning district. A full list of the waivers required would depend on which proposal was chosen as well as the final dimensions, but construction of this size and density would likely need a significant amount of zoning relief. Although use of the Pierce property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the “Dover Amendment”), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

LWCF: The current Pierce Playground has benefitted from an LWCF grant, and must therefore remain accessible for “public outdoor recreational use.” This requirement may conflict with an increase in the number of classrooms at the Pierce site. Open access to the playground could raise security concerns, limit the playgrounds’ usefulness during recess periods, and could lead to additional maintenance or replacement costs if it accelerated wear and tear on the facilities.

Significance of previous uses: A portion of the greenspace behind the Public Health Building has been designated as the Garden of Remembrance as a memorial to victims of domestic violence.

Nuisance: Traffic impacts from an expansion at Pierce could lead to a suit in tort alleging nuisance.

BALDWIN

Article 97: The southern half of the Baldwin property is protected under Article 97. Use of it in the Baldwin Plan D proposal for school purposes would require removing it from Article 97 protection via a 2/3 vote of both houses of the State Legislature, which would almost certainly require following the EOEEA Land Disposition Policy and acquiring or swapping in land of equal or greater fair market value and significantly greater resource value.

LWCF: Land benefiting from an LWCF grant must remain accessible for “public outdoor recreational use.” This could conflict with any attempt to use the southern half of the Baldwin parcel as dedicated playspace for a new school. Open access to the playground could raise security concerns, limit the playgrounds’ usefulness during recess periods, and could lead to additional maintenance or replacement costs if it accelerated wear and tear on the facilities.

M.G.L. c.45, §7: This statutory section bars the construction of buildings in park land without leave of the Legislature.

M.G.L. c. 214, §7A: Pursuant to this statute, any ten citizens can bring a suit in superior court alleging damage or imminent damage to the environment, and the statute specifically allows the court to enjoin the allegedly damaging action(s) until the case is resolved.

Historic Preservation: The Baldwin School is eligible for listing on the National Register for Historic Places. Applying for a demolition permit will trigger an 18-month demolition delay pursuant to the Town By-Law unless the Preservation elects to reduce the required stay.

MEPA: Disposition of land protected under Article 97 will trigger MEPA review, and will require at least the filing of an ENF and likely additional submissions such as an Environmental Impact Report (EIR) if the Secretary of EOEEA requires it. Demolition of a historic structure will trigger MEPA review. The Town would need to either file an Environmental Notification Form (ENF) or seek to consult with the Massachusetts Historical Commission in an effort to obtain a “no adverse effect” determination or a MOA with the MHC in lieu of filing an ENF.

Zoning: The Baldwin site proposals all exceed the zoning allowed for the T-6 district. As currently crafted, the proposals all exceed the height allowed for the zoning district. A full list of the waivers required would depend on which proposal was chosen as well as the final dimensions, but construction of this size and density would likely need a significant amount of zoning relief. Although use of the Pierce property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the “Dover Amendment”), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Nuisance: Use of the Baldwin site could lead to suits in tort by abutting owners alleging nuisance due to stormwater runoff or excessive traffic impacts impairing the use and enjoyment of their property. Both Baldwin proposals involve construction in close proximity to the neighboring houses on Oak Street. This could lead to nuisance claims if abutters claimed damage due to noise, shadowing or other impacts of the proposed ninth school.

PINE MANOR

Eminent Domain: If the Town acquired the referenced portion of Pine Manor College by eminent domain, the owner would have the right to challenge the validity of the taking. In addition, the owner would have the right to challenge the valuation used by the Town in determining the amount to pay as compensation for the taking. A challenge based on valuation would not undo the taking, but it could lead to a significant increase in the cost of acquisition if successful. Such a challenge could include a claim that the damages should include the loss in value to the remainder of Pine Manor College. Certain neighbors that are parties to a Declaration of Restriction on the land barring access to it from Woodland Road could also bring a claim that this covenant created a compensable interest entitling them to damages as well.

Wetlands: A portion of the property borders wetlands. The state Wetlands Protection Act restricts any development within 100 feet of a wetland, and the Town's wetlands bylaw extends that buffer zone to 150'. A Notice of Resource Area Delineation would have to be filed with Conservation Commission to determine the presence and type of the wetlands.

MEPA: Development within 200' of the wetlands will trigger MEPA review and may require the filing of an Environmental Notification Form (ENF). Disposition of land protected under Article 97 will also trigger MEPA review, and will require at least the filing of an ENF and likely additional submissions such as an Environmental Impact Report (EIR) if the Secretary of EOEEA requires it.

Zoning: The Pine Manor site proposal may exceed the zoning allowed for the S-40 district. As currently crafted, the proposal may exceed the height allowed for the zoning district. A full list of the relief required would depend on the final dimensions, but construction of this size and density may need a significant amount of zoning relief. Although use of the property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the "Dover Amendment"), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Nuisance: Use of the Pine Manor site could lead to suits in tort by abutting owners alleging nuisance due to stormwater runoff or excessive traffic impacts impairing the use and enjoyment of their property.

BAKER

Article 97: Utilizing the west side of the Baker parcel could give rise to a challenge alleging the land is protected under Article 97.

Wetlands: It is our understanding that a Phase I ESA of the site has not been completed. A portion of the property borders wetlands. The state Wetlands Protection Act restricts any development within 100 feet of a wetland, and the Town's wetlands bylaw extends that buffer zone to 150 feet. A Notice of Resource Area Delineation would have to be filed with Conservation Commission to determine the presence and type of the wetlands. If the Commission's Order of Resource Area Delineation found that the wetlands in question was a perennial stream or river, the Rivers Protection Act will apply and bar any development within 200 feet from the mean annual high water line where: a) there will be a significant adverse impact on the stream or b) a practicable and substantially equivalent alternative to the project exists.

Historic Preservation: The Baker School is eligible for listing on the National Register of Historic Places. Application for a demolition permit will trigger an 18-month demolition delay pursuant to the Town By-Law unless the Preservation Commission elects to reduce the required stay.

MEPA: Development within 200' of the wetlands will trigger MEPA review and may require the filing of an Environmental Notification Form (ENF). Demolition of a historic structure will trigger MEPA review. The Town would need to either file an Environmental Notification Form (ENF) or seek to consult with the Massachusetts Historical Commission in an effort to obtain a "no adverse effect" determination or a MOA with the MHC in lieu of filing an ENF.

Zoning: All the Baker site proposals exceed the zoning allowed for the S-10 district. As currently crafted, the proposals all exceed the height allowed for the zoning district. A full list of the relief required would depend on the final dimensions, but construction of this size and density would likely need a significant amount of zoning relief. Although use of the property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the "Dover Amendment"), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Nuisance: Traffic impacts to Beverly Road from the expansion could lead to a suit in tort alleging nuisance.

HEATH

Zoning: The Heath proposal exceeds the zoning allowed for the T-6 district. As currently crafted, the proposal exceeds the height allowed for the zoning district. A full list of the relief required would depend on the final dimensions, but construction of this size and density would likely need a significant amount of zoning relief. Although use of the property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the “Dover Amendment”), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Nuisance: Traffic impacts from the expansion could lead to a suit in tort alleging nuisance.

Neighboring Land: Eliot Street is subject to an MWRA Easement.

Neighboring Land: A nearby parcel at the corner of Reservoir Road and Route 9 is a former gas station. Its proximity and the fact that it is uphill from the Heath School will require an environmental study to determine whether there has been a release of pollutants at the gas station that has contaminated the Heath site.

DRISCOLL

Zoning: The Driscoll proposal exceeds the zoning allowed for the T-5 district. As currently crafted, the proposal exceeds the height allowed for the zoning district. A full list of the relief required would depend on the final dimensions, but construction of this size and density would likely need a significant amount of zoning relief. Although use of the property is unquestionably an educational use and therefore qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the “Dover Amendment”), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Nuisance: Traffic impacts to Westbourne Terrace from the expansion could lead to a suit in tort alleging nuisance.

Additional Restrictions: There is a Town utility easement running the length of the site that may need to be relocated to accommodate the expansion.

PUTTERHAM WOODS

Article 97: The Putterham Woods parcel is considered to be Article 97 land. Utilizing it for school purposes would require removing it from Article 97 protection via a 2/3 vote of both houses of the State Legislature, which would almost certainly require following the EOEEA Land Disposition Policy and acquiring or swapping in land of equal or greater fair market value and significantly greater resource value.

M.G.L. c. 45, §7: This statutory section bars the construction of buildings on park land without leave of the Legislature.

M.G.L. c. 214, §7A: Pursuant to this statute, any ten citizens can bring a suit in superior court alleging damage or imminent damage to the environment, and the statute specifically allows the court to enjoin the allegedly damaging actions until the case is resolved.

Wetlands: A portion of the property borders wetlands. The state Wetlands Protection Act restricts any development within 100 feet of a wetland, and the Town's wetlands bylaw extends that buffer zone to 150 feet. A Notice of Resource Area Delineation would have to be filed with Conservation Commission to determine the extent and type of the wetlands. If the Commission's Order of Resource Area Delineation found that the wetlands in question was a perennial stream or river, the Rivers Protection Act will apply and bar any development within 200 feet from the mean annual high water line where: a) there will be a significant adverse impact on the stream or b) a practicable and substantially equivalent alternative to the project exists.

MEPA: Development within 200' of the wetlands will trigger MEPA review and may require the filing of an Environmental Notification Form (ENF). Disposition of land protected under Article 97 will also trigger MEPA review, and will require at least the filing of an ENF and likely additional submissions such as an Environmental Impact Report (EIR) if the Secretary of EOEEA requires it. The impacts to the West Roxbury Parkway will also be considered by the Secretary during MEPA review.

Zoning: The proposal exceeds the zoning allowed for the S-15 district. The proposal's height, and potentially other characteristics, requires zoning relief. The contemplated use of the property qualifies for the exemption from zoning requirements found in M.G.L. c. 40A, s. 3 (the "Dover Amendment"), the Town customarily opts to seek zoning relief for such projects. Abutters would have the right to appeal any permit granted by the ZBA, or any decision exempting the project via the Dover Amendment.

Access: Any modifications to the West Roxbury Parkway that may be needed for site access will require permission from the state Department of Conservation Resources. In addition, the Town may need to acquire a construction and access permit from DCR, if it is clear that a new school will generate a substantial increase or impact on traffic from the current use. This is likely.

Neighboring Uses: Fire Station 6 directly abuts the site. Upon its reopening in March 2019 after renovations, it will contain an active fire company, with attendant noise and vehicular traffic. It will also contain two bays for servicing vehicles and apparatus, which will mean the potential storage of chemicals. It will also serve as a training facility, including live fire training that will generate particulate smoke.

Nuisance: Traffic impacts from the expansion could lead to a suit in tort alleging nuisance.

Restrictions that are not Site-Specific:

Article 3.7 of the Town's General By-Laws lays out a specific procedure for the construction and alteration of Town buildings and structures. If the Town elects to deviate from this procedure, it may pursue a waiver pursuant to Section 3.7.4. Based on the cost of the project, such a waiver would require a Town Meeting vote.

The authority to select a site for a ninth school does not clearly rest with any one body in Town government. The Town could face a challenge alleging that its site selection was improperly made.

Pursuant to M.G.L. c.40, §53, ten taxpayers of the Town of Brookline could file suit to enjoin any project they alleged represented an unlawful expenditure of taxpayer funds.