BOARD OF APPEALS

OF THE

CITY OF WALTHAM

Case No. 2020-15
August 4, 2020

BRIEF

OF

Omni Navitas Holdings, LLC, co-Petitioner

and

Gann Academy – The New Jewish High School of Greater Boston, Inc. – co-Petitioner / Owner

CONNORS & CONNORS LLP
ATTORNEYS AT LAW
6 LEXINGTON STREET
THIRD FLOOR
WALTHAM, MASSACHUSETTS
02452
781-894-6000
FAX 781-894-6848

Omni Navitas Holdings, LLC, co-Petitioner

and

Gann Academy – The New Jewish High School of Greater Boston, Inc. – co-Petitioner / Owner

Exhibits

Examiner

Name Approved

C ☐
P ☑
M ☐
R.A. ☐

8

P.C.

The Commonwealth of Massachusetts

William Francis Galvin
Secretary of the Commonwealth

ONE ASHBURTON PLACE, BOSTON, MASSACHUSETTS 02108

ARTICLES OF ORGANIZATION

(Under G.L. Ch. 180)

ARTICLE I

The name of the corporation is:

New Jewish High School, Inc.

ARTICLE II

The purpose of the corporation is to engage in the following activities:

See RIDER II-1

95-213058

Note: If the space provided under any article or item on this form is insufficient, additions shall be set forth on separate 8½ x 11 sheets of paper leaving a left hand margin of at least 1 inch. Additions to more than one article may be continued on a single sheet so long as each article requiring each such addition is clearly indicated.

ARTICLE III

If the corporation has one or more classes of members, the designation of such classes, the manner of election or appointments, the duration of membership and the qualification and rights, including voting rights, of the members of each class, may be set forth in the by-laws of the corporation or may be set forth below:

The corporation shall not have members.

ARTICLE IV

* Other lawful provisions, if any, for the conduct and regulation of the business and affairs of the corporation, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or members, or of any class of members, are as follows:

See RIDER IV-1

* If there are no provisions, state "None".

Note: The preceding four (4) articles are considered to be permanent and may ONLY be changed by filing appropriate Articles of Amendment.

[redacted]ACX02086/IJD
07/31/95

NEW JEWISH HIGH SCHOOL, INC.

Articles of Organization

RIDER II-1

The corporation is organized, and is to be operated, exclusively as an educational organization within the meaning of section 4(a) of Chapter 180 of the Massachusetts General Laws, as now in force or as hereafter amended, and within the meaning of sections 170(b)(1)(A)(ii) and 501(c)(3) of the Internal Revenue Code of 1986, as now in force or as hereafter amended. The purposes of the corporation shall include:

(a) To establish, operate, and maintain a Jewish-sponsored, coeducational high school that integrates Jewish studies with a rigorous college preparatory program; provided, that the school (i) shall not deny admission to any individual on the basis of race, color, or national or ethnic origin, (ii) shall admit students of any race, color, or national or ethnic origin to all of the rights, privileges, programs, and activities generally accorded or made available to students at the school, and (iii) shall not discriminate on the basis of race, color, or national or ethnic origin in the administration of its educational policies, admissions policies, scholarship and loan programs, and athletic or other school-administered programs;

(b) To maintain a regular faculty and curriculum for a regularly enrolled body of students in an educational environment that will explore the disciplines and values that have shaped both the American and Jewish traditions, that will nourish the talents of each student, and that will encourage the spiritual growth of each student;

(c) To carry on any activity connected with, or incidental to, the foregoing purposes; and

(d) All other purposes conferred by the Commonwealth of Massachusetts upon non-profit educational corporations under Chapter 180 of the Massachusetts General Laws, as now in effect or as hereafter amended.

In carrying out the foregoing purposes, the corporation shall have all of the powers granted to a corporation formed under Chapter 180 of the Massachusetts General Laws, as now in effect or as hereafter amended, and, in addition, (i) shall have the power to become a partner, general or limited, in any business enterprise that the corporation would have the power to conduct by itself, and (ii) shall have all other powers necessary or convenient to effect any or all of the purposes for which the corporation is formed except, and to the extent that, any such power (or its exercise in any instance) is inconsistent with said Chapter 180 or any other chapter of the Massachusetts General Laws.

[redacted]ACX02083/IJD
07/31/95

NEW JEWISH HIGH SCHOOL, INC.

Articles of Organization

RIDER IV-1

(a) No part of the assets of or the net earnings of the corporation shall be divided among, inure to the benefit of, or be distributable to its directors, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of its purposes set forth in Article II of these Articles of Organization.

(b) No substantial part of the activities of the corporation shall consist of carrying on propaganda, or otherwise attempting, to influence legislation; and the corporation shall not participate in, or intervene in (including the publication or distribution of statements), any political campaign on behalf of or in opposition to any candidate for public office.

(c) Notwithstanding any other provision of these Articles of Organization, the corporation shall neither engage in nor carry on any activity that is not permitted to be engaged in or carried on by (1) a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986, as now in effect or as hereafter amended, (2) a corporation contributions to which are deductible under section 170(c)(2), 2055(a)(2) or 2522(a)(2) of the said Internal Revenue Code, or (3) an educational organization described in section 170(b)(1)(A)(ii) of the said Internal Revenue Code.

(d) In the event that the corporation is a private foundation, within the meaning of section 509(a) of the Internal Revenue Code of 1986, as now in effect or as hereafter amended, then, notwithstanding any other provision of these Articles of Organization or the By-Laws of the corporation, the following provisions shall apply:

(1) The corporation shall distribute its income for each taxable year at such time and in such manner as not to become subject to the tax on undistributed income imposed by section 4942 of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.

(2) The corporation shall not engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.

(3) The corporation shall not retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.

(4) The corporation shall not make any investments in such manner as to subject it to tax under section 4944 of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.

(5) The corporation shall not make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.

(e) Meetings of the Board of Directors of the corporation may be held anywhere in the United States.

(f) Upon the dissolution of the corporation, the funds, properties and assets of the corporation, after the payment or provision for payment of all of the liabilities and obligations of the corporation, shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose.

(g) No officer or director of the corporation shall be personally liable to the corporation for monetary damages for breach of fiduciary duty as an officer or director, notwithstanding any provision of law imposing such liability; provided, however, that the foregoing shall not eliminate or limit the liability of an officer or director for (i) any breach of the officer's or director's duty of loyalty to the corporation, (ii) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, or (iii) any transaction from which the officer or director derived an improper personal benefit. A director, officer, or incorporator of the corporation shall not be liable for the performance of his or her duties if he or she acts in compliance with section 6C of Chapter 180 of the General Laws.

ACX02081/IJD
07/31/95

NEW JEWISH HIGH SCHOOL, INC.

Articles of Organization

RIDER VII-1

Chairman of the Board:

NAME	RESIDENCE	POST OFFICE ADDRESS
Michael Bohnen	60 Nathan Road Newton Centre, MA 02159	60 Nathan Road Newton Centre, MA 02159

Vice Presidents:

NAME	RESIDENCE	POST OFFICE ADDRESS
Marion Gribetz	23 Highland Street Sharon, MA 02067	23 Highland Street Sharon, MA 02067
Shoshana Zaritt	30 Tory Fort Lane Worcester, MA 01602	30 Tory Fort Lane Worcester, MA 01602

Directors:

NAME	RESIDENCE	POST OFFICE ADDRESS
Michael Bohnen	60 Nathan Road Newton Centre, MA 02159	60 Nathan Road Newton Centre, MA 02159
Solomon Eisenberg	32 Nonantum Street Newton, MA 02158	32 Nonantum Street Newton, MA 02158
Joshua Elkin	74 Park Lane Newton, MA 02159	74 Park Lane Newton, MA 02159
Robert Fein	114 Greenlawn Avenue Newton Centre, MA 02159	114 Greenlawn Avenue Newton Centre, MA 02159
Edith Goldman	347 Russett Road Chestnut Hill, MA 02167	347 Russett Road Chestnut Hill, MA 02167
Marion Gribetz	23 Highland Street Sharon, MA 02067	23 Highland Street Sharon, MA 02067
Bonnie Hausman	70 Neshobe Road Waban, MA 02168	70 Neshobe Road Waban, MA 02168
Alan Lobovits	168 Allerton Road Newton, MA 02161	168 Allerton Road Newton, MA 02161
Barbara Skydell Safran	12 Ivanhoe Street Newton, MA 02158	12 Ivanhoe Street Newton, MA 02168
Reena Slovin	30 Brookshire Road Worcester, MA 01609	30 Brookshire Road Worcester, MA 01609
Shoshana Zaritt	30 Tory Fort Lane Worcester, MA 01602	30 Tory Fort Lane Worcester, MA 01602

ARTICLE V

By-laws of the corporation have been duly adopted and the initial directors, president, treasurer and clerk or other presiding, financial or recording officers, whose names are set out below, have been duly elected.

ARTICLE VI

The effective date of organization of the corporation shall be the date of filing with the Secretary of the Commonwealth or if a later date is desired, specify date, (not more than 30 days after date of filing).

The information contained in ARTICLE VII is NOT a PERMANENT part of the Articles of Organization and may be changed ONLY by filing the appropriate form provided therefor.

ARTICLE VII

a. The post office address of the initial principal office of the corporation IN MASSACHUSETTS is:

126 High Street, Boston, MA 02110

b. The name, residence and post office address of each of the initial directors and following officers of the corporation are as follows:

	NAME	RESIDENCE	POST OFFICE ADDRESS
President:	Bonnie Hausman	70 Neshobe Road Waban, MA 02168	70 Neshobe Road Waban, MA 02168
Treasurer:	Robert Fein	114 Greenlawn Avenue Newton Centre, MA 02159	114 Greenlawn Avenue Newton Centre, MA 02159
Clerk:	Edith Goldman	347 Russett Road Chestnut Hill, MA 02167	347 Russett Road Chestnut Hill, MA 02167

Directors: (or officers having the powers of directors).

NAME	RESIDENCE	POST OFFICE ADDRESS
See RIDER VII-1		

c. The fiscal year of the corporation shall end on the last day of the month of: June

d. The name and BUSINESS address of the RESIDENT AGENT of the corporation, if any, is: N/A

I/We the below-signed INCORPORATORS do hereby certify under the pains and penalties of perjury that I/We have not been convicted of any crimes relating to alcohol or gaming within the past ten years. I/We do hereby further certify that to the best of my/our knowledge the above-named principal officers have not been similarly convicted. If so convicted, explain.

IN WITNESS WHEREOF and under the pains and penalties of perjury, I/WE, whose signature(s) appear below as incorporator(s) and whose names and business or residential address(es) ARE CLEARLY TYPED OR PRINTED beneath each signature do hereby associate with the intention of forming this corporation under the provisions of General Laws Chapter 180 and do hereby sign these Articles of Organization as incorporator(s) this 1st day of August, 1995

Ira J. Deitsch
Posternak, Blankstein & Lund
100 Charles River Plaza
Boston, MA 02114

NOTE: If an already-existing corporation is acting as incorporator, type in the exact name of the corporation, the state or other jurisdiction where it was incorporated, the name of the person signing on behalf of said corporation and the title he/she holds or other authority by which such action is taken.

SECRETARY OF
THE COMMONWEALTH

1995 AUG -1 PM 3:49

CORPORATION DIVISION

508644

THE COMMONWEALTH OF MASSACHUSETTS

ARTICLES OF ORGANIZATION

GENERAL LAWS, CHAPTER 180

I hereby certify that, upon an examination of the within-written articles of organization, duly submitted to me, it appears that the provisions of the General Laws relative to the organization of corporations bave been complied with, and I hereby approve said articles; and the filing fee in the amount of $35.00 having been paid, said articles are deemed to have been filed with me this 1st day of AUGUST 19 95.

Effective date

William Francis Galvin

WILLIAM FRANCIS GALVIN
Secretary of the Commonwealth

A PHOTOCOPY OF THESE ARTICLES OF ORGANIZATION SHALL BE RETURNED

TO: Ira J. Deitsch, Esquire
Posternak, Blankstein & Lund
100 Charles River Plaza
Boston, MA 02114

Telephone: (617) 973-6100

Exhibit B

Examiner

Name Approved

FEDERAL IDENTIFICATION NO. 000508644
Fee: $15.00

The Commonwealth of Massachusetts

William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Boston, Massachusetts 02108-1512

041

ARTICLES OF AMENDMENT
(General Laws, Chapter 180, Section 7)

We, Alan Lobovits, *President / ~~Vice President~~

and Barbara Skydell Safran, *Clerk / ~~Assistant Clerk~~,

of New Jewish High School, INC.,
(Exact name of corporation)

located at 8 Prospect Street, Waltham, MA 02110,
(Address of corporation in Massachusetts)

do hereby certify that these Articles of Amendment affecting articles numbered:

Article I
(Number those articles 1, 2, 3, and/or 4 being amended)

of the Articles of Organization were duly adopted ~~at a meeting held~~ by written consent effective on October 3 20 02, by vote of:

~~XXXXXXX~~ UNANIMOUS directors, ~~XX~~ ~~XXXXXXXXX~~,

being at least two-thirds of its members/directors legally qualified to vote in meetings of the corporation (or, in the case of a corporation having capital stock, by the holders of at least two thirds of the capital stock having the right to vote therein):

Artilce I shall be deleted in its entirety and in its place shall read:

Article I: The name of the corporation is "Gann Academy-The New Jewish High School of Greater Boston, Inc."

C ☐
P ☐
M ☐
R.A. ☐

3

P.C.

**Delete the inapplicable words.*
Note: If the space provided under any article or item on this form is insufficient, additions shall be set forth on one side only of separate 8 1/2 x 11 sheets of paper with a left margin of at least 1 inch. Additions to more than one article may be made on a single sheet so long as each article requiring each addition is clearly indicated.

8/1/95

The foregoing amendment(s) will become effective when these Articles of Amendment are filed in accordance with General Laws, Chapter 180, Section 7 unless these articles specify, in accordance with the vote adopting the amendment, a *later* effective date not more than *thirty days* after such filing, in which event the amendment will become effective on such later date.

Later effective date: _____ .

SIGNED UNDER THE PENALTIES OF PERJURY, this 16 day of December, 20 02 ,

_____ , *President / *~~Vice President~~

Alan Lobovits

Barbara Skydell Safran

_____ , *Clerk / *~~Assistant Clerk~~

Barbara Skydell Safran

**Delete the inapplicable words.*

819973

THE COMMONWEALTH OF MASSACHUSETTS

ARTICLES OF AMENDMENT

(General Laws, Chapter 180, Section 7)

I hereby approve the within Articles of Amendment and, the filing fee in the amount of $ 15.00 having been paid, said articles are deemed to have been filed with me this 18th day of December 2002.

Effective date: _____

William Francis Galvin

WILLIAM FRANCIS GALVIN

Secretary of the Commonwealth

02 DEC 18 AM 10:25
CORPORATION DIVISION

TO BE FILLED IN BY CORPORATION

Photocopy of document to be sent to:

Michael J. Bohnen, Esq.

Nutter, McClennen & Fish, LLP

World Trade Center West, 155 Seaport Blvd., Boston, MA

Telephone: (617) 439-2285

BK34027PG001

QUITCLAIM DEED

PREAMBLE

This DEED is made this 8th day of November, 2001, between the UNITED STATES OF AMERICA, acting through the Secretary of Education, by Peter A. Wieczorek Director, Eastern Operations, Federal Real Property Assistance Program, Office of Management, ("GRANTOR") pursuant to §203(k) of the Federal Property and Administrative Services Act of 1949, as amended ("Act"), Public Law No. 81-152, 63 Stat. 377, 40 U.S.C. 471 et seq., Reorganization Plan No. 1 of 1953, the Department of Education Organization Act of 1979, Public Law No. 96-88, 93 Stat. 668, 20 U.S.C. §3401 et seq., and New Jewish High School, Inc., a Massachusetts corporation, having its principal offices at 8 Prospect Street, Waltham, Massachusetts 02453 ("GRANTEE").

Locus: Lot 2B Prospect St. Waltham

I. RECITALS

1. By letter dated October 1, 2001 from the General Services Administration, certain Federal surplus real property located in Waltham, Middlesex County, Massachusetts, known as a portion of the former Frederick C. Murphy Federal Center, and consisting of approximately 17.42 acres of land and improvements, more or less, ("Property"), was assigned to GRANTOR for disposal upon the recommendation of GRANTOR that the Property is needed for educational purposes in accordance with the provisions of the Act.

2. GRANTEE has made a firm offer to purchase the Property under the provisions of the Act, has applied for a public benefit allowance, and proposes to use the Property for certain educational purposes as detailed in its July 15,1999 application and amendment dated September 17, 2001 to the GRANTOR (together "Application").

3. The General Services Administration has notified GRANTOR that no objection will be interposed to the transfer of the Property to GRANTEE at 100 percent public benefit allowance, and GRANTOR has accepted the offer of GRANTEE.

II. AGREEMENT

4. GRANTOR, in consideration of the foregoing, one dollar, the performance by the GRANTEE of the covenants, conditions, and restrictions hereinafter contained and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby remise, release and quitclaim to the GRANTEE, its successors and assigns, all right, title, interest, claim and demand, but reserving such rights as may arise from the operation of the conditions subsequent, restrictions and covenants of this Deed, which the UNITED STATES OF AMERICA has in and to the Property, which is more particularly described as follows:

PROPERTY DESCRIPTION
Lot-2B
Waltham, Massachusetts

A certain parcel of land situated in the Commonwealth of Massachusetts, County of Middlesex, City of Waltham, and shown as Lot-2B on a plan entitled "Plan of Land Forest Street and Trapelo Road, Waltham, Massachusetts, Middlesex County" dated July 24, 2001 last revised September 19, 2001 by Beals and Thomas, Inc., recorded in the Middlesex South Registry of Deeds on September 25, 2001 as Instrument Number 709 of 2001, more particularly bounded and described as follows:

Beginning at the most northwesterly corner of said lot on the easterly sideline of Forest Street, thence running;

N 30 39 16 E	486.06 feet to a point, said last course being bounded by the easterly sideline of Forest Street, thence turning and running;
S 67 51 17 E	876.89 feet to a point, said last course being bounded by Lot-2C as shown on said plan, thence turning and running;
S 22 04 07 W	504.17 feet to a point, thence turning and running;
N 68 10 30 W	170.67 feet to a point, thence turning and running;
S 21 27 15 W	511.76 feet to a point, thence turning and running;
N 68 32 45 W	393.22 feet to a point, thence turning and running;
N 13 46 25 W	667.87 feet to the point of beginning, said last five courses being bounded by Lot-2A as shown on said plan.

Containing 759,022 square feet more or less, or 17.42 acres, more or less

Subject to any and all existing rights and easements of record, including specifically a certain Declaration of Easements and Licenses dated September 19, 2001 and recorded with said Middlesex South Registry of Deeds on September 25, 2001 as instrument number 709.

5. GRANTEE by acceptance of this Quitclaim Deed agrees that the Property is transferred on an as is, where is basis without warranties of any kind either expressed or implied. GRANTEE further agrees that this conveyance is subject to any and all existing easements, rights of way, reservations, and servitudes, whether of record or not.

III. CONDITIONS SUBSEQUENT

6. GRANTEE shall HAVE AND HOLD the Property, subject, however, to each of the following conditions subsequent, which are for the sole benefit of the UNITED STATES OF AMERICA and which shall be binding upon and enforceable against GRANTEE, its successors and assigns as follows:

(1) For a period of thirty (30) years from the date of this Deed, the Property will be used solely and continuously for the educational purposes set forth in the proposed program and plan of GRANTEE in its July 15, 1999 application and amendment dated September 17, 2001 and for no other purposes except as GRANTOR may authorize in advance in writing. GRANTOR reserves the right to enter and inspect the Property during said period.

(2) During the above period of thirty (30) years GRANTEE will not sell, resell, lease, rent, mortgage, encumber,

or otherwise transfer any interest in any part of the Property except as GRANTOR may authorize in advance in writing.

(3) One year from the date of this Deed and annually thereafter for the period of thirty (30) years, unless GRANTOR directs otherwise, GRANTEE will file with GRANTOR a report on the operation and maintenance of the Property and will furnish, as requested by GRANTOR, such other pertinent information evidencing its continuous use of the Property as required by condition subsequent number 1.

(4) During the above period of thirty (30) years GRANTEE will at all times be and remain a tax supported institution or a nonprofit institution, organization, or association exempt from taxation under §501(c)(3) of the Internal Revenue Code of 1954, as amended.

(5) For the period during which the Property is used for the purpose for which Federal assistance is hereby extended by GRANTOR or for another purpose involving the provision of similar services or benefits, GRANTEE hereby agrees that it will comply with the requirements of (a) Title VI of the Civil Rights Act of 1964 (P.L. No. 88-352), 42 U.S.C. §2000d et seq.; (b) Title IX of the Education Amendments of 1972 (P.L. No. 92-318), 20

U.S.C. §1681 et seq.; (c) §504 of the Rehabilitation Act of 1973 (P.L. No. 93-112), 29 U.S.C. §794 et seq.; and all requirements imposed by or pursuant to the Regulations (34 C.F.R. Parts 12, 100, 104 and 106) issued pursuant to the Act and now in effect, to the end that, in accordance with said Acts and Regulations, no person in the United States shall, on the grounds of race, color, national origin, sex, or handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under the program and plan referred to in condition subsequent number 1 above or under any other program or activity of the GRANTEE, its successors and assigns, to which such Acts and Regulations apply by reason of this conveyance.

7. The failure of GRANTOR to insist in any one or more instances upon complete performance of the conditions subsequent, terms, or covenants of this Deed shall not be construed as a waiver of, or a relinquishment of GRANTOR's right to the future performance of any of those conditions subsequent, terms and covenants and the GRANTEE's obligations with respect to such future performance shall continue in full force and effect.

8. In the event of a breach of any of the conditions subsequent or in the event of a breach of any other terms and

covenants of this Deed, whether caused by the legal or other inability of GRANTEE, its successors and assigns, to perform any of the terms and conditions of this Deed, at the option of the UNITED STATES OF AMERICA, all right, title and interest in and to the Property shall, upon the recording by the UNITED STATES OF AMERICA of a Notice of Entry, pass to and become the property of the UNITED STATES OF AMERICA, which shall have an immediate right to entry thereon, and the GRANTEE, its successors and assigns, shall forfeit all right, title, and interest in and to the Property and in and to any and all of the tenements, hereditaments, and appurtenances thereto.

9. In the event the GRANTOR fails to exercise its options to reenter the Property or to revert title thereto for any breach of conditions subsequent numbered 1, 2, 3, and 4 of Paragraph 6 of this Deed within thirty one (31) years from the date of this conveyance, conditions subsequent numbered 1, 2, 3, and 4 of said Paragraph 6, together with all rights to reenter and revert title for breach of those conditions, will, as of that date, terminate and be extinguished.

10. The expiration of conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed and the right to reenter and revert title for breach thereof, will not affect the obligation of GRANTEE, its successors and assigns, with respect to condition

subsequent 5 of Paragraph 6 or the right reserved to GRANTOR to reenter and revert title for breach of condition subsequent 5.

IV. COVENANTS

11. GRANTEE, by the acceptance of this Deed, covenants and agrees for itself, its successors and assigns, that in the event GRANTOR exercises its option to revert all right, title, and interest in and to the Property to GRANTOR, or GRANTEE voluntarily returns title to the Property in lieu of a reverter, the GRANTEE shall provide protection to and maintenance of the Property at all times until such time as the title to the Property or possession of the Property, whichever occurs later in time, is actually reverted or returned to and accepted by GRANTOR. Such protection and maintenance shall, at a minimum, conform to the standards prescribed by the General Services Administration in FPMR 101-47.4913 (41 C.F.R. Part 101-47.4913) now in effect, a copy of which is referenced in the GRANTEE's Application.

12. GRANTEE, by the acceptance of this Deed, covenants that, at all times during the period that title to the Property is vested in GRANTEE, its transferees or assigns, subject to conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed, it will comply with all provisions of the following with respect to the Property: the National Environmental Policy Act of 1969,

as amended, 42 U.S.C. §4321 et seq., including the preparation of environmental impact statements, as required (See 42 U.S.C. §4332); the National Historic Preservation Act of 1966, as amended (P.L. No. 89-665); Executive Order No. 11988, 44 Fed. Reg. 43239 (1979) reprinted in 42 U.S.C. §4321 app. at 188-189 (1987), governing floodplain management; Executive Order No. 11990, 42 Fed. Reg. 26961 (1977), reprinted in 42 U.S.C. §4321 app. at 197-198 (1987), governing protection of wetlands; Federal Property Management Regulations, 41 C.F.R. 101-47.304-13; 41 C.F.R. 101-§47.200 et seq., 53 Fed. Reg. 29892 (1988), provisions relating to asbestos; and other appropriate guidelines, laws, regulations or executive orders, federal, state or local, pertaining to floodplains, wetlands or the future use of this Property, all to the extent the same are applicable to the property.

13. GRANTEE, by acceptance of this Deed, covenants and agrees for itself, its successors and assigns, and every successor in interest to the Property herein conveyed or any part thereof that it will comply with the requirements of (a) Title VI of the Civil Rights Act of 1964 (P.L. No. 88-352), 42 U.S.C. §2000d et seq.; (b) Title IX of the Education Amendments of 1972 (P.L. No. 92-318), 20 U.S.C. §1681 et seq.; (c) Section 504 of the Rehabilitation Act of 1973 (P.L. No. 93-112), 29 U.S.C. §794 et seq.; and all requirements imposed by or pursuant to the

Regulations (34 C.F.R. Parts 12, 100, 104 and 106) issued pursuant to the Act and now in effect, to the end that, in accordance with said Acts and Regulations, no person in the United States shall, on the ground of race, color, national origin, sex, or handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under the program and plan referred to in condition subsequent 1 of paragraph 6 above or under any other program or activity of the GRANTEE, its successors and assigns, to which such Acts and Regulations apply by reason of this conveyance. This covenant shall attach to and run with the land for so long as the Property is used for a purpose for which Federal assistance is hereby extended by GRANTOR or for another purpose involving the provision of similar services or benefits, and shall in any event, and without regard to technical classifications or designation, legal or otherwise, be binding to the fullest extent permitted by law and equity, for the benefit of, in favor of and enforceable by GRANTOR against GRANTEE, its successors and assigns, for the Property, or any part thereof. In the event of a breach of this covenant by GRANTEE or by its successors or assigns, GRANTOR, may, in addition to any right or remedy set forth in this agreement, avail itself of any remedy authorized by the violated statute or regulation.

14. In the event title to the Property or any part thereof is reverted to the UNITED STATES OF AMERICA for noncompliance or is voluntarily re-conveyed in lieu of reverter, GRANTEE, its successors or assigns, shall at the option of GRANTOR, be responsible for and be required to reimburse the UNITED STATES OF AMERICA for the decreased value thereof that is not the result of reasonable wear and tear, an act of God, or alterations and conversions made by the GRANTEE and approved by the GRANTOR, to adapt the Property to the educational use for which the Property was transferred. GRANTEE shall, in addition thereto, reimburse GRANTOR for damage it may sustain as a result of such noncompliance, including but not limited to costs incurred to recover title to or possession of the Property.

15. GRANTEE may seek abrogation of the conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed by:

a. Obtaining the advance written consent of the GRANTOR; and

b. Payment to the UNITED STATES OF AMERICA of a sum of money equal to the fair market value of the property to be released from the conditions subsequent as of the effective date of the abrogation:

(1) multiplied by the percentage public benefit allowance of 100 percent granted at the time of conveyance,

(2) divided by 360, and

(3) multiplied by the number of months, or any portion thereof, of the remaining period of restrictions to be abrogated.

16. GRANTEE, by acceptance of this Deed, further covenants and agrees for itself, its successors and assigns, that in the event the Property or any part or interest thereof is at any time within the period of thirty (30) years from the date of this conveyance sold, leased, mortgaged, encumbered or otherwise disposed of or used for purposes other than those designated in condition subsequent 1 of paragraph 6 above without the prior written consent of GRANTOR, all revenues received therefrom and the reasonable value, as determined by GRANTOR, of any other benefits to GRANTEE deriving directly or indirectly from such sale, lease, mortgage, encumbrance, disposal or use, shall be considered to have been received and held in trust by GRANTEE for the UNITED STATES OF AMERICA and shall be subject to the direction and control of GRANTOR; but the provisions of this paragraph shall not impair or affect the rights reserved to GRANTOR under any other provision of this Deed.

17. GRANTEE, by the acceptance of this Deed, further covenants and agrees for itself, its successors and assigns, that at all times during the period that title to the Property is vested in GRANTEE subject to conditions subsequent 1, 2, 3, and 4

of Paragraph 6 of this Deed, GRANTEE shall at its sole cost and expense keep and maintain the Property and the improvements thereon, including all buildings, structures and equipment at any time situate upon the Property, in good order, condition and repair, and free from any waste whatsoever.

18. GRANTEE, by the acceptance of this Deed, further covenants and agrees for itself, its successors and assigns, that at all times during that period that it holds title to the Property subject to conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed, it shall not engage in, authorize, permit or suffer the extraction or production of any minerals from the Property without the prior written consent of GRANTOR. GRANTEE, by the acceptance of this Deed, further covenants and agrees for itself, its successors and assigns, that should an extraction or production of minerals including but not limited to oil, gas, coal, and sulfur on or under the described Property occur during that period that it holds title to the Property subject to conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed (i) it will hold all payments, bonuses, delayed rentals, or royalties in trust for GRANTOR and (ii) that all net revenues and proceeds resulting from the extraction or production of any minerals including, but not limited to, oil, gas, coal or sulfur, by GRANTEE, its successors and assigns, will be held in trust for and promptly paid to GRANTOR. The listing of certain

minerals shall not cause the doctrine of ejusdem generis to apply. Nothing herein shall be construed as authorizing the GRANTEE to engage in the extraction or production of minerals in, on or under the Property.

19. GRANTEE, by acceptance of this Deed, covenants that, upon the recording by the UNITED STATES OF AMERICA of a Notice of Entry pursuant to Paragraph 8 above, all right, title and interest in and to the Property shall pass to and become the property of the UNITED STATES OF AMERICA, which shall have an immediate right to enter thereon, and the GRANTEE, its successors and assigns, shall immediately and quietly quit possession thereof and forfeit all right, title, and interest in and to the Property and in any and all of the tenements, hereditaments, and appurtenances thereunto belonging, conveying all right, title and interest conveyed to it in this Deed except for encumbrances authorized and approved by the GRANTOR in writing as provided in condition subsequent 2 of Paragraph 6 of this Deed.

20. If the GRANTEE, its successors or assigns, shall cause the Property and/or any improvements thereon to be insured against loss, damage or destruction, or if the GRANTOR requires such insurance while the Property is subject to conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed, and any such loss, damage or destruction shall occur during the period GRANTEE holds title to the Property subject to conditions

subsequent 1, 2, 3, and 4 set forth in Paragraph 6 of this Deed, said insurance and all moneys payable to GRANTEE, its successors or assigns, shall be held in trust by the GRANTEE, its successors or assigns, and shall be promptly used by GRANTEE for the purpose of repairing and restoring the Property to its former condition or replacing it with equivalent or more suitable facilities; or, if not so used, shall be paid over to the Treasurer of the United States in an amount equal to the unamortized public benefit allowance of Property multiplied by the current fair market value of the improvements lost, damaged or destroyed. If the Property is located in a floodplain, GRANTEE will, during the period it holds title subject to conditions subsequent 1, 2, 3, and 4 of Paragraph 6 of this Deed insure the Property and any machinery, equipment, fixtures, and furnishings contained therein against loss, damage, or destruction from flood, to the maximum limit of coverage made available with respect to the Property under §102 of the Flood Disaster Protection Act of 1973 (P.L. No. 93-234). Proceeds of such insurance will be used as set forth above.

21. GRANTEE further covenants to pay damages for any time period held over beyond the time period stated in a demand to quit possession of the Property at the fair market rental value plus reasonable attorney's fees and costs of the GRANTOR in securing the return of the Property.

22. GRANTEE covenants and agrees, on behalf of itself, its

successors and assigns, that any construction upon or alteration of the Property that exceeds 200 feet above the average ground level is prohibited unless a Determination of No Hazard to Navigable Airspace is issued by the Federal Aviation Administration in accordance with Title 14, Code of Federal Regulations, Part 77, entitled "Objects Affecting Navigable Airspace", or under the authority of the Federal Aviation Act of 1958, as amended.

23. Notice Regarding Hazardous Substance Activity, Pursuant to 40 CFR 373.2 and Section 120(h)(3)(A)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA)(42 U.S.C. §9620 (h)(3)(A)(i)), and based upon a complete search of agency files, the United States gives notice that Exhibit "A" provides the following information: (1) the type and quantity of hazardous substances that were known to have been released or disposed of or stored for one year or more on the Property; (2) the time such storage, release or disposal took place; and (3) a description of remedial action taken, if any.

23(1). CERCLA Covenant. The United States warrants that it shall take any response action found to be necessary after the date of this conveyance regarding hazardous substances located on the Property on the date of this conveyance. This covenant shall not apply: (a) in any case in which GRANTEE, its successors or assigns, or any successor in interest to the Property or part

thereof is a Potentially Responsible Party (PRP) with respect to the Property immediately prior to the date of this conveyance; or (b) to the extent but only to the extent that such additional response action or part thereof found to be necessary is the result of an act or failure to act of the GRANTEE, its successors or assigns, or any party in possession after the date of this conveyance that either: (i) results in a release or threatened release of a hazardous substance that was not located on the Property on the date of this conveyance; or (ii) causes or exacerbates the release or threatened release of a hazardous substance the existence and location of which was known and identified to the applicable regulatory authority as of the date of this conveyance.

23(2). In the event GRANTEE, its successors or assigns, seeks to have the United States conduct or pay for any additional response action, and, as a condition precedent to the United States incurring any additional cleanup obligation or related expenses, the GRANTEE, its successors or assigns, shall provide the United States at least 45 days written notice of such a claim and provide credible evidence that: (a) the associated contamination existed prior to the date of this conveyance; and (b) the need to conduct any additional response action or part thereof was not the result of any act or failure to act by the GRANTEE, its successors or assigns, or any party in possession.

23(3) Reservation of Right of Access. The United States reserves a right of access to all portions of the Property for environmental investigation, remediation or other corrective action. This reservation includes the right of access to and use of available utilities at reasonable cost to the United States. These rights shall be exercisable in any case in which a remedial action, response action or corrective action is found to be necessary after the date of this conveyance, or in which access is necessary to carry out a remedial action, response action, or corrective action on adjoining property. Pursuant to this reservation, the United States of America, and its respective officers, agents, employees, contractors and subcontractors shall have the right (upon reasonable advance written notice to the record title owner) to enter upon the Property and conduct investigations and surveys, to include drilling, test-pitting, borings, data and records compilation and other activities related to environmental investigation, and to carry out remedial or removal actions as required or necessary, including but not limited to the installation and operation of monitoring wells, pumping wells, and treatment facilities. Any such entry, including such activities, responses or remedial actions, shall be coordinated with record title owner and shall be performed in a manner that minimizes interruption with activities of authorized occupant. Following the completion of any such

activities, the United States shall restore and repair any damage caused thereby.

24. GRANTEE hereby acknowledges the required disclosure in accordance with the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4852d (Title X), of the presence of any known lead-based paint and/or lead-based paint hazards in target housing constructed prior to 1978 on the Property. This disclosure includes the receipt of available records and reports pertaining to lead-based paint and lead-based paint hazards; receipt of the lead hazard information pamphlet; and inclusion of the 24 CFR 35 and 40 CFR 745 disclosure and lead warning language in its contract of sale. GRANTEE further acknowledges that GRANTEE was given the opportunity to inspect, and thereby assess, the Property for lead-based paint hazards.

24(1) GRANTEE covenants and agrees, that in any improvements on the Property defined as "target housing" by 24 CFR 35 and constructed prior to 1978, lead-based paint hazards will be disclosed to potential occupants in accordance with Title X before any use of such improvements as a residential dwelling.

24(2)GRANTEE further covenants that GRANTEE, with respect to target housing constructed prior to 1960, will abate, at GRANTEE's own cost, all lead hazards in accordance with 40 CFR 745.227(e) and other applicable laws and regulations, prior to

the occupancy of any residential structures on the Property. Following the abatement, GRANTEE shall obtain a clearance examination, in accordance with 40 CFR 745.227(e) and 24 CFR 35.1340 (c) through (f), and conducted by a person certified to perform risk assessments or lead-based paint inspections. The examination must show that the clearance samples meet the standards set forth in 24 CFR 35.1320(b)(2). GRANTEE must obtain a clearance report, prepared by a person certified to perform risk assessments or lead-based paint inspections and in accordance with 40 CFR 745.227(e)(10). Prior to occupancy of the Property, GRANTEE shall provide Grantor with a fully executed CERTIFICATE OF COMPLETION OF LEAD ABATEMENT.

24(3)GRANTEE covenants and agrees that in its use and occupancy of the Property it will comply with 24 CFR 35 and 40 CFR 745 and all applicable Federal, State and local laws relating to lead-based paint; and that the United States assumes no liability for damages for property damage, personal injury illness, disability, or death, to GRANTEE, its successors or assigns, or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use disposition, or other activity causing or leading to contact of any kind whatsoever with lead-based paint on the Property described in this deed, whether GRANTEE, and its successors or assigns, have properly warned or failed properly to

warn the individual(s) injured. GRANTEE further agrees to indemnify, defend and hold harmless the United States from any and all loss, judgment, claims, demands, expenses or damages, of whatever nature which might arise or be made against the United States of America, due to, or relating to the presence of lead-based paint hazard on the Property, any related abatement activities, or the disposal of any material from the abatement process.

24(4)GRANTEE covenants and agrees that it will comply with all Federal, state, local, and any other applicable law regarding the lead-based paint hazards with respect to the Property.

25. All covenants, conditions subsequent and restrictions contained in this Deed shall run with the land and be binding upon GRANTEE, its successors and assigns, to all or any part of the Property. All rights and powers reserved to GRANTOR by the Deed may be exercised by any successor in function to GRANTOR, and all references to GRANTOR shall include its successor in function. All covenants and conditions subsequent contained herein are for the sole benefit of GRANTOR and may be modified or abrogated by it as provided in the Act.

V. SIGNATURES

TO INDICATE THEIR AGREEMENT to the provisions contained in this agreement, GRANTOR and GRANTEE have executed this document as the date and year first above written.

UNITED STATES OF AMERICA
Acting by and through the
Secretary of Education

GRANTOR:

By: Peter A Wieczorek

Peter A. Wieczorek, Director
Eastern Operations Federal Real
Property Assistance Program
Office of Management
U.S. Department of Education

GRANTOR ACKNOWLEDGMENT

Commonwealth of Massachusetts)
City of Waltham, County of Middlesex)

On this 8th day of November, 2001, personally appeared before me, a Notary Public in and for the Commonwealth of Massachusetts, Peter A. Wieczorek Director, Eastern Operations, Federal Real Property Assistance Program, Office of Management, United States Department of Education, acting for the United States of America and the Secretary of Education, known to me to be the same person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same on the date hereof as his free and voluntary act and deed for the purposes and consideration therein expressed and with full authority and as the act and deed of the United States of America and the Secretary of Education.

IN WITNESS WHEREOF, I have set my hand and seal at City of Waltham, Middlesex County, Massachusetts, this 8th day of November 2001.

Notary Public
My Commission Expires 2/4/2007

GRANTEE ACCEPTANCE

The GRANTEE hereby accepts this Quitclaim Deed and accepts and agrees to all the terms, covenants, conditions subsequent, and restrictions contained therein.

GRANTEE:

By: _____
Carl Blanchard
Treasurer
New Jewish High School, Inc.

GRANTEE ACKNOWLEDGEMENT

STATE OF MASSACHUSETTS)

COUNTY OF MIDDLESEX)

On this 8th day of November, 2001 personally appeared before me, a Notary Public in and for the State of Massachusetts, Carl Blanchard, Treasurer, New Jewish High School, Inc., to me known to be the same person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same on the date hereof as his free and voluntary act and deed for the purposes and consideration therein expressed and with full authority and as the act and deed of the City of Bangor, Maine.

IN WITNESS WHEREOF, I have set my hand and seal on this 8th day of November, 2001.

_____
Notary Public

My Commission Expires: Oct 4, 2004

Exhibit "A"
NOTICE OF HAZARDOUS SUBSTANCE ACTIVITY

1. Section 120(h)(3)(A)(i) of the Comprehensive Response, Compensation and Liability Act of 1980, as amended, (CERCLA) (42 U.S.C. (h)(3)(A)(i)) requires that each deed entered into for the transfer of property by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, include a notice of the type and quantity of such hazardous substances, notice of the time at which such storage, release or disposal took place and a description of the remedial action taken, if any. The notice must be provided to the extent such information is available from a complete search of agency files. The following information is provided to fulfill CERCLA Section 120(h)(3)(A)(i) requirements.

2. The F.C. Murphy Federal Center is located on approximately 80 acres of land in Waltham, Middlesex County, Massachusetts. The U.S. Government acquired three large tracts of rural land along with easements for access and utilities in 1943 for the construction of the hospital. The F.C. Murphy Federal Center was used as a hospital from 1943 until 1958, when the Army Corps of Engineers transferred its civilian district operations to the facility. In 1961, the GSA took charge of operations and maintenance, and leased other portions of the F.C. Murphy Federal Center to the Department of Labor, Department of Defense, the Federal Bureau of Investigations and the Department of Agriculture. Structures remaining on the F.C. Murphy Federal Center - the original hospital building, ancillary ward buildings, a power plant and an incinerator are all vacant and unutilized.

3. Environmental Conditions at the F.C. Murphy Federal Center were investigated in preparation for transfer. The investigation, conducted by Tecumseh Professional Associates, identified reportable concentrations of petroleum, dieldrin, benzo(a)anthracene, benzo(a)pyrene and benzo(b)flouranthene in an area of the F.C. Murphy Federal Center near the former motor pool. The findings of these investigations are documented in a Release Notification Form submitted to the Massachusetts Department of Environmental Protections (DEP) on October 18, 1999; a Release Abatement Measure (RAM) Plan was filed on October 19, 1999.

4. After submission of the notification and RAM Plan, the GSA implemented Release Abatement Measures at the site. Between

November 29, 1999 and December 16, 2000 excavation and remediation occurred in four phases. These measures resulted in the achievement of a condition of No Significant Risk as defined by a Method 3 Risk Assessment. Specifically, a condition of no significant risk of harm to human health, public welfare, safety and the environment has been achieved.

5. The results of the RAM are documented in two volumes titled Response Action Outcome State, RTN 3-18887, F.C. Murphy Federal Center, Waltham, Massachusetts prepared for the General Services Administration, prepared by VHB/Vanasse Hangen Brustlin, Inc., Watertown, Mass., dated February 21, 2001.

6. Pursuant to the Massachusetts Contingency Plan (310 CMR 40.000) unless and until an RAC is audited by the Department of Environmental Protection, the opinions and findings of the Licensed Site Professional are considered to be valid and complete.

EXHIBIT B

CERTIFICATE OF COMPLETION OF LEAD ABATEMENT

The Property consists of a portion of the Frederick C. Murphy Federal Center, 427 Trapelo Road, Waltham, Massachusetts with improvements thereon (the "Property").

Name and Address of GRANTEE: The New Jewish High School, Inc., 8 Prospect Street, Waltham, MA 02453

Mark appropriate boxes with an "X".

____ GRANTEE certifies that lead hazards were abated and that the following statements are true

1. All lead-based paint hazards were abated from the Property in accordance with 40 CFR 745.227(e) and other applicable laws and regulations prior to the occupancy of any residential improvements

2. No more than 12 months elapsed from the date on the Government's risk assessment to the time when onsite preparation activities for the abatement commenced, or the risk assessment was made current by the GRANTEE prior to the commencement of such activities, at no cost to the Government.

3. A clearance examination was performed in accordance with 40 CFR 745.227(e) and 24 CFR 35.1340 (c) through (f), by a person certified to perform risk assessments or lead-based paint inspections. The examination reveals that clearance samples meet the standards set forth in 24 CFR 35.1320(b)(2).

4. A true and correct copy of the clearance report, prepared by a person certified to perform risk assessments or lead-based paint inspections and in accordance with 40 CFR 745.227(e)(10), is attached.

____ GRANTEE hereby certifies that the ~~Property~~ existing improvements will not be occupied as a residence. PMW

____ GRANTEE hereby certifies that pre-1960 housing will not be used as a residence and will be demolished, in accordance with local laws and regulations.

Under penalty of perjury, the GRANTEE hereby declares that the foregoing statements are true and correct to the best of his or her knowledge and belief.

By: _____

Print Name & Title: _____

Date: _____

Exhibit D

BK35023PG145

CITY OF WALTHAM

MASSACHUSETTS

ZONING BOARD OF APPEALS

January 23, 2002

ZONING BOARD OF APPEALS
NOTICE OF DECISION

CASE NUMBER: #01-38

NAME OF PETITIONER: New Jewish High School OWNER

LOCATION OF PROPERTY: The locus is an unnumbered parcel of land on Forest Street formerly being a part of a larger parcel of land known as 424 Trapelo Road, and being shown in the Assessor's Atlas as part of Sheet 35, Block 7, Lot 15.

DATE OF HEARING: 1-22-02 DATE OF DECISION: 1-22-02

DATE OF FILING OF DECISION WITH CITY CLERK: 2-5-02

DATE OF NOTIFICATION TO BUILDING INSPECTOR: 2-5-02

FINAL DATE FOR FILING OF APPEAL FROM THIS DECISION - SUPERIOR COURT - 2-25-02. Appeals, if any, shall be made pursuant to Section 17 of Massachusetts General Laws Chapter 40A. All plans referred to in the decision have been filed with the Planning Board and with the City Clerk.

DECISION

GRANTED XXX
DENIED _____

ROLL CALL

	Yes	No		Yes	No
Edmund R. Tarallo	XX		L. Richard LeClair		
Barbara Rando	XX		Oscar L. LeBlanc		
Christopher Curtin	XX		Peter Collura		
Bruce Morris			Glenna Gelineau	XX	
Edward T. McCarthy	XX		Michael Cotton		

Doc # 757 of 11/9/01
Bk: 35023 Pg: 145

119 SCHOOL STREET WALTHAM, MASSACHUSETTS 02451 (781) 314-3330 FAX (781) 314-3341

PETITION

Petitioner: New Jewish High School, Inc. Nature of Appeal: Appeal from Decision of Building Inspector under G.L. c40A, Sec. 3 and Application for Variance. Subject Matter: New Jewish High School, Inc. (NJHS) is a nonprofit educational corporation organized under Chapter 180 of the Massachusetts General Laws. The locus is a part of a larger parcel of land formerly known as the Frederick C. Murphy Federal Center. By deeds dated November 9, 2001, the United States Government deeded off one section of the land to the City of Waltham, one section to Bentley College (Bentley) and one section (17.42 acres) to the New Jewish High School, Inc. (NJHS). Under a Memorandum of Understanding the City, Bentley and NJHS agreed that upon the completion of a public access road Bentley would convey to NJHS approximately 2.5 additional acres, resulting in the NJHS parcel consisting of two lots containing in total 19.86 acres. NJHS proposes to take down the existing buildings and to construct, use and maintain a school with related facilities on the parcel for educational and religious purposes. Location and Zoning District: The locus is an unnumbered parcel of land on Forest Street formerly being a part of a larger parcel of land known as 424 Trapelo Road, and being shown in the Assessor's Atlas as part of Sheet 35, Block 7, Lot 15. The NJHS parcel is located in a Conservation/Recreation Zoning District. Provisions of Zoning Ordinance Involved: Sec. 7.31, Sec. 3.87, Sec. 4.11. Specific Manner in Which Subject Matter Varies From Zoning Ordinance: **DOVER AMENDMENT G.L. c40A Sec. 3:** Sec. 7.31 states that any person aggrieved by the refusal of the Building Inspector to issue a permit on the grounds of noncompliance with the Ordinance may appeal to the Board of Appeals. G. L. c 40A, Sec. 8 states that any one aggrieved by his inability to obtain a permit from the Building Inspector may appeal to the Board of Appeals. By letter dated November 28, 2001 (a copy on file with ZBA) the Building Inspector stated: 1. That he has determined that the Board of Appeals must review the NJHS proposal; and 2. That a building permit is denied NJHS on the basis that NJHS proposal: (a) fails to comply with the reasonable requirements of the Zoning Ordinance; and (b) the Petitioner has failed to establish that these requirements of the Ordinance are unreasonable. NJHS contends that the requirements of the Ordinance, as applied to the proposed use, are not within the reasonable requirements of G.L., c40, Sec. 3, as to the bulk and height of its proposed structure, the yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Therefore, the Petitioner respectfully requests, that this Board of Appeals make a determination and declare such Ordinances to be unreasonable as applied to the proposed use by the NJHS, and to set them aside pursuant to G.L., c40A, Sec. 3. **VARIANCES: IN THE ALTERNATIVE, AND WITHOUT WAIVING ANY RIGHTS NJHS MAY HAVE UNDER GENERAL LAWS, CHAPTER 40, SEC. 3** NJHS requests variances pursuant to Sec. 3.87, as follows: Sec. 3.87 states that use of land or structures by a nonprofit educational corporation or by a religious sect or denomination shall not be restricted, provided that such land or structures shall be subject to the regulations of this chapter regulating the bulk and height of structure, yard sizes, lot area, setbacks, open space, parking and building average, and further that the Board of Appeals may grant a variance for adjustments to such regulations. **17.42 Acre Lot:** Sec. 4.11 states that the side yard depth shall be 100 feet and here the proposed westerly, side yard is 3 feet, more or less. Sec. 4.11 states that the maximum allowable building height is 20 feet, and here the building height will be 42.2 feet, more or less. Sec. 4.11 states that the maximum number of allowable stories is one, and here the building will be 3 stories in height. Section 4.11 states that the maximum lot coverage is 5% and here the maximum lot coverage will be 7.3%. Section 4.11 states that the maximum allowable floor area ratio is 0.05 and here the maximum floor area ratio will be 0.17. Section 5.21 requires 1,591 parking spaces and here 217 parking spaces will be provided.

ON MOTION DULY MADE AND SECONDED THE BOARD ADOPTED THE FOLLOWING AMENDED FINDINGS OF FACT:

The Board of Appeals for the City of Waltham makes the following findings of fact after a hearing on the above captioned Appeal of the Decision of the Building Inspector for a Determination under Massachusetts General Laws Chapter 40A, §3:

1. This Board of Appeals, having met all legal prerequisites by proper publications and postings as provided in Massachusetts General Laws Chapter 40A, §11, and having also notified by mail all parties in interest and having heard all the evidence, is now empowered to exercise the power to grant or to deny the Petition by the Petitioner;
2. The locus is an unnumbered parcel of land on Forest Street formerly being a part of a larger parcel of land known as 424 Trapelo Road, is shown in the Assessor's Atlas as part of Sheet 35, Block 7, Lot 15, and is located in a Conservation/Recreation Zoning District;
3. The locus is bounded to the north by the City of Waltham land, to the east by Bentley College land, to the south by other land of Bentley College which is abutted by other City of Waltham land, and to the west by Forest Street, and residences on the other side thereof;
4. The locus was originally the United States Army Hospital, and most recently referred to as the Frederick C. Murphy Federal Center. The locus has a number of buildings thereon, some of which are free standing and others of which are interconnected. The buildings have had innumerable uses over the years from hospital to offices to storage. The site has also been utilized in a number of manners by the U.S. Government, from hospital to auction site for seized;
5. The Petitioner is a non-profit educational corporation organized under Chapter 180 of the Massachusetts General Laws.
6. The Petitioner proposes to take down the existing buildings and to construct, use and maintain a school with related facilities on the parcel for educational and religious purposes;
7. By letter dated November 28, 2001 the Building Inspector stated:
    1. That he has determined that this Board of Appeals must review the Petitioner's proposal; and
    2. That a building permit is denied the Petitioner on the basis that the Petitioner's proposal:
        - Fails to comply with the reasonable requirements of the Ordinance; and
        - The Petitioner has failed to establish that these requirements of the Ordinance are unreasonable.
8. To build this high school, the Petitioner states the following sections of the Zoning Ordinance of the City of Waltham are unreasonable when applied to it and that by waiving such, no legitimate municipal concerns would be violated. The sections of the Ordinance involved are, as follows:

- §4.11 states that the side yard depth shall be 100 feet and here the proposed westerly side yard is 3 feet, more or less.
- §4.11 states that the maximum allowable building height is 20 feet, and here the building height will be 42.2 feet, more or less.
- §4.11 states that the maximum number of allowable stories is one, and here the building will be 3 stories in height.
- §4.11 states that the maximum lot coverage is 5% and here the maximum lot coverage will be 7.3%.
- §4.11 states that the maximum allowable floor area ratio is 0.05 and here the maximum floor area ratio will be 0.17.
- §5.21 requires 1,591 parking spaces and here 217 parking spaces, or an equivalent ratio of parking spaces to the student/faculty/staff at Waltham High School, whichever is greater, will be provided.

9. The proposed use, a high school and related facilities, is allowed in the Conservation/Recreation Zoning District; and
10. This Board has the power (Massachusetts General Laws, c.40A, §3 and §8) and the authority (Ordinance, Section 7.31) to grant the requested relief.

AFTER DUE DELIBERATION: ON MOTION DULY MADE AND SECONDED IT WAS UNANIMOUSLY VOTED TO GRANT THIS PETITION, SUBJECT TO THE FOLLOWING AMENDED DECISIONS:

Therefore, the Board of Appeals for the City of Waltham after due deliberation, on motion duly made and seconded, voted:

To grant the Petitioner's appeal of the decision of the Building Inspector as requested in Case No. 01-38 and incorporates by reference the Findings of Fact and further cites as reasons the following:

Height and Number of Stories

The Petitioner proposes to build a school with a height of 42.2 feet and which will be 3 stories in height. The height and story restrictions of the Conservation/Recreation Zoning District are respectively 20 feet and one story.

Application of these zoning restrictions would unreasonably impede the educational use of the high school by:

(i) Making it impossible to build a gymnasium or a suitable synagogue/auditorium,

(ii) Adding significant cost and inefficiency to the building of the high school, and

(iii) Requiring the high school building to use a much greater portion of the land, making it impossible to have the planned space for parking and athletic fields.

The concerns of the City are not invalidated as:

(i) The existing buildings currently located on the site are between 25 and 30 feet high and have a finished floor elevation of approximately 225 feet, resulting in the peak of the roof elevation 250 to 255 feet. The high school will have a finished floor elevation of 216 feet with a height of 36 feet making the roof elevation of 252 feet,

(ii) The proposed high school will be set back from Forest Street over 175 feet which distance will obviously reduce the sense of its height,

(iii) The proposed high school will not block the light or unreasonably obstruct any views of any residents across Forest Street, and

(iv) The City is currently constructing the South Street Elementary School which is 3 stories and 58 feet in height, and the School Street Middle School which is 3 stories and 67 feet in height.

FAR/Lot Coverage

The Petitioner proposes to build a school with a FAR of approximately 0.17 and a lot coverage of approximately 7.3%. The FAR and lot coverage restrictions of the Conservation/Recreation Zoning District are respectively 0.05 and 5%.

Application of these zoning restrictions would unreasonably impede the educational use of the high school by:

(i) Allowing a high school of only 38,000 square feet of floor area to handle an enrollment of 320 students; and

(ii) Allowing only 5% of a lot containing 17.42 acres to be utilized for building space. This would require the high school to be built higher, which is not inductive to education of high school students and would be in further violation of the height and story requirements of the Ordinance. The additional height would also make a building which is planned to blend in with the landscape to rise from it affecting the views of the neighbors.

The concerns of the City are not invalidated as:

(i) It seeks to protect the views of the neighbors;

(ii) It is itself constructing athletic fields on another part of the original site which will provide a further buffer to the neighbors located to the north; and

(iii) The City is currently constructing the South Street Elementary School with a 90,000 square foot building on 10.8 acres, which has a FAR of 0.19 and a lot coverage 0 8.4%, and the School Street Middle School with a 124,000 square foot building on 9.2 acres, which has a FAR of 0.30 and a lot coverage of 11.0%.

Parking

The Ordinance does not make any separate provision for parking. The Building Inspector has made a determination that for the intended 320 students and 79 faculty and staff that 1,591 parking spaces would be required. Here the Petitioner proposes to provide 217 parking spaces, or the equivalent ratio of parking spaces to the student/faculty/staff parking at Waltham High School, whichever is greater.

Application of the Building Inspector's interpretation would unreasonably impede the educational use of the high school by:

(i) Requiring the paving over of 10 acres or almost 60% of the locus. This would result in the loss of area for athletic fields and the needless expense of funds for building the parking lots;

(ii) This far exceeds typical parking provisions, which require 1 parking space for every 10 students and 1 parking space for every member of the faculty and staff. In this instance that would be 111 parking spaces.

The concerns of the City are not invalidated as:

(i) The City under its Ordinance seeks to have open space and parking lots would be the opposite of this; and

(ii) The City is currently constructing the South Street Elementary School, which will have 120 parking spaces, and the School Street Middle School, which will have 138 parking spaces. In each of these instances the City used a reasonable number.

THE PETITION IS GRANTED SUBJECT TO THE FOLLOWING CONDITIONS:

1. Any and all necessary permits shall be issued within one (1) year of the date of the filing of this decision with the City Clerk of Waltham and all work shall be completed within two (2) years of said filing date; and

2. All use of the property shall be substantially in accordance with the following plans introduced as evidence during the hearing:

   (a) New Jewish High School, Waltham, MA "List of Drawings" dated November 21, 2001, including Abutters Plan; Existing Conditions Survey (2 sheets); L-1 Layout and Materials Plan; L-2 Existing Elevations Spot Grades; A3.1-A3.2 Building Elevations.

Christopher Curtin, Chairman

DATE: 2/4/02

IN ACCORDANCE WITH THE PROVISIONS OF M.G.L. CHAPTER 40A, SECTION II, I HEREBY CERTIFY THAT THIS DECISION AND ANY AUTHORIZED SIGNATURE(S) ARE TRUE COPIES OF THE ORIGINAL AND THAT 20 DAYS HAVE ELAPSED FROM THE FILING DATE OF THE DECISION AND NO APPEAL HAS BEEN FILED IN THIS OFFICE.

ATTEST _____
CITY CLERK

A TRUE COPY ATTEST:

_____
CITY CLERK

Exhibit E

July 16, 2020

Zoning Board of Appeals
City of Waltham
119 School Street
Waltham, Massachusetts 02451

Re: ZBA Caso No. 2020-15
Solar Canopies – Gann Academy

Dear Members of the Board of Appeals:

Omni Navitas Holdings, LLC, is a full-service, comprehensive development firm concentrating on solar renewable energy. Omni Navitas partners with private land owners and governmental agencies to construct ground based and parking lot solar canopies. Omni Navitas has partnered with Gann Academy and proposes to install solar parking lot canopies above the existing parking lot at the school.

Solar parking lot canopies are essentially carports with solar panels. The canopies cover existing parking lot spaces and protect cars from the elements: sun, rain, and snow while providing a green source of renewable energy. Omni Navitas will be installing the canopies under a long term lease arrangement with the school.

The proposed project is a 480 KW AC Solar Canopy. It will cover four rows of a to be reconfigured parking lot at Gann Academy as well as an adjoining grassed area. The project will produce approximately 800,000 kwh per year which can power approximately 130 homes. The structure is a steel frame with photovoltaic panels installed on top. The panels convert the sunlight into electricity which will be fed into the local grid. The current Massachusetts Solar Program provides a greater financial incentive for building parking lot canopies that feed the power into the local grid rather than consuming directly on site. This represents the only remaining solar option for Gann as it has all ready installed solar panels on its' roof and a ground mounted project is not feasible given the limited available land.

Gann Academy has made a commitment to increasing its use of alternative energy through either direct consumption or through offsetting its consumption by generating power and feeding it into the grid. Though it is not directly user of the power, in reality the power fed into the grid is generally consumed in the nearby area.

The project is anticipated to be constructed in 2021 when the school is having its summer break. The construction period is expected to be six weeks.

Thank you for your consideration of this matter.

John McDonough
Principal

Omni Navitas Holdings LLC
75 Central Street Boston MA 02109

Omni Navitas Holdings, LLC, co-Petitioner

and

Gann Academy – The New Jewish High School of Greater Boston, Inc. – co-Petitioner / Owner

Brief

GANN ACADEMY
Ground Based Solar Canopies

The Petitioners:

Gann Academy: The co-Petitioner / Owner, Gann Academy – The New Jewish High School of Greater Boston, Inc. (Gann Academy), is a nonprofit educational corporation organized under Chapter 180 of the Massachusetts General Laws (see **Exhibit A – Articles of Organization** and **Exhibit B – Secretary of the Commonwealth Change of Corporate Name**).

"Gann Academy is Greater Boston's independent Jewish high school, recognized for an innovative curriculum that combines in-depth critical analysis, experiential learning, and a focus on building a better world. With an unparalleled commitment to faculty development, small classes, and a unique advisory system, Gann prepares students to live lives rich with accomplishment and meaning and to contribute to their communities and the world."[1]

Gann Academy is also dedicated to reducing its carbon footprint, having previously committing to powering the school with one hundred percent renewable energy, joining an exclusive club of only 5% of U.S. schools powered exclusively by renewable energy.[2]

Presently, about 25% of the school's power is generated from rooftop solar panels which were installed in 2018, and the other 75% is generated by wind farms.[3] This Petition for ground based solar canopies on site will significantly increase the amount of power Gann Academy will produce on site, creating renewable power for its own use and/or offsetting the energy it currently draws from the grid, further improving its carbon footprint. The proposal is also beneficial to the area residents of the City of Waltham as Gann Academy's reliance on power from the grid, particularly during peak demand times, will be offset by the amount of energy being produced on campus and fed back to the grid.

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[1] https://www.gannacademy.org/
[2] https://www.gannacademy.org/gann-news-detail?pk=976853
[3] *Id.*

Omni Navitas: The co-Petitioner, Omni Navitas Holdings, LLC (Omni Navitas), is a group of seasoned real estate professionals that partners with commercial, industrial, educational, and agricultural land owners, as well as government agencies (for example the MBTA is one of its largest clients locally) to implement revenue-generating solar solutions for private and public institutions.[4]

To date, Omni Navitas has over 400 megawatts of solar structures under contract and over 100 solar installations in development.[5]

Omni Navitas' business involves leasing land and parking lots for either ground mounted solar arrays or solar parking lot canopies, utilizing the highest quality solar panels and equipment available in today's market to generate an immediate stream of revenue for the owner. As a team of solar industry professionals, Omni Navitas is always exploring and utilizing the most up-to-date options available in this rapidly changing industry.[6]

All of the design process, engineering, approval process, fabrication, and installation process is Omni Navitas' responsibility, resulting in no cost to the owner / end user. Further, upon installation, Omni Navitas takes care of all operating and maintenance expenses over the life of the lease.[7]

The Locus:

The locus is a large parcel of land (approximately 865,101 sq. ft., 19.86 ± acres) owned by Gann Academy on the easterly side of Forest Street with an address of 333 Forest Street. The locus is situated in a Conservation / Recreation Zoning District according to the Zoning District Map of the City of Waltham.

This parcel of land, the entire Gann Academy campus, makes up a portion of the former Frederick C. Murphy Federal Center which was deeded in sections to Gann

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[4] https://omni-navitas.com/
[5] Id.
[6] https://omni-navitas.com/services/
[7] Id.

Academy, Bentley University, and the City of Waltham by the U.S. Government on November 9, 2001 (see **Exhibit C – Gann Academy Deed**).

On site there is presently a three-story high school building, related facilities (e.g. athletic fields), and surface parking located thereon the locus, all of which was constructed pursuant to the Decision in Zoning Board of Appeals (ZBA) Case No. 01-38 (see **Exhibit D – ZBA Case No. 01-38**).

The Abutters Plan[8] shows the locus is bounded to the north by the City of Waltham's Veterans Memorial Field Complex, to the east by land owned by Bentley University, to the south by land owned by the City of Waltham, and to the west by Forest Street.

The Proposal:

The Petitioners propose to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of the existing building in the rear yard. As referenced above, the proposed solar structures will significantly increase the amount of power Gann Academy will produce on site, creating renewable power for its own use and/or offsetting the energy it currently draws from the grid, further improving its carbon footprint. The proposal is also beneficial to the area residents of the City of Waltham as Gann Academy's reliance on power from the grid, particularly during peak demand times, will be offset by the amount of energy being produced on campus and fed back to the grid.

These goals and benefits of this system are further explained in the letter dated July 16, 2020 from John McDonough of Omni Navitas attached hereto as **Exhibit E – Omni Navitas Letter.**

As noted therein, "[t]he proposed project is a 480 KW AC Solar Canopy… The project will produce approximately 800,000 kwh per year which can power approximately 130 homes."

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[8] All references to sheet numbers or Plans are to the various sheets of the Plans filed with the Board of Appeals in this matter, unless otherwise specified.

The proposed work will also entail repaving and reconfiguring the existing main surface parking lot where the aforesaid four ground based solar canopies will be located. The solar canopies will provide shelter for vehicles parked underneath, and the new parking lot will be landscaped, particularly the islands where the solar canopies' footings and framing will be located.

As members of the Board of Appeals are likely aware, the purpose of this system is to harness the sun's power to create electricity which will go back out to the grid to be used by Gann Academy and/or other users in the immediate area. As aforementioned, Gann Academy uses 100% renewable energy, roughly 25% of which is currently generated from the 315-kilowatt rooftop solar panels, while the remaining 75% is currently purchased from wind farms.

In order to do this, the Petitioners will require relief from the dimensional requirements of the Conservation / Recreation Zoning District pursuant to the Dover Amendment, as well as modify Case No. 01-38 by substituting the Plans filed in this Case with the Plans filed in Case No. 01-38.

The Petition:

This Petition is an appeal from the Decision of Building Inspector pursuant to G.L. c. 40A § 3, ¶¶ 2 and 9, also commonly referred to as "the Dover Amendment", and for a modification of Case No. 01-38 (which itself was decided pursuant to the Dover Amendment).

Dimensional Relief:

1. Height – Solar Canopies:
   The Table of Dimensional Regulations, § 4.11 of the Zoning Ordinance of the City of Waltham, states that the maximum height allowed in the Conservation / Recreation Zoning District is 20 feet.
   The proposed solar canopy structures, which are angled towards the sun, will be approximately 13 feet from the existing grade at their lowest point, approximately 21 feet in height from the existing grade at their highest point, and cannot be decreased in height in order to provide appropriate clearance for emergency vehicles.

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2. Stories – Solar Canopies:

§ 4.11 states that one story is allowed in the Conservation / Recreation Zoning District. § 2.340 provides in pertinent part that "where a building is not divided into stories a "story" shall be considered up to 15 feet in height."

Here, the proposed solar canopy structures will be approximately 21 feet in height from the existing grade at their highest point and are thus considered to be two story structures pursuant to the Zoning Ordinance.

3. Lot Coverage:

§ 4.11 states that the maximum lot coverage allowed in the Conservation / Recreation Zoning District is 5%. § 4.12(2) states that lot coverage shall include all principal and accessory buildings on a lot.

Here the existing lot coverage is 7.3% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2). The proposed solar canopy structures will lead to the lot coverage increasing to 12.1%.

4. Rear Yard Setback – Fifth Solar Canopy:

§ 4.242 of the Zoning Ordinance states that in the Conservation / Recreation Zoning District, detached accessory structures may be erected in the side or rear yard area and shall be subject to the same front, side, and rear yard requirements as the principal building (100 feet in the case of the rear yard).

Here the proposed "fifth" solar canopy will be setback approximately 60.9 feet from the rear lot line (which is land owned by Bentley University).

5. Compact Parking:

The existing school requires 217 parking spaces pursuant to the Decision in ZBA Case No. 01-38. However, as part of the installation of the four solar canopy structures over portions of the existing parking lot, the Petitioners propose to re-design the parking lot to accommodate the proposed solar canopy structures.

In doing so, the Petitioners propose to re-stripe 80 of the 217 parking spaces to compact parking, approximately 36.9% of the total parking on site.

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The Petitioners contend that the aforementioned dimensional limitations as applied to Gann Academy and the proposed solar canopy structures are not reasonable under M.G.L. c. 40A, § 3, ¶ 2 and, pursuant to M.G.L. c. 40A, § 3, ¶ 9, that such limitations as applied to the proposed solar canopy structures are not "... necessary to protect the public health, safety or welfare."

Therefore, the Petitioners respectfully requests that the Board of Appeals make a determination and declare that the aforementioned dimensional limitations of the Conservation / Recreation Zoning District are unreasonable as applied to the proposed solar canopy structures, nor are they "... necessary to protect the public health, safety, or welfare", and to set such provision of the Zoning Ordinance aside pursuant to G.L. c. 40A, § 3, ¶¶ 2 and 9.

Modification of Case No. 01-38:

1. Open Space:
   § 4.11 states that the minimum open space in the Conservation / Recreation Zoning District is 10% and here the existing open space is 73% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2).

   The proposed solar canopies will lead to the open space decreasing to 71.6%, still significantly more than the 10% requirement in the Zoning District.

2. Parking Configuration:
   The construction, use, and maintenance of the proposed solar canopy structures will necessitate the reconfiguration of the existing surface parking lot, which will differ from the Plans approved in Case No. 01-38. Furthermore, the proposed solar canopy structures were not contemplated in ZBA Case No. 01-38 and thus do not appear of the approved Plans in that Case.

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Accordingly, the Petitioners seek to modify the Decision in Case No. 01-38 by substituting the Plans in that Case with the Plans filed in the present Case and making the conditions consistent with the zoning relief outlined above to allow the Petitioner to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of

the existing building, along with the associated reconfiguration and re-striping of the existing parking lot, all as shown on the Plans filed in this Case.

There will be no changes to the existing main school building as part of this proposal (except for any necessary underground utility connections from the solar panels).

JURISDICTION

The Dover Amendment - M.G.L. c. 40A, § 3, ¶¶ 2 and 9:

- *¶ 2: No zoning ordinance or by-law shall regulate or restrict… nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by… a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.*

- *¶ 9: No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety, or welfare.*

§ 3.87 of the Zoning Ordinance and G.L. c. 40A, § 3, ¶ 2 allow educational uses in any Zoning District within the City. Thus, the use proposed by the Petitioners, solar panels to be used to help power Gann Academy, are allowed in the Conservation / Recreation Zoning District.

Further, pursuant to G.L. c. 40A, § 3, ¶ 9, unless it is "…necessary to protect the public health, safety or welfare" the use of solar panels are allowed in every Zoning District in the City of Waltham. In fact, solar panels are currently found in every Zoning District in the City – from single family houses to large apartment buildings such as Cronin's Landing or Longview Place, from office buildings in the Limited Commercial and Commercial Zoning Districts to the new hockey arena at Bentley University or the field house at Brandeis University, from the MacArthur School and finally to the Department of Public Works on Lexington Street as just a few examples. Thus, the use

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of solar panels as proposed by the Petitioners is an allowed use in the Conservation / Recreation Zoning District.

§ 7.31 of the Zoning Ordinance states that any person aggrieved by the refusal of the Inspector of Buildings to issue a permit on the grounds of noncompliance with the Zoning Ordinance may appeal to this Board of Appeals.

G.L. c. 40A, § 8 provides that "...any person aggrieved by reason of his inability to obtain a permit ... [from the Inspector of Buildings] ..." may appeal to the Board of Appeals. The Petition in this matter was filed with the Building Inspector William L. Forte on May 19, 2020 and on May 28, 2020 Building Inspector Forte refused to issue a Permit thereunder.

As to the modifications of Case No. 01-38 the case law of Massachusetts has long interpreted M.G.L. c. 40A, §10 as allowing modifications to prior decisions, *Huntington v. Zoning Board of Appeals of Hadley*, 12 Mass. App. Ct. 710 (1981), provided the Board of Appeals holds a public hearing after notice is given in accordance with M.G.L. c. 40A, § 11.

§ 7.2 of the Zoning Ordinance authorizes this Board of Appeals to utilize all of the powers granted to it by the General Laws which would include modifications of prior Board of Appeal decisions as set forth in *Huntington v. Zoning Board of Appeals of Hadley*.

With that, in that this Board has jurisdiction in this matter, the Petitioners respectfully request that its Petition be granted for the following reasons:

DISCUSSION

The Dover Amendment – M.G.L. c. 40A, § 3, ¶¶ 2 and 9:

The Petitioners contend that the proposed solar canopies and the Gann Academy land as a whole are entitled to the broad and deep protections under M.G.L. c. 40A, § 3, ¶¶ 2 and 9 (hereinafter, "The Dover Amendment") afforded to land and structures used for religious or educational purposes (¶ 2) and for solar energy systems (¶ 9).

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Religious and Educational Uses (¶ 2):

In 1933 the Town of Dover adopted its Zoning By-Law, which allowed churches and educational uses throughout the Town. In 1946, the Town amended the By-Law to allow "Educational uses; if non-sectarian..." The purpose was to prevent any religious schools from locating in Dover. Word quickly spread to Beacon Hill, where in 1950 the Legislature enacted the predecessor of the Dover Amendment (St.1950, c. 325), and inserted the following language in G.L. c. 40, § 25, a predecessor of the present G.L. c. 40A, § 3:

> *No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.*

This was upheld by the Supreme Judicial Court ("SJC") in *Attorney Gen. v. Dover*, 327 Mass. 601, 100 N.E.2d 1 (1951), where the SJC was called upon to consider the impact of this amendment, and ruled that the Dover Zoning By-Law "became invalid immediately upon the taking effect of the statute in 1950".

Today, the Dover Amendment (G.L. c. 40A, § 3, second para.) states in pertinent part that:

> *No zoning ordinance ... shall ... regulate or restrict the use of land or structures for ...educational purposes... by a non-profit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.*

Many cases have examined the application of this statute to particular restrictions, and they have uniformly interpreted the Dover Amendment to mean that any zoning ordinance that unreasonably impedes a proposed educational or religious use is invalid. However, these cases also recognize the proviso to the statute which authorizes reasonable regulations concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. *Trustees of Boston College v. Board of Alderman of Newton*, 58 Mass. App. Ct. 794, 793 N.E.2d 387 (2003), *Martin v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints*, 434 Mass. 141, 747 NE2d 131 (2001), *Trustees of Tufts College v. Medford*, 415 Mass. 753, 616 N.E. 2d 433 (1993) and *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 391 N.E. 2d 279 (1979).

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Gann Academy is seeking to install, use and maintain ground based solar canopies which will generate electricity to help power the campus. It has long been recognized that such uses are within the broad scope of protection for educational uses under the Dover Amendment. In *Trustees of Tufts College v. Medford*, 415 Mass. 753, 754-755 (1993), the Supreme Judicial Court recognized that a parking garage was for an educational purpose, because it "will be located in the core... area of Tufts campus." Thus, solar panels to power a campus is likewise an educational use.

In the *Tufts* case the Supreme Judicial Court held that the "Whole of the Dover Amendment ... seeks to strike a balance between preventing local discrimination against an educational use ... and honoring legitimate municipal concerns..." *Tufts, Ibid.* at 757.

Recently, the Supreme Judicial Court re-affirmed and strengthened the broad scope of the Dover Amendment as to religious and educational uses in *The McLean Hospital Corporation v. Lincoln*, 483 Mass. 215 (2019). McLean Hospital proposed to use its land in Lincoln, utilizing the Dover Amendment's exemption for educational uses, for a residential life skills program for 15-21 year old males who exhibit extreme "emotional dysregulation", allowing them to develop the emotional and social skills necessary to lead productive lives. Part of the program encompassed elements of emotional regulation and individualized therapy sessions, while some skills were to be taught by clinical professionals and not educators. *Mclean*, at 216-217.

Nonetheless, the Supreme Judicial Court determined in regard to McLean Hospital's proposed residential treatment program in the town of Lincoln that:

> *... although not a conventional educational curriculum offered to high school or college students, the proposed facility and its skills-based curriculum fell well within the "broad and comprehensive" meaning of "education purposes" under the Dover Amendment. McLean*, at 216, citing *Regis College v. Weston*, 462 Mass. 280 (2012).

Therefore, the intent of the Dover Amendment is to allow educational and religious institutions on any land within a community and educational and/or religious uses are to be interpreted broadly.

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In the *Tufts* case the Court stated the issues to be determined by the local authority are twofold, the so called "Tufts test":

1. Whether the local Zoning Ordinance is unreasonable when applied to the religious or educational use; and
2. Whether to waive the provisions of the Zoning Ordinance would violate a community's legitimate concerns.

The *Tufts* Court gave examples of how an educational or religious institution could do this by showing that:

> *... compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns ... For example, a showing that the parking requirements of the ordinance, as applied, would necessitate that Tufts pave over significant open areas of the campus, would demonstrate the unreasonableness of the ordinance in view of the fact that construction of the proposed garage will provide an adequate solution to the parking problem. Tufts*, at 759.

Here for example, compliance with the one story (max 15 feet) requirement of the Conservation / Recreation Zoning District "would substantially diminish or detract from the usefulness of [the proposed solar panels]... without appreciably advancing the municipality's legitimate concerns" in that the solar panels would not have adequate clearance for emergency vehicles nor would they be able to be properly positioned to harness the sun's energy in the most efficient manner possible.

Solar Energy Systems (¶ 9):

Separately, also included in M.G. L. c. 40A, § 3 is paragraph 9 which states that communities are limited in their regulation of solar panels:

> *No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.*

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The obvious intent of M.G.L. c. 40A, §3. ¶ 9 is to facilitate municipalities to allow solar panels.[9] The only guidelines are that the installation of them shall not endanger "... the public health, safety or welfare".

The term "public health, safety or welfare" was a term that was used when Zoning was first coming into being. The first major zoning case in America was *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclid, Ohio is a township bordering on Cleveland. When industry started to quickly grow in Cleveland, Euclid, expecting that industry would soon invade its town, enacted restrictions as to the uses allowed in various parts of the town. Ambler Realty owned large parcels of undeveloped land in Euclid and brought suit stating that the ordinance operated to reduce the value of its property and to deprive it of liberty and property without due process of law. On the basis of the old nuisance laws the Supreme Court ruled that it was proper in certain instances for a town to enact ordinances to divide a town into different sections where only certain uses would be allowed.

The "old nuisance" laws were the basis for the term "public health, safety or welfare", and as such are the basis for present day zoning. These primarily arose in the late 19th and early 20th centuries with the growth of cities where "... as the result of unplanned growth, there were in many areas a hodgepodge cluster of mixed uses characterized by backyard privies and filth and stench in the streets. Fires and deadly disease were commonplace. During this period, the so-called "sanitary reforms" pressed for implementation of comprehensive public water and sewage systems and for increased regulation of land uses which posed the threat of fire and disease ["public health, safety or welfare"] [10].

In this case, there is no tangible threat to "public health, safety, or welfare" by locating four ground based solar canopies over portions of Gann Academy's main surface

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[9] Solar energy has become so important to the Commonwealth that the Legislature has also enacted M.G.L. c. 40A, § 9B which states in essence that communities can create Zoning Ordinances to protect solar energy systems from being blocked from sunlight from abutting properties by:

> "... regulation of the orientation of streets, lots and buildings, maximum building height limits, minimum building set back requirements, limitations on the type, height and placement of vegetation and other provisions ... Zoning ordinances or by-laws may also provide for special permits to protect access to direct sunlight for solar energy systems. Such ordinances or by-laws may provide that such solar access permits would create an easement to sunlight over neighboring property.

[10] *Rathkopf's The Law of Zoning and Planning*, § 1.2 (2005)

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parking lot, as well as a fifth ground based solar canopy to the east of the existing building in the rear yard.

Therefore, the Petitioners contend that the Zoning Ordinance is unreasonable when applied to the proposed ground based solar canopies, pursuant to both ¶¶ 2 and 9 of the Dover Amendment, and requests that this Board of Appeals set aside the aforementioned sections of the Zoning Ordinance for the following reasons:

Dimensional Relief:

1. **M.G.L. c. 40A, § 3, ¶ 2 – Tufts Test:**
    a. **Whether the aforementioned dimensional limitations in the Conservation / Recreation Zoning District (height, stories, lot coverage, rear yard setback, and amount of compact parking spaces) are unreasonable when applied to the proposed ground based solar canopies.**

    Height & Stories: § 4.11 of the Zoning Ordinance (the "Table of Dimensional Regulations"), states that the maximum height allowed in the Conservation / Recreation Zoning District is 20 feet and the maximum number of stories allowed is one. § 2.340 provides in pertinent part that "where a building is not divided into stories a "story" shall be considered up to 15 feet in height."

    The proposed solar canopy structures, which are angled towards the sun, will be approximately 13 feet from the existing grade at their lowest point, approximately 21 feet in height from the existing grade at their highest point (thus, they are considered to be two story structures even though they are not divided into stories), and cannot be decreased in height in order to provide appropriate clearance for emergency vehicles.

    Thus, the Petitioners require one foot of relief from the height requirements (as well as from the one-story limitation despite the proposed solar canopies not being divided into stories) of the Zoning Ordinance for health and safety reasons.

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The overall intent of the limitations to height and stories are to ensure that Conservation / Recreation land is not over-developed with tall, dense structures, in many cases preserving land in its natural state. In the context of the proposed solar canopies however, the restriction is unreasonable.

First and foremost, the existing school, which is adjacent to the location of the solar canopies, has a height of over 40 feet divided into three stories pursuant to the Decision in ZBA Case No. 01-38, more than double that which is allowed by right in the Zoning District. Accordingly, it would not be reasonable to require the Petitioners to build within the height limitations set by the Zoning Ordinance when the neighboring principal structure on site is over twice the height allowed in the Zoning District.

Further, aside from part of the "fifth" solar canopy, all of the canopies are proposed to be located over already paved areas, thus not effecting the natural state of any of the land within the Conservation / Recreation Zoning District.

Lot Coverage:

§ 4.11 states that the maximum lot coverage allowed in the Conservation / Recreation Zoning District is 5%. § 4.12(2) states that lot coverage shall include all principal and accessory buildings on a lot.

Here the existing lot coverage is 7.3% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2). The proposed solar canopy structures will lead to the lot coverage increasing to 12.1%.

Similar to height and stories above, the overall intent of the limitation as to lot coverage is to ensure that Conservation / Recreation land is not over-developed, in many cases preserving land in its natural state. In the context of the proposed solar canopies however, the restriction is unreasonable.

Aside from part of the "fifth" solar canopy, all of the canopies are proposed to be located over already paved areas, thus not effecting the natural state of any of the land within the Conservation / Recreation Zoning District.

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Rear Yard Setback – Fifth Solar Canopy:

§ 4.242 of the Zoning Ordinance states that in the Conservation / Recreation Zoning District, detached accessory structures may be erected in the side or rear yard area and shall be subject to the same front, side, and rear yard requirements as the principal building (100 feet in the case of the rear yard).

Here the proposed "fifth" solar canopy will be setback approximately 60.9 feet from the rear lot line (which is land owned by Bentley University).

The purpose of setbacks are to prevent structures from being located too closely to one another, preventing overly dense development. Only in the Conservation / Recreation and Limited Commercial Zoning Districts is such a large rear yard setback required. If the locus was situated in any other Zoning District in the City this would not even be an issue as the rear yard setbacks of the other Zoning Districts are much less than the 100-foot rear yard setback of the Conservation / Recreation District.

Further, this is the ideal location for the "fifth" solar canopy, as locating it outside of the setback requirements in the rear yard would interfere with the fire lane leading to the easterly side of the building, and locating it elsewhere on campus would interfere with existing athletic fields.

Thus, it would be unreasonable to deny the Petitioners from locating the "fifth" solar canopy 60.9 feet from the rear lot line, where the nearest residential structure (Bentley University's North Campus Apartments) is located over 300 feet away.

Compact Parking:

The existing school requires 217 parking spaces pursuant to the Decision in ZBA Case No. 01-38. However, as part of the installation of the four solar canopy structures over portions of the existing parking lot, the Petitioners propose to re-design the parking lot to accommodate the proposed solar canopy structures.

In doing so, the Petitioners propose to re-stripe 80 of the 217 parking spaces to compact parking, approximately 36.9% of the total parking on site.

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§ 5.47 allows up to 25% of all parking spaces to be designed for compact vehicles. But, the Board of Appeals may allow up to 50% of the parking spaces to be compact.

In this case, the Petitioners are requesting relief for merely 11.9% of its 217 parking spaces, roughly 25 parking spaces, to be striped as compact spaces. The parking lot presently exists, and will continue to exist in the same location (albeit with a new striping pattern). No existing parking areas are to be removed and no new parking areas are being created.

Thus, it would not be reasonable to deny the Petitioners a minor derogation from § 5.47 for an additional 11.9% of its 217 parking spaces being compact parking spaces on a lot that presently exists but is being reconfigured to accommodate ground based solar canopies which will provide shelter to the cars parked underneath.

b. Whether waiving the dimensional limitations in the Conservation / Recreation Zoning District would violate the community's legitimate concerns.

As noted in the proceeding paragraphs, the overall intent of the dimensional limitations are to prevent Conservation / Recreation land from becoming over-developed with tall, dense structures, with structures being properly setback from abutting land and structures, in many cases preserving land in its natural state. In the context of the proposed solar canopies however, the restrictions are unreasonable.

In this case, the locus is already developed with a high school, related facilities (e.g. athletic fields), and surface parking, with the principal structure's height exceeding 40 feet.

Accordingly, waiving the applicable dimensional limitations in the Conservation / Recreation Zoning District will not violate the City's legitimate concerns in that the proposed ground based solar canopies will be

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approximately half the height of the existing building, will be located largely on existing paved areas, and are significantly setback from the nearest residential structures (over 300 feet to the North Campus Apartments of Bentley University, and over 500 feet from the nearest residential abutters on Forest Street).

Further, waiving such dimensional regulations will also benefit City of Waltham residents as well as Gann Academy. As referenced above, the proposed solar structures will significantly increase the amount of power Gann Academy will produce on site, creating renewable power for its own use and/or offsetting the energy it currently draws from the grid, further improving its carbon footprint. The proposal is beneficial to the area residents of the City of Waltham as Gann Academy's reliance on power from the grid, particularly during peak demand times, will be offset by the amount of energy being produced on campus and fed back to the grid.

2. M.G.L. c. 40A, § 3, ¶ 9 – Public Health, Safety, or Welfare:

As previously noted, M.G.L. c. 40A, §3, ¶ 9 states:

> *No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety, or welfare.*

The first issue is whether the Zoning Ordinance either prohibits or unreasonably regulates solar panel structures as there is no provision of the Zoning Ordinance specific to solar energy systems.

§ 2.343 of the Zoning Ordinance defines "structure" in pertinent part as:

> *A combination of materials assembled together to give support or shelter. The term "structure" shall include a building, …*

Four of the five solar panel structures are proposed to be built over the main surface parking lot and as such they fall within the definition of building in that they will be providing shelter for the cars parked beneath them.

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Thus, the term "structure" includes a "building". § 2.308 of the Zoning Ordinance defines "building" in pertinent part as:

> *A combination of any materials, whether portable or fixed, having a roof to form a structure for the shelter of persons, animals or property.*

The primary use of the locus is that of a high school that is located thereon. The use of the solar panel structures is to provide solar power to be sent back to the grid, either to be used by the principal building or to offset the amount of energy it draws from the grid. The "use" of the solar panels to provide solar energy to the building is an "accessory use" as defined in § 2.303 of the Zoning Ordinance, which defines "Accessory Use" in pertinent part as:

> *Use of land, building or part of building that is customarily incidental and clearly subordinate to the principal use of the premises.*

The solar panels are clearly an "accessory use", and the structures of these solar panels would clearly fall within the definition of an "accessory building", which is defined in pertinent part in § 2.302 of the Zoning Ordinance as:

> *A building subordinate to the principal building, ... customarily incidental to that of a principal building or principal use on the same premises ...*

Accessory buildings are allowed in the Conservation / Recreation Zoning District. Thus, the Zoning Ordinance does not prohibit or unreasonably regulate solar panels.

The second issue to be decided is whether the proposed solar canopies endanger the "public health, safety, or welfare". The Petitioners respectfully believe that the proposed solar panel structures would not endanger the "public health, safety, or welfare".

Specific to the height of the structures and the minor relief requested from the height restrictions of the Conservation / Recreation Zoning District, the Petitioners contend that the proposed height of the solar canopies is directly related to public health, safety, or welfare in that they are being designed to allow adequate clearance and maneuverability of emergency vehicles.

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The minor increase in lot coverage also does not endanger "public health, safety, or welfare" as the solar panel structures are proposed to be located on already developed land within the Conservation / Recreation Zoning District, and will provide shelter for the vehicles parked underneath.

Further, the "fifth" solar panel, while located within the rear yard setback, is appropriately setback from the principal building, and significantly setback from the nearest structures, thus posing no risk to "public health, safety, or welfare".

Lastly, in that the Zoning Board of Appeals is allowed to grant up to 50% compact parking spaces, there is no risk to "public health, safety, or welfare", in allowing the petitioner to have approximately 36.9% compact parking spaces, as the parking lot will have sufficient vehicle circulation aisles, and compact spaces will be appropriately grouped and marked (as shown on the Plans submitted in this matter).

Accordingly, the Petitioners respectfully request that this Board of Appeals make a determination and declare that the applicable dimensional limitations of the Conservation / Recreation Zoning District (height, stories, lot coverage, rear yard setback, amount of compact parking spaces) are unreasonable as applied to the proposed solar canopies, and to set such provisions of the Zoning Ordinance aside pursuant to G.L. c. 40A, § 3, ¶¶ 2 and 9.

Modification of Case No. 01-38:

1. Open Space:

   § 4.11 states that the minimum open space in the Conservation / Recreation Zoning District is 10% and here the existing open space is 73% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2).

   The proposed solar canopies will lead to the open space decreasing to 71.6%, still significantly more than the 10% requirement in the Zoning District. This minor decrease in open space is due to the "fifth" solar canopy being located over a portion of the rear yard, whereas the other four solar canopies are

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proposed to be located over the existing main surface parking lot, thus not effecting open space.

2. Parking Configuration:

   The construction, use, and maintenance of the proposed solar canopy structures will necessitate the reconfiguration of the existing surface parking lot, which will differ from the Plans approved in Case No. 01-38. Furthermore, the proposed solar canopy structures were not contemplated in ZBA Case No. 01-38 and thus do not appear of the approved Plans in that Case.

As previously noted, the case law of Massachusetts has long interpreted M.G.L. c. 40A, §10 as allowing modifications to prior decisions, *Huntington v. Zoning Board of Appeals of Hadley*, 12 Mass. App. Ct. 710 (1981), provided the Board of Appeals holds a public hearing after notice is given in accordance with M.G.L. c. 40A, § 11.

§ 7.2 of the Zoning Ordinance authorizes this Board of Appeals to utilize all of the powers granted to it by the General Laws which would include modifications of prior Board of Appeal decisions as set forth in *Huntington v. Zoning Board of Appeals of Hadley*.

In that a public hearing is to be held after notice is given in accordance with M.G.L. c. 40A, § 11, and for the reasons stated herein, the Petitioners respectfully request that the Zoning Board of Appeals modify the Decision in Case No. 01-38 by substituting the Plans in that Case with the Plans filed in the present Case and making the conditions consistent with the zoning relief outlined above to allow the Petitioner to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of the existing building (the rear yard), along with the associated reconfiguration and re-striping of the existing parking lot, all as shown on the Plans filed in this Case.

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Thus, for all of the reasons set forth herein, the Petitioners respectfully request that the Board of Appeals make a determination and declare that the applicable dimensional limitations of the Conservation / Recreation Zoning District (height, stories, lot coverage, rear yard setback, amount of compact parking spaces) are unreasonable as applied to the proposed solar canopies, and to set such provisions of the Zoning Ordinance aside pursuant to G.L. c. 40A, § 3, ¶¶ 2 and 9.

Further, the Petitioners respectfully request that the Zoning Board of Appeals modify the Decision in Case No. 01-38 by substituting the Plans in that Case with the Plans filed in the present Case and making the conditions consistent with the zoning relief outlined above to allow the Petitioner to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of the existing building (the rear yard), along with the associated reconfiguration and re-striping of the existing parking lot, all as shown on the Plans filed in this Case.

Gann Academy &
Omni Navitas Holdings, LLC
By its Attorneys,
Connors & Connors LLP

Michael R. Connors

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Omni Navitas Holdings, LLC, co-Petitioner

and

Gann Academy – The New Jewish High School of

Greater Boston, Inc. – co-Petitioner / Owner

Proposed Findings of Fact

City of Waltham
Board of Appeals

Petition of	)	
Omni Navitas Holdings, LLC – co-Petitioner	)	
and	)	
Gann Academy- The New Jewish High School	)	Case No. 2020-15
Of Greater Boston, Inc. – co-Petitioner / Owner	)	August 4, 2020
	)	
Appeal from Decision of the Building Inspector	)	
under M.G.L. c. 40A, § 3, ¶¶ 2 and 9	)	
and	)	
Modification of Case No. 01-38	)	
	)	

Proposed Findings of Fact

The Board of Appeals of the City of Waltham makes the following findings of fact after a hearing on the above captioned Appeal from the Decision of the Building Inspector under M.G.L. c. 40A § 3, ¶¶ 2 and 9, and Modification of Case No. 01-38:

1. This Board of Appeals, having met all legal prerequisites by proper publications and postings as provided in Massachusetts General Laws Chapter 40A, §11, and having also notified by mail all parties in interest, and having heard all the evidence, is now empowered to exercise the power to grant or to deny this appeal from the decision of the Building Inspector under the provisions of M.G.L. c.40A, § 3, ¶¶ 2 and 9 (also commonly referred to as "the Dover Amendment"), and to or not modify Case No. 01-38 (which itself was decided pursuant to the Dover Amendment), all as requested by the Petitioner.

2. This Board has the both the power to handle appeals from decisions of the Building Inspector (Zoning Ordinance § 7.31), and also the power to modify prior decisions granted by the Board of Appeals (Zoning Ordinance § 7.2).

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3. The locus is a large parcel of land (approximately 865,101 sq. ft., 19.86 + acres) owned by Gann Academy on the easterly side of Forest Street with an address of 333 Forest Street.

4. Gann Academy is Greater Boston's independent Jewish high school, and is organized as a nonprofit educational corporation under Chapter 180 of the Massachusetts General Laws.

5. The locus is situated in a Conservation / Recreation Zoning District according to the Zoning District Map of the City of Waltham.

6. On site there is presently a three-story high school building, related facilities (e.g. athletic fields), and surface parking located thereon the locus, all of which was constructed pursuant to the Decision in Zoning Board of Appeals (ZBA) Case No. 01-38 (which was decided pursuant to the Dover Amendment).

7. The Petitioners propose to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of the existing building in the rear yard.

8. The proposed ground based solar canopies will significantly increase the amount of power Gann Academy will produce on site, creating renewable power for its own use and/or offsetting the energy it currently draws from the grid, further improving its carbon footprint. The proposal is also beneficial to the area residents of the City of Waltham as Gann Academy's reliance on power from the grid, particularly during peak demand times, will be offset by the amount of energy being produced on campus and fed back to the grid.

9. The proposed work will also entail repaving and reconfiguring the existing main surface parking lot where the aforesaid four ground based solar canopies will be located. The solar canopies will provide shelter for vehicles parked underneath, and the new parking lot will be landscaped, particularly the islands where the solar canopies' footings and framing will be located.

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10. The Petition in this matter was filed with the Building Inspector of the City of Waltham on May 19, 2020 and on May 28, 2020 Building Inspector Forte refused to issue a permit thereunder.

11. The Petitioners require the following dimensional relief pursuant to the Dover Amendment:

    a. Height – Solar Canopies: The Table of Dimensional Regulations, § 4.11 of the Zoning Ordinance of the City of Waltham, states that the maximum height allowed in the Conservation / Recreation Zoning District is 20 feet. The proposed solar canopy structures, which are angled towards the sun, will be approximately 13 feet from the existing grade at their lowest point, approximately 21 feet in height from the existing grade at their highest point, and cannot be decreased in height in order to provide appropriate clearance for emergency vehicles.

    b. Stories – Solar Canopies: § 4.11 states that one story is allowed in the Conservation / Recreation Zoning District. § 2.340 provides in pertinent part that "where a building is not divided into stories a "story" shall be considered up to 15 feet in height." Here, the proposed solar canopy structures will be approximately 21 feet in height from the existing grade at their highest point and are thus considered to be two story structures pursuant to the Zoning Ordinance.

    c. Lot Coverage: § 4.11 states that the maximum lot coverage allowed in the Conservation / Recreation Zoning District is 5%. § 4.12(2) states that lot coverage shall include all principal and accessory buildings on a lot. Here the existing lot coverage is 7.3% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2). The proposed solar canopy structures will lead to the lot coverage increasing to 12.1%.

    d. Rear Yard Setback – Fifth Solar Canopy: § 4.242 of the Zoning Ordinance states that in the Conservation / Recreation Zoning District, detached accessory structures may be erected in the side or rear yard area and shall be subject to the same front, side, and rear yard

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requirements as the principal building (100 feet in the case of the rear yard). Here the proposed "fifth" solar canopy will be setback approximately 60.9 feet from the rear lot line (which is land owned by Bentley University).

e. Compact Parking: The existing school requires 217 parking spaces pursuant to the Decision in ZBA Case No. 01-38. However, as part of the installation of the four solar canopy structures over portions of the existing parking lot, the Petitioners propose to re-design the parking lot to accommodate the proposed solar canopy structures. In doing so, the Petitioners propose to re-stripe 80 of the 217 parking spaces to compact parking, approximately 36.9% of the total parking on site.

12. The Petitioners require the following relief pursuant to an amendment of ZBA Case No. 01-38:
    a. Open Space: § 4.11 states that the minimum open space in the Conservation / Recreation Zoning District is 10% and here the existing open space is 73% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2). The proposed solar canopies will lead to the open space decreasing to 71.6%, still significantly more than the 10% requirement in the Zoning District.

    b. Parking Configuration: The construction, use, and maintenance of the proposed solar canopy structures will necessitate the reconfiguration of the existing surface parking lot, which will differ from the Plans approved in Case No. 01-38. Furthermore, the proposed solar canopy structures were not contemplated in ZBA Case No. 01-38 and thus do not appear of the approved Plans in that Case. Accordingly, the Petitioners seek to modify the Decision in Case No. 01-38 by substituting the Plans in that Case with the Plans filed in the present Case and making the conditions consistent with the zoning relief requested in this matter.

13. The Dover Amendment, M.G.L. c. 40A § 3, ¶¶ 2 and 9, provides in pertinent part:

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a. ¶ 2: *No zoning ordinance or by-law shall regulate or restrict… nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by… a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.*

b. ¶ 9: *No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety, or welfare.*

14. The Petitioners contend pursuant to the Dover Amendment ¶ 2 that these dimensional restrictions of the Conservation / Recreation Zoning District are not reasonable as applied to the proposed ground based solar canopies and that waiving such restrictions will not violate the City's legitimate concerns in that the proposed ground based solar canopies will be approximately half the height of the existing building, will be located largely on existing paved areas, and are significantly setback from the nearest residential structures (over 300 feet to the North Campus Apartments of Bentley University, and over 500 feet from the nearest residential abutters on Forest Street).

15. The Petitioners contend pursuant to the Dover Amendment ¶ 9 that these dimensional restrictions of the Conservation / Recreation Zoning District as applied to the proposed ground based solar canopies are not necessary to protect "public health, safety, or welfare", and to set such provisions aside.

16. The Petitioners contend that the proposed modifications to Case No. 01-38 are proper in that a public hearing was held after this matter was noticed in accordance with M.G.L. c. 40A, § 11.

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Omni Navitas Holdings, LLC, co-Petitioner

and

Gann Academy – The New Jewish High School of

Greater Boston, Inc. – co-Petitioner / Owner

Proposed Decision

City of Waltham
Board of Appeals

Petition of	)	
Omni Navitas Holdings, LLC – co-Petitioner	)	
and	)	
Gann Academy- The New Jewish High School	)	Case No. 2020-15
Of Greater Boston, Inc. – co-Petitioner / Owner	)	August 4, 2020
	)	
Appeal from Decision of the Building Inspector	)	
under M.G.L. c. 40A, § 3, ¶¶ 2 and 9	)	
and	)	
Modification of Case No. 01-38	)	
	)	

Proposed Decision

Therefore, the Board of Appeals of the City of Waltham after due deliberation, on motion duly made and seconded, voted:

To grant the Petition of Omni Navitas Holdings, LLC as co-Petitioner, and Gann Academy – The New Jewish High School of Greater Boston, Inc., as co-Petitioner / Owner, appealing from the Decision of the Building Inspector under the provisions of M.G.L. c. 40A, § 3, ¶¶ 2 and 9 and to grant the Modification of Case No. 01-38, and incorporates by reference the Findings of Fact and further cites as reasons the following:

1. **The Dover Amendment – M.G.L. c. 40A, § 3, ¶¶ 2 and 9:**
   This Board agrees with the Petitioners contentions that the proposed solar canopies and the Gann Academy land as a whole are entitled to the broad and deep protections under M.G.L. c. 40A, § 3, ¶¶ 2 and 9 (hereinafter, "The Dover Amendment") afforded to land and structures used for religious or educational purposes (¶ 2) and for solar energy systems (¶ 9).

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2. **Dimensional Relief:**

a. **The Board finds that the pertinent dimensional limitations in the Conservation / Recreation Zoning District (height, stories, lot coverage, rear yard setback, and amount of compact parking spaces) are unreasonable when applied to the proposed ground based solar canopies.**

- Height & Stories: The Table of Dimensional Regulations, § 4.11 of the Zoning Ordinance of the City of Waltham, states that the maximum height allowed in the Conservation / Recreation Zoning District is 20 feet.

  § 4.11 states that one story is allowed in the Conservation / Recreation Zoning District. § 2.340 provides in pertinent part that "where a building is not divided into stories a "story" shall be considered up to 15 feet in height."

  Here, the proposed solar canopy structures, which are angled towards the sun, will be approximately 13 feet from the existing grade at their lowest point, approximately 21 feet in height from the existing grade at their highest point (thus, they are considered to be two story structures even though they are not divided into stories), and cannot be decreased in height in order to provide appropriate clearance for emergency vehicles.

  Thus, the Board finds it would be unreasonable to deny the requested relief, which is necessary for health and safety reasons, where the existing school, which is adjacent to the location of the solar canopies, has a height of over 40 feet divided into three stories pursuant to the Decision in ZBA Case No. 01-38, more than double that which is allowed by right in the Zoning District. Accordingly, it would not be reasonable to require the Petitioners to build within the height limitations set by the Zoning Ordinance when the neighboring

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principal structure on site is over twice the height allowed in the Zoning District.

Further, aside from part of the "fifth" solar canopy, all of the canopies are proposed to be located over already paved areas, thus not effecting the natural state of any of the land within the Conservation / Recreation Zoning District.

- Lot Coverage: § 4.11 states that the maximum lot coverage allowed in the Conservation / Recreation Zoning District is 5%. § 4.12(2) states that lot coverage shall include all principal and accessory buildings on a lot.

  Here, the existing lot coverage is 7.3% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2). The proposed solar canopy structures will lead to the lot coverage increasing to 12.1%.

  The Board agrees that, similar to height and stories above, the overall intent of the limitation as to lot coverage is to ensure that Conservation / Recreation land is not over-developed, in many cases preserving land in its natural state. In the context of the proposed solar canopies however, the restriction is unreasonable.

  Aside from part of the "fifth" solar canopy, all of the canopies are proposed to be located over already paved areas, thus not effecting the natural state of any of the land within the Conservation / Recreation Zoning District.

- Rear Yard Setback – Fifth Solar Canopy: § 4.242 of the Zoning Ordinance states that in the Conservation / Recreation Zoning District, detached accessory structures may be erected in the side or rear yard area and shall be subject to the same front, side, and rear yard requirements as the principal building (100 feet in the case of the rear yard).

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Here, the proposed "fifth" solar canopy will be setback approximately 60.9 feet from the rear lot line (which is land owned by Bentley University). The Board agrees with the Petitioners' contentions that the required 100-foot rear yard setback is unreasonable as applied to the "fifth" solar canopy.

This Board agrees with the Petitioners' contention that the purpose of setbacks are to prevent structures from being located too closely to one another, preventing overly dense development, and that only in the Conservation / Recreation and Limited Commercial Zoning Districts is such a large rear yard setback required.

The Board agrees that if the locus was situated in any other Zoning District in the City this relief would not be at issue as the rear yard setbacks of the other Zoning Districts are much less than the 100-foot rear yard setback of the Conservation / Recreation District.

Further, this is the ideal location for the "fifth" solar canopy, as locating it outside of the setback requirements in the rear yard would interfere with the fire lane leading to the easterly side of the building, and locating it elsewhere on campus would interfere with existing athletic fields.

Thus, the Board agrees that it would be unreasonable to deny the Petitioners from locating the "fifth" solar canopy 60.9 feet from the rear lot line, where the nearest residential structure (Bentley University's North Campus Apartments) is located over 300 feet away.

- Compact Parking: The existing school requires 217 parking spaces pursuant to the Decision in ZBA Case No. 01-38. However, as part of the installation of the four solar canopy structures over portions of the existing parking lot, the Petitioners propose to re-design the parking lot to accommodate the proposed solar canopy structures. In doing so, the Petitioners propose to re-stripe 80 of the 217 parking spaces to compact parking, approximately 36.9% of the total parking on site.

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The Board agrees with the Petitioners' contentions that it would be unreasonable to not allow the Petitioners to re-stripe 80 of the required 217 parking spaces to compact parking, approximately 36.9% of the total parking on site, particularly where the Board may allow up to 50% of parking spaces to be compact pursuant to § 5.47.

In this case, the Petitioners are requesting relief for merely an additional 11.9% of its 217 parking spaces, roughly 25 parking spaces, to be striped as compact spaces. The parking lot presently exists, and will continue to exist in the same location (albeit with a new striping pattern). No existing parking areas are to be removed and no new parking areas are being created.

Thus the Board agrees that it would not be reasonable to deny the Petitioners a minor derogation from § 5.47 for an additional 11.9% of its 217 parking spaces being compact parking spaces on a lot that presently exists but is being reconfigured to accommodate ground based solar canopies which will provide shelter to the cars parked underneath.

b. This Board further agrees that waiving the aforementioned dimensional limitations in the Conservation / Recreation Zoning District would not violate the community's legitimate concerns.

The Board agrees that, as noted in the proceeding paragraphs, the overall intent of the dimensional limitations are to prevent Conservation / Recreation land from becoming over-developed with tall, dense structures, with structures being properly setback from abutting land and structures, in many cases preserving land in its natural state. In the context of the proposed solar canopies however, the restrictions are unreasonable.

In this case, the Board finds that the locus is already developed with a high school, related facilities (e.g. athletic fields), and surface parking,

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with the principal structure's height exceeding 40 feet, and that the existing locus was constructed pursuant to the relief granted by this Board in Case No. 01-38 pursuant to the Dover Amendment.

Accordingly, the Board finds that waiving the applicable dimensional limitations in the Conservation / Recreation Zoning District will not violate the City's legitimate concerns in that the proposed ground based solar canopies will be approximately half the height of the existing building, will be located largely on existing paved areas, and are significantly setback from the nearest residential structures (over 300 feet to the North Campus Apartments of Bentley University, and over 500 feet from the nearest residential abutters on Forest Street).

Further, the Board finds that waiving such dimensional regulations will also benefit City of Waltham residents as well as Gann Academy. The proposed solar structures will significantly increase the amount of power Gann Academy will produce on site, creating renewable power for its own use and/or offsetting the energy it currently draws from the grid, further improving its carbon footprint. The proposal is beneficial to the area residents of the City of Waltham as Gann Academy's reliance on power from the grid, particularly during peak demand times, will be offset by the amount of energy being produced on campus and fed back to the grid.

3. **M.G.L. c. 40A, § 3, ¶ 9 – Public Health, Safety, or Welfare:**

The Board agrees that, as noted in M.G.L. c. 40A, §3, ¶ 9, the Zoning Ordinance may not prohibit or unreasonably regulate the installation of solar energy systems except where necessary to protect the public health, safety, or welfare.

The Board agrees with the Petitioners' contentions that the Zoning Ordinance does not either prohibit or unreasonably regulate solar panel structures.

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§ 2.343 of the Zoning Ordinance defines "structure" in pertinent part as:

> *A combination of materials assembled together to give support or shelter. The term "structure" shall include a building, …*

The Board agrees that four of the five solar panel structures are proposed to be built over the main surface parking lot and as such they fall within the definition of building in that they will be providing shelter for the cars parked beneath them.

The Board acknowledges that the term "structure" includes a "building". § 2.308 of the Zoning Ordinance defines "building" in pertinent part as:

> *A combination of any materials, whether portable or fixed, having a roof to form a structure for the shelter of persons, animals or property.*

As the Petitioners indicated and the Board agrees, the primary use of the locus is that of a high school that is located thereon. The use of the solar panel structures is to provide solar power to be sent back to the grid, either to be used by the principal building or to offset the amount of energy it draws from the grid. The "use" of the solar panels to provide solar energy to the building is an "accessory use" as defined in § 2.303 of the Zoning Ordinance, which defines "Accessory Use" in pertinent part as:

> *Use of land, building or part of building that is customarily incidental and clearly subordinate to the principal use of the premises.*

The Board agrees that the solar panels are clearly an "accessory use", and the structures of these solar panels would clearly fall within the definition of an "accessory building", which is defined in pertinent part in § 2.302 of the Zoning Ordinance as:

> *A building subordinate to the principal building, … customarily incidental to that of a principal building or principal use on the same premises …*

Accessory buildings are allowed in the Conservation / Recreation Zoning District. Thus, the Board agrees that the Zoning Ordinance does not prohibit or unreasonably regulate solar panels.

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The Board further agrees with the Petitioners' contentions that the proposed ground based solar canopies are not a threat to the public health, safety, or welfare as proposed in the locations set forth in the Plans filed in this matter.

Specific to the height of the structures and the minor relief requested from the height restrictions of the Conservation / Recreation Zoning District, the Board agrees with the Petitioners' contention that the proposed height of the solar canopies is directly related to public health, safety, or welfare in that they are being designed to allow adequate clearance and maneuverability of emergency vehicles.

Further, the Board agrees that the minor increase in lot coverage also does not endanger "public health, safety, or welfare" as the solar panel structures are proposed to be located on already developed land within the Conservation / Recreation Zoning District, and will provide shelter for the vehicles parked underneath.

Additionally, the "fifth" solar panel, while located within the rear yard setback, the Board agrees with the Petitioners' contention that it is appropriately setback from the principal building, and significantly setback from the nearest structures, thus posing no risk to "public health, safety, or welfare".

Lastly, the Board agrees in that the Zoning Board of Appeals is allowed to grant up to 50% compact parking spaces, there is no risk to "public health, safety, or welfare", in allowing the petitioner to have approximately 36.9% compact parking spaces, as the parking lot will have sufficient vehicle circulation aisles, and compact spaces will be appropriately grouped and marked (as shown on the Plans submitted in this matter).

Accordingly, for all of the reasons listed above, the Board makes the requested determinations and declares that the applicable dimensional limitations of the Conservation / Recreation Zoning District (height, stories, lot coverage, rear yard setback, amount of compact parking spaces) are unreasonable as applied to the

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proposed solar canopies, and set such provisions of the Zoning Ordinance aside pursuant to G.L. c. 40A, § 3, ¶¶ 2 and 9.

4. **Modification of Case No. 01-38:**

   a. Open Space: § 4.11 states that the minimum open space in the Conservation / Recreation Zoning District is 10%. The Board acknowledges that here the existing open space is 73% pursuant to the Decision in ZBA Case No. 01-38 (which was decided pursuant to G.L. c. 40A, § 3, ¶ 2) and that the proposed solar canopies will lead to the open space slightly decreasing to 71.6%, still significantly more than the 10% requirement in the Zoning District.

      The Board finds that this minor decrease in open space is due to the "fifth" solar canopy being located over a portion of the rear yard, whereas the other four solar canopies are proposed to be located over the existing main surface parking lot, thus not effecting open space. The Board finds that this minor decrease is reasonable, and does not pose any risk to the public health, safety, or welfare.

   b. Parking Configuration:
      The Board acknowledges that the construction, use, and maintenance of the proposed solar canopy structures will necessitate the reconfiguration of the existing surface parking lot, which will differ from the Plans approved in Case No. 01-38. Furthermore, the proposed solar canopy structures were not contemplated in ZBA Case No. 01-38 and thus do not appear of the approved Plans in that Case.

The Board acknowledges that the case law of Massachusetts has long interpreted M.G.L. c. 40A, §10 as allowing modifications to prior decisions, *Huntington v. Zoning Board of Appeals of Hadley*, 12 Mass. App. Ct. 710 (1981), provided the Board of Appeals holds a public hearing after notice is given in accordance with M.G.L. c. 40A, § 11.

Further, that § 7.2 of the Zoning Ordinance authorizes this Board of Appeals to utilize all of the powers granted to it by the General Laws, which would include

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modifications of prior Board of Appeal decisions as set forth in *Huntington v. Zoning Board of Appeals of Hadley*.

Accordingly, in that a public hearing was held on these matters after notice was given in accordance with M.G.L. c. 40A, § 11, and for the reasons stated herein, the Board agrees to modify the Decision in Case No. 01-38 by substituting the Plans in that Case with the Plans filed in the present Case and making the conditions consistent with the zoning relief outlined above to allow the Petitioner to construct, use, and maintain four ground based solar canopies over portions of the existing surface parking lot, as well as a fifth ground based solar canopy to the east of the existing building (the rear yard), along with the associated reconfiguration and re-striping of the existing parking lot, all as shown on the Plans filed in this Case.

* * * * *

Therefore, based on all of the above, the Board of Appeals grants this appeal from the Decision of the Building Inspector under the provisions of M.G.L. c. 40A, § 3, ¶¶ 2 and 9, and to the Modification of Case No. 01-38 subject to the following conditions:

1. All necessary permits shall be issued, and work commenced in accord with M.G.L. c. 40A, § 10; and

2. All construction and use of the premises shall be in substantial accordance with the following plans introduced as evidence during the hearing, and on file in the office of the Board of Appeals:
    a. "Waltham Zoning Board of Appeals Ground Based Solar Canopies Pursuant to M.G.L. Ch. 40A, Sec. 3, Para. 9 & Modification of ZBA Case No. 01-38", prepared by McCarty Engineering, Inc., dated May 12, 2020 and consisting seven (7) sheets including the Cover Sheet.

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