



Ruthanne Fuller
Mayor

City of Newton, Massachusetts
Department of Planning and Development
1000 Commonwealth Avenue Newton, Massachusetts 02459

#376-23

Telephone
(617) 796-1120
Telefax
(617) 796-1142
TDD/TTY
(617) 796-1089
www.newtonma.gov

Barney Heath
Director

MEMORANDUM

To: City Council Zoning and Planning Committee
Planning & Development Board

From: Barney Heath, Director of Planning & Development
Jennifer Caira, Deputy Director of Planning & Development

Date: November 22, 2023

Subject: Docket #376-23 Petition to rezone lot on Dedham Street KATHERINE ADAMS petitioning to amend the City of Newton's Zoning Map by changing the current zoning of the property known and numbered 0 Dedham St Off, Newton, MA, and shown on the City of Newton Assessor's database as Section 83, Block 36, Lot 3A, currently zoned PUBLIC to SINGLE RESIDENCE 1.

CC: Andrew Lee, Assistant City Solicitor
Alan Schlesinger, Schlesinger & Buchbinder, LLP

Please find attached correspondence related to the above docket item.

The request Monday evening will be to set a public hearing.

SCHLESINGER AND BUCHBINDER, LLP
ATTORNEYS AT LAW

STEPHEN J. BUCHBINDER
ALAN J. SCHLESINGER
LEONARD M. DAVIDSON
A MIRIAM JAFFE
SHERMAN H. STARR, JR.
JUDITH L. MELIDEO-PREBLE
BARBARA D. DALLIS
KATHRYN K. WINTERS
KATHERINE BRAUCHER ADAMS
FRANKLIN J. SCHWARZER
ADAM M. SCHECTER

1200 Walnut Street
Newton, Massachusetts 02461-1267
Telephone (617) 965-3500

www.sab-law.com

November 15, 2023

BY ELECTRONIC MAIL

Barney Heath, Planning Director
Newton City Hall
1000 Commonwealth Avenue
Newton, MA 02459-1449

Re: Rezoning Petition 197 Countryside Road

Dear Barney,

On behalf of Nima Shokrollahi and Sophia Vaulina, contract purchasers for SBLI Section 83 Block 036 Lot 0003A ("the Parcel") we are petitioning for the rezoning of the Parcel from PUB to SR-1 in accordance with Council Order #393-20. The proposed form of restrictive covenant is attached to the Purchase and Sale Agreement as Exhibit A (see attached).

We look forward to working with you on this matter.

Very Truly Yours,

Alan J. Schlesinger

Alan J. Schlesinger

cc: (By Email, w/enclosures)

Jen Caira, Deputy Director of Planning and Development
Ms. Katie Whewell, Chief Planner
Mr. Andrew Lee, Assistant City Solicitor
Nima Shokrollahi and Sophia Vaulina

EXHIBIT A

DECLARATION OF RESTRICTIVE COVENANTS

Vacant land located at Countryside Road, Newton, MA 02459

Nima Shokrollahi and Sophia Vaulina, both with an address at 197 Countryside Road, Newton, MA 02459 (collectively, the "Owner"), being the owner of the parcel of land off Countryside Road, Newton, MA being more particularly described in Section 83, Block 36, Lot 3A of the City of Newton Assessor's Plans and shown as a lot containing approximately 16,900 sq/ft on a plan of land titled "Land Taken in Fee for Municipal Purposes, Private Land, Dedham St to Winchester St., Land Taken for Water Purposes" and recorded with the Middlesex South Registry of Deeds as Plan Number 1022 of 1955 and in a Deed recorded herewith (the "Premises"), for good and valuable consideration as recited herein, hereby covenants and agrees for itself, its successors, heirs and assigns, that the Premises shall be subject to the following restrictions for the benefit of the City of Newton, a municipal corporation duly established under the laws of the Commonwealth of Massachusetts, having its usual place of business at 1000 Commonwealth Avenue, Newton, MA 02459 (the "City"), its successors and permitted assigns.

Whereas, the good and valuable consideration for the Owner's grant of this Declaration of Restrictive Covenants (the "Covenant"), without intending any limitation hereby, includes the sale and transfer of the Premises to the Owner by the City of Newton pursuant to City Council Order No. 393-20; and

Whereas, the deed from the City to the Owner conveying the Premises is recorded herewith; and

Now therefore, the Owners hereby agree to and covenant:

The terms of this Covenant authorized by Massachusetts General Laws, Chapter 184, §26 and otherwise by law, are as follows:

1. **Purpose.** The purpose of this Covenant is to ensure that the Premises shall be retained as open space as defined and set forth below. This Covenant constitutes an "other restriction" held by a governmental body as defined in Massachusetts General Laws, Chapter 184, §26(c).
2. **Covenants.** The Owner intends, declares and covenants on behalf of itself, its successors and assigns that these covenants, agreements, and restrictions are not merely personal covenants of the Owner and shall run with the land and shall bind the Owner, its successors and assigns and inure to the benefit of the City of Newton, and its successors and assigns.

3. **Term.** The term of this Covenant shall be in perpetuity. In the event that a court of competent jurisdiction determines that this Covenant is not enforceable in perpetuity, then the term of this Covenant shall be for 99 years.

4. **Owner's Covenants.** During the term of this Covenant, as defined in paragraph 3, the Owner shall comply with the following requirements:

- a. The Premises shall only be used for customary recreational and open space uses for yards for single family homes, e.g., gardening, play areas, tree and wildlife habitats.
- b. The Premises shall not be used for construction of temporary or permanent buildings, including, but not limited to, sheds and garages. Notwithstanding the foregoing, installation and maintenance of recreational structures accessory to residential uses, including but not limited to a swimming pool, uncovered outdoor tennis or similar courts, parking, or fencing on the Premises are not prohibited by this Covenant.
- c. Notwithstanding any provision hereof, nothing in this Covenant shall be deemed to prohibit the applicability of the provisions of Zoning Ordinance Section 3.1.9 to the combined lot of Owner's adjacent property at 197 Countryside Road (+/- 25,878 s.f.) and the Premises (+/- 16,000 s.f.) total = 41,878 x .26, or however Section 3.1.9 may be amended from time to time

5. **Instrument to Enforce Covenant.** The City is authorized to record or file any notices or instruments appropriate to ensuring the enforceability of this Covenant; and the Owner on behalf of itself and its successors and assigns appoints the City its attorney-in-fact to execute, acknowledge and deliver any such instruments on its behalf. Without limiting the foregoing, the Owner and its successors and assigns agree to execute any such instruments upon request. This Covenant shall take effect upon the date it is executed by the City, and to the extent enforceability by any person ever depends upon the approval of governmental officials, such approval when given shall relate back to the date hereof regardless of the date of actual approval or the date of filing or recording of any instrument evidencing such approval.

6. **Transfer Requirements.** In connection with any conveyance of the Premises, or any portion thereof or interest therein, the instrument conveying such interest shall make reference to this Declaration of Restrictive Covenants. Upon transfer of the Premises, or any portion thereof or interest therein, the term of the Covenant shall restart and run from the date of such transfer.

7. **Notices.** All notices required under this Covenant shall be deemed to have been received if mailed, postage prepaid to the following:

For the City of Newton:
City Solicitor
Newton City Hall, 1000 Commonwealth Avenue
Newton, MA 02459

For the Owner:
Nima Shokrollahi and Sophia Vaulina
197 Countryside Road
Newton, MA 02459

Or the successor and assign to Nima Shokrollahi and Sophia Vaulina at the mailing address for the real estate tax bill for the Premises

8. Enforcement.

- a. The rights hereby granted shall include the right of the City to enforce this Covenant by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including without limitation relief requiring restoration of the Premises to its condition prior to such violation, it being agreed that the City will have no adequate remedy at law, and such restoration shall be in addition to, and not in limitation of, any other rights and remedies available to the City. The Owner covenants and agrees to reimburse the City all reasonable costs and expenses (including without limitation reasonable attorneys' fees) incurred in enforcing this Covenant or in taking reasonable measures to cure any violation hereof, provided that a violation of this Covenant is acknowledged by Owner or determined by a court of competent jurisdiction to have occurred.
- b. Prior to the City taking any legal action to enforce this Covenant, the City shall give the Owner written notice of the violation and the Owner shall have sixty (60) days to cure the violation.
- c. The Owner hereby grants to the City and its duly authorized representatives the right to enter upon the Premises upon forty-eight (48) hours prior written notice for the purposes of inspecting the Premises for compliance with the Covenant, and for the purpose of enforcing the restrictions contained in this Covenant and to take any reasonable and appropriate action under the circumstances to cure any violation of the provisions of this Covenant. Notwithstanding the definition of Owner contained herein, the rights of enforcement for violations of this Covenant shall survive any subsequent sale or transfer of the Premises.

i.

9. **Construction.** Any general rule of construction to the contrary notwithstanding, this Covenant shall be liberally construed in favor of the grant to effectuate the purpose of this Covenant and the policy and purposes of Section 31 of Chapter 184 of the General laws of the Commonwealth of Massachusetts. The provisions of Section 26 of chapter 184 of the General Laws of the Commonwealth of Massachusetts shall apply to this Covenant and the City shall be deemed to be a "Governmental Body" as defined therein. If any provision of this Covenant is found to be ambiguous, an interpretation consistent with the purpose of this Covenant that would render such provision valid shall be favored over any interpretation that would render it invalid.

10. **Governing Law.** This Covenant shall be governed by the laws of the Commonwealth of Massachusetts. Any amendments to this Covenant must be in writing and executed by all of the parties hereto. If any provision of this Covenant shall to any extent be held invalid, the remainder shall not be affected.

11. **Severability.** If any provisions hereof or the application thereof to any person or circumstance are judicially determined, to any extent, to be invalid or unenforceable, the remainder hereof, or the application of such provision to the persons or circumstances other than those as to which it is held unenforceable, shall not be affected thereby.

12. **Independent Counsel.** THE OWNER ACKNOWLEDGES THAT THEY HAVE READ THIS DOCUMENT IN ITS ENTIRETY AND HAS HAD THE OPPORTUNITY TO CONSULT LEGAL AND FINANCIAL ADVISORS OF THEIR CHOOSING REGARDING THE EXECUTION, DELIVERY AND PERFORMANCE OF THE OBLIGATIONS HEREUNDER.

[END OF PAGE – SIGNATURES TO FOLLOW]

Executed as a sealed instrument this _____ day of _____.

THE OWNER

By: _____

Nima Shokrollahi

By: _____

Sophia Vaulina

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

On this ___ day of _____ 2023, before me, the undersigned notary public, personally appeared Nima Shokrollahi and Sophia Vaulina, proved to me through satisfactory evidence of identification, which were _____, to be the persons whose names are signed on the preceding document, and acknowledged that they signed it voluntarily for its stated purpose.

Notary Public

My Commission expires: _____

Acceptance of Grant:

CITY OF NEWTON

By: _____

Ruthanne Fuller, Mayor

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

On this ___ day of _____ 2023, before me, the undersigned notary public, personally appeared Ruthanne Fuller, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the proceeding document, and acknowledged to me that she signed it voluntarily for its stated purpose in her official capacity as Mayor of the City of Newton.

Notary Public

My Commission expires: _____

CITY OF NEWTON

IN CITY COUNCIL

July 12, 2021

That, pursuant to Section 2-7 of the Revised Ordinances of 2012, as amended, after a public hearing and upon recommendation of the Real Property Reuse Committee through its Chair Victoria Danberg, it is hereby

ORDERED:

That Her Honor the Mayor be and is hereby authorized to sell the land commonly known as the Baldpate Water Tower site containing approximately 16,900 square feet of land, identified as Section 83, Block 36, Lot 3A, in Ward 8, in a Public Use zoned district, and,

The property shall be sold, subject to the minimum financial terms and conditions as voted by the Honorable City Council as set forth as follows:

TERMS OF SALE

1. That the minimum sale price shall be set at Fair Market Value; and
2. That the property be sold for the purposes of maintaining the land as open space.

FURTHER BE IT RESOLVED:

1. That a permanent conservation restriction held by the City shall be placed on the property.

Approved as to legal form and character:

Alissa O. Giuliani

ALISSA O. GIULIANI

City Solicitor

Under Suspension of Rules

Readings Waived and Adopted

22 Yeas 2 Nays (Councilors Ryan and Humphrey)

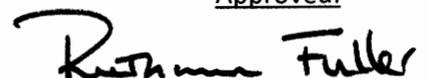


(SGD) NADIA H KHAN

Acting City Clerk

EXECUTIVE DEPARTMENT

Approved:



(SGD) RUTHANNE FULLER

Mayor

7/26/2021



Ruthanne Fuller
Mayor

City of Newton, Massachusetts
Department of Planning and Development
1000 Commonwealth Avenue Newton, Massachusetts 02459

#376-23

Telephone
(617) 796-1120
Telefax
(617) 796-1142
TDD/TTY
(617) 796-1089

www.newtonma.gov

Barney S. Heath
Director

M E M O R A N D U M

To: Councilor Danberg, Chair of the Reuse Committee
Members of Reuse Committee

From: Barney S. Heath, Director of Planning & Development
Jennifer Caira, Deputy Director
Neil Cronin, Chief Planner

Date: June 24, 2021

Subject: Public Hearing on Reuse of Parcel ID 83036 0003A on Countryside Road

CC: Andrew Lee, Assistant City Solicitor
Jonah Temple, Assistant City Solicitor

The subject property is the site of the former Baldpate Water Tower on Countryside Road (the "Water Tower Parcel"). The Water Tower Parcel was declared available for sale or lease on September 10, 2020, the item was heard by the Real Property Reuse Committee (the "Committee") on October 20, 2020, February 24, 2021, and on March 24, 2021. At those meetings, the Committee discussed whether the Water Tower Parcel is a buildable lot, whether the site could be used for a wireless facility, the challenges of developing the parcel, and whether the parcel should remain as open space.

At the March 24th meeting, the representative for the owner of 197 Countryside Road suggested the owner would be interested in purchasing the property for open space or for the development of a single-family home. At that meeting the Committee also requested information regarding the tax implications of combining the Water Tower Parcel with 197 Countryside Road for either the expansion of a single-family home or the preservation of open space.

The Water Tower Parcel contains 16,900 square feet, has no frontage, and is located within the Public Use district (the "PUB zone"). The Water Tower Parcel abuts the Single Residence 1 zone (the "SR-1 zone") to the west and south and the Multi Residence 1 zone (the "MR-1 zone") to the north. Accordingly, these adjacent zones are improved with a single-family dwelling at 197 Countryside Road, a golf course use at 483-655 Dedham Street, and a multi-family use at 421 Dedham Street. As a response to the Committee's discussion regarding potential uses, the Planning Department has analyzed the Water Tower Parcel's development possibilities regarding zoning for residential uses and wireless facilities within the PUB, SR-1, and MR-1 zones.

Potential Development Scenarios

If the Water Tower Parcel remains within the PUB zone:

- Residential development is not possible because residential uses are not allowed within the PUB zone.

- Wireless communication equipment in the form of a monopole or a tower is allowed by special permit. Such facilities are limited to 100 feet in height and must be set back 125 feet from the property line. Given the required setbacks and the Water Tower Parcel's dimensions, approximately 130 feet by 130 feet, a tower or monopole is impracticable.

If the Water Tower Parcel was rezoned to the SR-1 zone:

- To allow residential development, the Water Tower Parcel would require variances from the Zoning Board of Appeals (the "ZBA") for lot size and for frontage because 25,000 square feet and 140 feet, respectively are required for a new lot within the SR-1 zone.
 - If the variances were granted, there is the practical problem of access. Because there is no frontage, one cannot access the Water Tower Parcel without crossing adjacent private property.
 - If the variances were granted and access was created (would most likely need to be from 197 Countryside), a single-family dwelling with a floor area ratio ("FAR") of 5,070 square feet would be allowed as of right.
- A tower or monopole would be allowed by special permit with the same dimensional standards required in the PUB zone.
- It is unlikely that a new buildable lot could be created, or a monopole erected under this scenario given the need for variances and access.

If the Water Tower Parcel was rezoned to the SR-1 zone and combined with the adjacent parcel at 197 Countryside Road (the "Combined Parcel"):

- The Combined Parcel would contain 160 feet of frontage and 42,778 square feet of lot area. The Combined Parcel could not be subdivided without variances for lot area and frontage from the ZBA to create two separate buildable lots.
- The total allowable FAR would increase from the currently allowed 6,728 (at 197 Countryside Road) to 11,122 square feet.
- If the parcels are combined and the house at 197 Countryside is not expanded the increase in assessed value would be \$142,200, resulting in a tax increase of \$1,530.
- An alternative discussed at the March 24, 2021 meeting was combining the parcels and placing a conservation restriction on the area that was the water tower parcel. If the existing home is not expanded and the land currently constituting the water tower parcel is placed under a conservation restriction the assessed value would increase by \$68,500 instead of \$142,200. In this scenario the tax increase would be \$737.

If the Water Tower Parcel was rezoned to the MR-1 zone:

- The Water Tower Parcel would comply with the lot area requirement of 10,000 square feet for a new lot within the MR-1 zone.
- The Water Tower Parcel would require a variance from the ZBA for frontage because 80 feet is required for a new lot within the MR-1 zone.
 - If the variance was granted, there is the practical problem of access (which again, would most likely need to be provided by 197 Countryside).

- If the variance was granted and access was created, a single-or two-family dwelling would be allowed as of right, with an FAR of 7,774 square feet, or three dwelling units in the form of Single-Family Attached Dwellings would be allowed by special permit.
- While the adjacent parcel at 421 Dedham Street is zoned MR-1 and has minimal frontage at the end of Countryside Road, there are not currently any multifamily homes on Countryside Road. The multifamily buildings at 421 Dedham Street are accessed from Dedham Street and separated from Countryside Road by dense vegetation that is part of a conservation restriction.

If the Water Tower Parcel was rezoned to the MR-1 zone and combined with the adjacent parcel at 421 Dedham Street:

- The adjacent parcel at 421 Dedham Street (the “421 Dedham Street Parcel”), a multi-family use known as “The Gables”, is governed by a special permit and that portion adjacent to the Water Tower Parcel is subject to a conservation restriction held by the Conservation Commission. Any improvement to the 421 Dedham Street Parcel in the form of a road or driveway would likely require review from the City Council for changes to the approved site plan and approval from multiple bodies to amend the conservation restriction.

In addition to the above scenarios, the Committee could also decide to retain ownership of the Water Tower Parcel and leave the parcel in the PUB zone or rezone the property to the Open Space/Recreation District akin to other City parcels.

Development Challenges

There are significant challenges to developing the Water Tower Parcel. The only development option, without any regulatory approval, would be to combine the Water Tower Parcel with the adjacent parcel at 197 Countryside Road to allow for a larger single-family dwelling or just to increase the size of the parcel. All other identified scenarios require variances from the ZBA which, per Mass. Gen. Laws Chapter 40, Section A, require findings relating to soil conditions, shape, or topography. It is difficult to predict how the ZBA may act on such a request, but there is certainly no guarantee that variances would be granted.

In addition to the variances needed to create a buildable lot, the issue of access is also a significant barrier. The adjacent property owner at 197 Countryside would need to combine the two parcels and subdivide (with variances) to create two parcels with frontage or grant an easement across 197 Countryside Road. The Gables development at 421 Dedham Street could grant an easement, which would require petitioning the City Council to amend their site plan and would need to amend the conservation restriction, which is unlikely to be approved. The conservation restriction does not permit the building of a driveway or other structures. An amendment would require approval by the Conservation Commission as well as the Executive Office of Energy and Environmental Affairs (EEA) and EEA’s policy is to only approve amendments that strengthen the conservation restriction or have a neutral impact. This land is also protected by Article 97 and would need approval under this act.

Recommendation

Creating a buildable lot at the Water Tower Parcel would likely require numerous discretionary actions from multiple boards/commissions as well as actions by private property owners. Given that development hinges upon these decisions, most importantly variances from the ZBA, and the granting of access from an adjacent property owner, the Planning Department recommends the Water Tower Parcel be sold at 'fair market value'. If the goal is to receive the highest price, a Request for Proposals would be tailored to require submissions that describe the planned use for the parcel and the plan for the development of the parcel, if any. Since the feasibility of development is currently unknown, the City Council could recommend setting the minimum price at the fair market value. Fair market value accounts for a parcel's development potential and would require the City to assess what the parcel would be used for in negotiating the price for sale. Such a recommendation is the minimum amount the City would be required to accept for sale of the parcel.

Next Steps

At the March 24th meeting the Committee voted to make an initial determination to make the property available for sale or lease and voted to waive the Joint Advisory Planning Group (JAPG). Following the public hearing the Committee will need to take a vote to make a recommendation to the City Council, which includes whether to authorize the Mayor to sell the Water Tower Parcel, as well as minimum financial terms for such sale.