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Barney S. Heath
Director

WORKING SESSION MEMORANDUM

DATE: October 11, 2024
MEETING DATE: October 16, 2024
TO: Zoning Board of Appeals
FROM: Barney S. Heath, Director of Planning and Development
Jennifer Caira, Deputy Director of Planning and Development
Katie Whewell, Chief Planner for Current Planning

COPIED: Mayor Ruthanne Fuller
Jonah Temple, Deputy City Solicitor
City Council

The Planning Department is providing the following information for the upcoming working session. The public hearing for this petition was closed at the last hearing on September 9, 2024. This information is supplemental to staff analysis previously provided at the public hearing.

PETITION #08-23

41 Washington Street

As discussed at the September 9th meeting of the Zoning Board of Appeals, attached are draft denial findings for the Board to consider.

Attachment A: DRAFT Denial Decision



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ZONING BOARD OF APPEALS

Brenda Belsanti, Board Clerk

DECISION

41 Washington Street, Newton, Massachusetts Comprehensive Permit

Decision Number: #08-23

Date Application Filed: August 15, 2023

Applicant: 41 TusNua, LLC

Premises Affected: 41 Washington Street, Newton, Massachusetts Assessor's Map, SBL 71029 0007

Relief Requested: Comprehensive Permit, G.L. c. 40B, §§ 20-23

Public Notice: August 30, 2023 & September 6, 2023.

Public Hearing Dates: September 13, 2023; November 29, 2023; January 10, 2024; April 3, 2024; May 15, 2024; July 11, 2024; September 9, 2024

Decision of the Board:

Members Voting: Michael Rossi (Chair), Brooke K. Lipsitt (Vice Chair), William McLaughlin, Stuart Snyder, and Elizabeth Sweet

Date of Decision:

PROCEDURAL HISTORY

1. On July 10, 2023, the Massachusetts Housing Finance Agency (“MassHousing”) issued a Project Eligibility Letter (“PEL”) to 41 TusNua, LLC (the “Applicant”).
2. On August 15, 2023, the Applicant submitted an application for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to the Newton Zoning Board of Appeals (the “Board”). The Application proposed to construct 16 residential home ownership units, including 4 affordable housing units (the “Project”) on approximately 0.6 acres of land located at 41 Washington Street, Newton, Massachusetts (the “Site”).
3. The Board opened a duly noticed hybrid public hearing on September 13, 2023. Additional sessions of the public hearing were held on November 29, 2023; January 10, 2024; April 3, 2024; May 15, 2024; July 11, 2024; and September 9, 2024.
4. The Board conducted a duly noticed site visit on October 20, 2023.
5. During the course of the public hearing, City staff, boards/commissions, peer reviewers, community members, and technical experts submitted extensive oral and written testimony with respect to the Project on issues of: site design; open space; landscaping; lighting; sewer and drainage; massing; scale; pedestrian scale; height; streetscapes/public realms; architecture; feasibility of the parking plan; geotechnical studies including but not limited to foundation method, construction means and methods, groundwater impact, soil conditions and testing for hazardous materials; construction management and planning; protection of abutters’ properties during construction; emergency access during construction; sustainability; parking adequacy, design, management, and ratios; shadow impacts; traffic impact and access studies; traffic and pedestrian safety; traffic demand management; rubbish and recycling management; site circulation, access/egress; adequacy of transit service; signage; accessibility; water table, flooding, flood plain, and compensatory flood storage; stormwater management; integration and coordination of functions occurring in the ground plane including but not limited to truck deliveries, trash/recycling pickup, and loading zones; snow removal; engineering; infiltration and inflow; design; environmental concerns; greenspace and recreation areas; site control, and the City’s Comprehensive Plan and Housing Strategy.
6. The following consultants and independent peer reviewers assisted the Board in its review of the Application:
 - a. Transportation:
Stephen Siragusa, M.S., Traffic Engineer
Wayne Keefner, PE, PTOE, LEED AP Senior Project Engineer, Senior Associate
BSC Group
 - b. Site Design, Open Space, Civil Engineering, Stormwater, Flooding:

Janet Carter Bernardo, P.E.
Jonas Procton, P.E.
Horsley Witten Group

7. The following representatives and members of the Applicant's development team presented oral and written testimony to the Board:
 - a. Stephen J. Buchbinder, Esq., Schlesinger and Buchbinder, LLP
 - b. John Pears, Landscape Architect
 - c. Blair Hynes, Verdant Landscape Architect
 - d. Stephen Martorano, Bohler Engineering
 - e. Robert Michaud, MDM Transportation Consultants, Inc.
 - f. Edmond Spruhan, Civil Engineer
 - g. Valerie Moore, Partner, Nutter
8. The Board closed the public hearing on September 9, 2024.
9. The Board deliberated on the application at a meeting held on October 16, 2024, and voted to deny a Comprehensive Permit based on the findings set forth herein.

FINDINGS

1. The Board has a proven track record of approving Comprehensive Permits. Since 2018, the Board approved seven comprehensive permit applications totaling 1,182 units of housing, 395 of those units are designated as deed restricted affordable units.
2. As of January 8, 2024, the City achieved Safe Harbor under the Housing Unit Minimum calculation with 10.2% of SHI Eligible Housing units.
3. The Site is located at 41 Washington Street (SBL 71029 0007) in the Single Residence 3 zoning district. The Site is located in the Hunnewell Hill neighborhood of Newton Corner.
4. The surrounding neighborhood is predominantly comprised of single-family residential uses and nonconforming two-family uses in a single residence zone. The only use allowed in this zoning district is single-family residential. The pattern of the neighborhood consists of Queen Anne and Italianate style homes.
5. The ten residences within the Washington Street, Grasmere Street, Merton Street, Elmhurst Road block that surround and abut the Site are predominately single-family homes. Seven of the properties are improved with single-family homes and three have nonconforming two-family homes, including an existing two-family home currently on the Site. All homes within this block appear single family in character, maintain the low residential density, and most maintain the Victorian typology of the area.

6. The Site consists of 25,902 square feet and is improved with nonconforming two-family home with a large rear yard, evidenced by the rear setback of 133.3 feet.
7. The existing dwelling is referred to as the George H. Hastings House and the pavilions, gables, bay windows and corner tower are reminiscent of Queen Anne style architecture. There are many notable features outlined by the Massachusetts Historical Commission such as its shingle style architecture with a fieldstone first story, corner tower, and porte cochère. Other details such as cropped shingle raking eaves, jambs in the gable window, and shingled parapet in the side bay are Shingle style in origin. The proposed demolition of this dwelling would result in a severe alteration of the streetscape and loss of a historic resource in a low-density residential neighborhood.
8. The Project proposes a floor area ratio of 1.16, where .36 is the maximum allowed as of right and .26 exists. Floor area ratio is intended to measure the bulk of a project in relation to the size of the lot. The floor area ratio proposed is excessive and out of scale with the single residence neighborhood and surrounding buildings on Washington Street. The Applicant declined to consider any reduction in massing or rearticulation of massing for the building.
9. The Project proposes a lot area per unit of 1,619 square feet where 10,000 square feet per unit is the minimum allowed as of right. Lot area per unit is intended to measure residential density. The existing lot area per unit is 12,951 square feet per unit. The lower range of lot area per unit for this area is approximately 4,000 square feet per unit, with two-family uses on approximately 8,000 square foot lots along the southern side of Washington Street. As proposed, the Project is severely out of scale with the density and single family residential pattern of the neighborhood.
10. The Project is incompatible with the surrounding neighborhood due to the chosen density of the development and limitations of the Site. As a result of the Project's excessive and out of scale massing and density brought on by the strict confines of the Site, the abutters and the neighborhood would be negatively impacted by loss of privacy, increased noise and light, as well as traffic and parking problems caused by site operations.
11. The Project proposes a 32.9% lot coverage, exceeding the 30% maximum allowed as of right for the single residence 3 zoning district. The proposed exceedance of lot coverage results in approximately an additional 770 square feet of impervious area on the large lot. A reduction in lot coverage/smaller footprint would reduce impervious surfaces and could mitigate any adverse impacts of high groundwater in this area.
12. Two iterations of the Project were reviewed by the City's Urban Design Commission. The most recent design was described by the Commission as a big bulky box on a single residence 3 parcel. They noted the proposed four story building was too big, with too many units, that drives other issues that need to be resolved.

13. The Urban Design Commission criticized the design and roof configuration as not being contextual with the neighborhood. The Applicant declined to redesign the roof to be in character with the single residence neighborhood with historic Queen Anne dwellings. The Urban Design Commission also noted the attractiveness of Washington Street with overwhelmingly Victorian architecture.
14. The proposed building's front entrance is seven feet above grade, accessed from Washington Street by stairs. As such, the design necessitates a "second entrance" with a lift which renders the main stairway front entrance inaccessible to people with disabilities. Planning staff, the City's ADA coordinator and members of the Board expressed concern with this design and the likelihood that it did not comply with Massachusetts Architectural Access Board regulations.
15. Members of the Board questioned whether the configuration of the garage will work, with the applicant stating that larger vehicles, such as a pickup truck, would not be able to park within the garage and all moving operations will need to take place from Washington Street. The city's on call consultant for traffic and site circulation, BSC, raised questions and concern throughout the process as to whether the electrical room and water/sprinkler room meets building code requirements. The tandem configuration of stalls directly adjacent to the water/sprinkler room and electrical cage present likely obstructions to these rooms when vehicles are parked in stalls 16, 17, 19. The floorplans also indicate that the trash room's door would conflict with the accessible stall's (stall 20) access aisle, creating a conflict for people with disabilities utilizing the accessible stall. The overall configuration of the garage does not meet safety code requirements and will create future conflicts and adverse impacts to the neighborhood.
16. The Board finds that the proposed development as designed at this location is not appropriate. The four-story Project with three times the floor area ratio than is allowed as of right is out of scale and inconsistent with the surrounding neighborhood, all within a single residence zoning district. The proposed multifamily building typology with four stories, a flat roof, roof deck, above grade entrance, and partially below grade garage is extremely out of character with the neighborhood and is inconsistent with the existing lower density land uses of the neighborhood.

Comprehensive Plan

17. The City's Comprehensive Plan and zoning ordinance, including the recently approved overlay district to comply with the MBTA Communities Act, focuses on locating multi-family and mixed-use housing near many of the City's village centers. The intent of the City's development plan is to enhance village centers and allow the development of buildings and uses in appropriate locations. The closest village center that was identified for the Village Center Overlay District is the Newtonville Village Center, which is

approximately two miles away. The site is not an appropriate location for the additional density, as it is not proximate to any Village Center that has been approved for the overlay district. The project does not support the intent of encouraging development that fosters compact, pedestrian-oriented villages.

18. The City's Comprehensive Plan states that development is to be guided to reflect the character held or sought by existing residential neighborhoods, protecting the qualities of that which exists. The proposed Project does not support this intention with the demolition of a notable Victorian dwelling that positively contributes to the overall streetscape and character of the neighborhood. The Project introduces a new building typology to the neighborhood of well-preserved Victorian and Italianate-style dwellings, thus being out of character and scale of the neighborhood.
19. Strategic Approaches outlined in the Comprehensive Plan to serve housing goals include:
 - a. Siting residential development that is well located in relationship to transportation, schools, commercial services, large employers, and existing patterns of residential type and character benefit the City in multiple ways.
 - b. Mutual benefits can come from planning for housing and economic development in concert. Housing retained or developed in or near village centers supports village businesses, and having a broad array of village services within walking distance benefits residents. That linkage strengthens the vitality and quality of life for the area.
 - c. Preservation of housing stock, especially smaller homes, can help to maintain the scale, character, and distinctiveness of our neighborhoods, as well as serves to protect the City cultural heritage and meet its housing goals.
 - d. Design that shows careful respect for neighborhood context by avoiding potentially disruptive impacts, can make such development a more welcome addition to the vicinity, thus serving both design and housing objectives.

The project as proposed does not meet any of the set forth actions to serve housing while acting in concert with other goals and efforts of others.

Stormwater

20. The rear yard of the Site slopes down approximately 14 feet from the rear of the existing dwelling to the northwest corner of the lot. Numerous mature trees are shown on the existing conditions, many with diameters of 30 inches. Several of these trees were removed during the course of the public process for the Comprehensive Permit application, further exacerbating existing drainage issues.
21. In 2019 and 2020, the Applicant submitted an application for a special permit from the City Council to develop the Site as a rear lot subdivision, which would result in two single-family homes on the 25,902 square foot lot. During the special permit public hearing, concerns about flooding in the area were raised and testimony from abutters and neighbors

was provided regarding the high water table, poor soil, and experience with their properties flooding. Many abutters testified to investing in sump pumps with backup batteries, French drains, drywells, and other containment systems, which indicate high groundwater which comes up from the bottom in the area. During Hurricane Irene, credible testimony indicated abutters' basements filled with up to six inches of standing water. Following a denial recommendation from the Land Use Committee of the City Council, the Applicant withdrew its special permit application. Since the 2020 special permit application and subsequent withdrawal, the City and region has seen more intense storms, with higher amounts of rain occurring in shorter periods of time, leading to flooding and drainage issues.

22. The City has experienced more intense days of high rainfall and increased flooding due, in part, to the effects of climate change. The 2022 Massachusetts Climate Change Assessment, prepared by the Executive office of Energy and Environmental Affairs and Massachusetts Emergency Management Agency, stressed three findings: that temperatures have gone up over the years and will continue to increase; there will be both fewer rainy days and more intense rainstorms; and sea levels will rise and combine with more powerful coastal storms.
23. The City's stormwater management system is strained by increased volumes of runoff from more frequent and higher intensity storms. Compounding the issue is a trend of increasing impervious areas and elevated grades around new structures limiting natural infiltration. Further, stormwater runoff from impervious surfaces is the greatest source of pollution to Newton's ponds, lake, and waterways.
24. Due to the severe storms in the region and effects of climate change, the City's Stormwater Ordinance rules and regulations are stricter than the state stormwater regulations to properly manage stormwater in a responsible and sustainable manner. The purpose of this ordinance is to protect, maintain, and enhance public safety as well as environmental health and general public welfare. This ordinance focuses on controlling the volume and rate of stormwater runoff resulting from land disturbing activities (both during and after such activities), managing stormwater at its source, and directing storm water into the ground rather than sending it into storm drainpipes and channels. The local ordinance explicitly protects flooding onto abutters properties and the Engineering Division of Public Works has discretion to require stormwater measures that go beyond state standards if they are necessary to ensure there won't be flooding, adverse impacts or harm to abutters. In requiring the mounding analysis, the Engineering Division acted within its powers and discretion under the local ordinance to ensure no adverse impacts to abutters.
25. During the project eligibility process, the Engineering Division of Public Works raised concerns with the Applicant's ability to keep the previously proposed underground garage dry. The Engineering Division commented that seasonal high ground water table during the Spring months would be higher due to the Project and stated that due to concerns

regarding flooding, additional soil testing would need to be done. Under the prior special permit review, the Associate City Engineer recommended that the Applicant install an interceptor/French drain which would act as a backstop to prevent the migration of water underground to the neighborhood.

26. During the public hearing, credible testimony was repeatedly submitted from abutters about increasing flooding and water issues in the neighborhood area that affect their properties and necessitates ongoing measures such as the installation of French drains and sump pumps. Testimony from the abutters point to the sponge-like conditions of the Site and poor soil conditions. Following the construction of a parking area, the abutter at 47 Washington Street experienced non-stop water flow from the sump or holding tank.
27. During the course of the public hearing, both the City's Engineering Division of Public Works and the Board's on-call consultant, Horsley Witten, advised that the Applicant conduct a mounding analysis to determine if there is any breakout out of stormwater above the land and demonstrate that the proposed stormwater system is dewatered within 72 hours (so the next storm can be stored for exfiltration). Based on this expert advice, the Board required that the Applicant conduct this analysis. The Applicant, however, declined to submit a mounding analysis, thus failing to ensure no adverse impacts to abutting properties.
28. Analysis has shown that there are flaws in the design of the stormwater system with insufficient separation between the bottom of the basin and seasonally high groundwater and will cause flooding on abutting properties due to a rise in the level of groundwater. Due to the specific nature of the site and surrounding area, including history of flooding, common standard design separation is insufficient.
29. The City's on call consultant, Horsley Witten, conducted a mounding analysis using the Hantush method, the standard method for modeling groundwater mounding height and extents. The mounding analysis indicated that the height of groundwater mounding underneath the proposed infiltration chamber system would not rise to the bottom elevation of the system. However, the mounding analysis indicated that groundwater mounding would occur at heights of up to 0.92 feet at neighboring buildings, impacting water seepage into the buildings. The Applicant declined to revise the design of impermeable barriers that will limit the lateral extent of groundwater mounding at neighboring buildings, thus demonstrating a major flaw in their system. The Applicant also declined to provide calculations that demonstrate that the revised design will not result in adverse mounding at the neighboring buildings. This analysis and failure of the Applicant to remedy the seepage by redesigning impermeable barriers results in a significant local concern of groundwater impacts and harm to the abutters which outweighs the regional need for housing.
30. The Applicant refused to consider the abovementioned issues and stated on the record that they will not conduct the mounding analysis, as required by the City's Engineering

Division of Public Works, Horsley Witten, and the ZBA. Because the Associate City Engineer has determined it is required by local stormwater ordinance and peer reviewer analysis shows it will increase water problems for abutters, the Project fails to meet local requirements and regulations and will result in harm to the abutters.

31. Overall, the Board finds that local concern for flooding on abutting properties outweighs the local need for affordable housing. As designed, the Project will exacerbate an existing situation. Mounding of groundwater will significantly worsen the situation. Abutting basements will intersect with the mound, which will create an adverse impact and harm to abutters because groundwater would be mounding higher than abutting properties. While the mounding issue is complex, the Applicant refused to study or mitigate the local concern despite acknowledging the local concern.

Concluding Findings

32. The Board heard from City staff, members of the City Council, boards, commissions, departments, and residents and has taken that testimony into account. The Board finds that local concerns of stormwater, groundwater mounding and the subsequent impact to abutters, increased density, and proposed scale of the project outweigh the regional need for affordable housing.
33. Given the Board's numerous concerns with the project's site, design and impact on abutting properties, as well the developer's refusal to address these concerns despite acknowledging them, the Board finds that the Local Concerns cannot be properly addressed through conditional approval.
34. At no time during the public hearing did the Applicant indicate that any condition or reduction in units may render the Project uneconomic.
35. The Board has determined that the above issues are Local Concerns that outweigh the regional need for affordable housing and for which adequate mitigation measures either are not possible or were refused to be provided by the Applicant.
36. Given the Board's numerous concerns with the project's site, design and impact on abutting properties, as well the developer's refusal to address these concerns despite acknowledging them, the Board finds that the Local Concerns cannot be properly addressed through conditional approval.

DECISION

Pursuant to Chapter 40B, after convening a public hearing and making findings of fact, the Board **DENIES** a Comprehensive Permit to the Applicant for the Project.