

CITY OF NEWTON
IN BOARD OF ALDERMEN
LAND USE COMMITTEE REPORT

WEDNESDAY, JUNE 25, TUESDAY, OCTOBER 28, THURSDAY, NOVEMBER 10, 2014

A Public Hearing was opened on June 25, continued to October 28, and continued to November 10, when it was voted out of committee.

#210-14 135 WELLS AVENUE LLC requesting an amendment to the Wells Avenue restrictive covenant as established in Board Order #276-68(3), as amended, as it relates to parcel E-2 at 135 Wells Avenue, to allow creation of a multi-family housing building and co-working space and to accept mitigation funds in accordance with MGL c.44 s. 53A under the terms and conditions described in an application from Cabot, Cabot & Forbes dated May 27, 2014

ACTION: HEARING CLOSED; DENIED 4-0-1 (Crossley abstaining; Harney not voting)
ON NOVEMBER 10, 2014

June 25

Present: Ald. Laredo (Chairman), Ald. Cote, Crossley, Albright, Lipof, Lennon, Harney, and Schwartz; also present: Ald. Fuller, Johnson, Leary, and Norton
Staff: Alexandra Ananth (Chief of Current Planning), Robert Waddick (Assistant City Solicitor), Ouida Young (Associate City Solicitor), Linda Finucane (Assistant Clerk of the Board)

October 28

Present: Ald. Laredo (Chairman), Ald. Albright, Lipof, Lennon, cote, Crossley, Schwartz, and Harney; also present: Ald. Fuller and Lappin
Staff: Alexandra Ananth (Chief Planner for Current Planning), Daniel Sexton (Senior Planner), Robert Waddick (Assistant City Solicitor), Ouida Young (Associate City Solicitor), Linda Finucane (Assistant Clerk of the Board)

November 10:

Present: Ald. Laredo (Chairman), Ald. Cote, Crossley, Lennon, Lipof, and Harney;
absent: Ald. Albright and Harney; also present: Ald. Baker, Lappin, Yates, Danberg, Kalis, Blazar, and Fuller
Staff: Alexandra Ananth (Chief Planner for Current Planning), Dennis Murphy (Assistant City Solicitor), Ouida Young (Associate City Solicitor), Daniel Sexton (Senior Planner), Linda Finucane (Assistant Clerk of the Board)

June 25, 2014

NOTE: The restrictive covenant established in Board Order #276-68(3) does not include housing as a use allowed in the Wells Avenue Office Park. The petitioner is seeking to amend the Wells Avenue deed restrictions to allow development of housing at 135 Wells Avenue, on land also identified as parcel Section 84, Block 34, Lot E-2, located in a Limited Manufacturing zoning district. Currently, the existing building is occupied by the Boston Sports Club, which

was allowed via a series of amendments to the restrictions approved by the Board of Aldermen. (The Chairman noted that the Boston Sports Club no longer owns the property and is moving.) There have been approximately 16 previous amendments to the deed restrictions, all of which have been approved by the Board of Aldermen and the Mayor. Other amendments to the restrictions included dimensional waivers and allowance of additional uses not originally listed in the restrictions, e.g., Iggy's Bakery, a for-profit children's gymnastics school, Solomon Schechter Day School, the School of Mathematics, the Massachusetts School of Psychology, etc.

Simultaneous with this request, the petitioner filed an application with the Zoning Board of Appeals for a MGL c. 40B Comprehensive Permit to construct 334-units of multi-family housing with co-working space on parcel E-2, 135 Wells Avenue. Although the petitioner is seeking approval from the Board of Aldermen because historically the Board of Aldermen and the Mayor have amended the deed restrictions, the petitioner contends that the Zoning Board of Appeals has the authority to grant or waive *all* approvals if the community has not achieved MGL c. 40B's 10% affordable housing threshold requirement, a requirement that Newton has not yet realized. However, the Board of Aldermen and the Mayor are the bodies that must accept and approve the proposed mitigation package.

The petitioner is requesting the following amendments to the deed restrictions:

- to waive the use restrictions to allow multi-family residential use;
- to waive the square foot limitation on gross floor area that may be built in the office park;
- to waive the 40% open space requirement;
- to waive the FAR limit of .25 to allow for an FAR of 1.51 plus structured parking;
- to waive the required setback;
- to waive then no build limitation on Area 1A;
- waivers from signage and lighting.

Architect Doug Carr of Cube 3 Studio described the proposed 334-unit building as six stories and built around three exterior courtyards, with 500 parking spaces, 100 above ground. The pet-friendly project will also contain a café and restaurant, work bar, convenience store, swimming pool, bike storage, and a bike repair shop. Spaces will be provided for car sharing and for a shuttle bus that will take residents to and from public transportation during rush hours. Senior project manager John Sullivan said that 84 (25%) of the units will be affordable to people who earn 80 percent of the area median income. The building will contain 20 studio apartments, 140 one bedrooms, 140 two bedrooms, and 34 three bedrooms. In a 40B all units count towards affordability. The affordable units will be dispersed throughout the building. This is a great opportunity to bring affordable housing to this part of the city.

David Dixon of Stantec Urban Design Group explained that the project will fit into the proposed Needham Street redevelopment plan known as the N2 Corridor. He cited Charles River Landing and Kendall Square in Cambridge as examples which have been developed to attract the same market projection: millennials and empty nesters. This is an opportunity to create a community that is vibrant and pedestrian friendly along with providing mitigation for traffic and infrastructure and additional affordable housing.

Jay Doherty, CEO of Cabot, Cabot & Forbes (CC&F), who was present with Attorney Franklin Stearns of the firm K&L Gates, referred to similar successful projects in Medford, Cambridge, Needham, and Quincy. There is no demand for suburban office space in the current market. Nationally, the demand for office space has been weak since 2007. The trend is toward mixed-use with amenities. The petitioner has offered \$250,000 to the city for improvements at the Wells/Nahanton intersection. The petitioner CC&F also has offered to contribute towards a master plan for the area.

Public comment:

Percy Nelson, 17 Plainfield Street, is a 92 year-old WWII veteran and a member of the Boston Sports Club, which he is upset about losing.

Sean Roche, 42 Daniel Street, is the parent of two children at Solomon Schechter Day School and a member of the school's Board. Representatives from the school have met with the petitioner. He said the school is unlikely to oppose the project. Its concerns are primarily traffic mitigation along Nahanton Street, which it would like ASAP. Shared parking within the office park, snow on Wells Avenue, and the possibility of an additional egress remain issues the school would like to see addressed as well. Mr. Roche said, personally, he believes the office park has failed as a commercial enterprise. It is car-centric and dead at night. He urged that the city keep the process collaborative, as cooperation between a developer and the city will produce the best situation.

Kathleen Kouril Greiser, 258 Mill Street, disagreed that the office park has failed. Businesses are thriving. Commercial real estate is more valuable than residential.

John Koot, 430 Winchester Street, said it's the city's responsibility to take care of streets. Wells Avenue's remoteness from transportation and stores make it unsuitable for housing. Any amendments should be for uses compatible with the existing uses. Allowing one residential development will open the door for others.

David Boyarsky has owned DAB appraisal services at 154 Wells Avenue for ten years. The park is at office capacity. However, in the last six years the other uses have had a massive impact. He is not opposed to a residential project, just the size of the one proposed.

Ron Mauri, 35 Bradford Road, believes the cumulative effects have not been looked at carefully enough. It smacks of social engineering. How many trips per day will result from this project? How many students will it bring to the schools?

Another property/business owner said it is no longer a business park, but one with very different, non-traditional tenants, none of which have stepped up to alleviate the traffic issues. It is not a priority of the city, but it needs help and money for traffic mitigation.

George Hinchey, 275 Winchester Street, said that projects such as Wegmans have contributed to horrible traffic all over the city. Development of Austin Street will entail more traffic. New

traffic lights don't solve the problems. He urged the committee to preserve the nature of Newton.

Sheila Ruth, Chestnut Street, is a geriatric social worker who has many clients who use and benefit from swimming in the heated pool at the Boston Sports Club.

Peter Karg, 210 Nahanton Street, submitted a petition signed by 67 unit owners in the Nahanton Wood Condos who oppose to the project.

Gary Walker, International Brotherhood of Electrical Workers' Business Agent, spoke for 50 Newton residents who are electricians, all of whom support the project.

Attorney Gary Lilienthal, Two Seapoint Lane, Boston, with the firm Bernkopf Goodman, LLP, represents Intrum Corporation of 60 and 180 Wells Avenue. Mr. Lilienthal maintains that Wells Avenue is a thriving, first class vital office park that has been regenerated and continues to grow. Although it commands high rents for a suburban office park, the vacancy rate is less than 10%. He disagrees that the Zoning Board of Appeals has the authority to waive the restrictions. He also questioned whether the restrictions could be waived for only one lot. Would that be inconsistent with the master plan?

Attorney William Shaevel, 141 Tremont Street, Boston, represents Wingate Companies, 100 Wells Avenue. His client urges more information and planning before a decision is made. Of particular concern:

- a peer review of the petitioner's traffic study;
- three Dedham Street intersections (Brookline, Carlson, Nahanton);
- five intersections (Wells/Nahanton, Winchester/Nahanton, Dedham/Nahanton, Dedham/Brookline, Dedham/Carlson) – traffic improvements are necessary and should be paid for by the developer, not the city, and completed prior to any construction;
- substantial commitment from the petitioner for more planning and capital to address the above traffic issues;
- unbundling the rent from the cost of a parking space is not wise; many tenants will forego on-site parking and park on the street which will be an additional burden on Wells Avenue.

Susan Barber, Winchester Street, is skeptical of the development a master plan. She distrusts the traffic projections. This proposal is too big.

Phil Herr, Marlboro Street, is pleased that the petitioner has offered to help with a master plan before releasing the restriction, not after. The proposed project would offer the enjoyment of living in a city, but with open spaces such as the Charles River, Mt. Ida, and the Jewish Community Center.

Greg Reibman, President of the Newton-Needham Chamber of Commerce, noted that there are 500 acres identified by the Chamber for N2 Innovation Corridor. There are approximately 150 companies on Wells Avenue, some of which are international companies. Wells Avenue is not

the same as a decade ago. There is the walk/bike/bump factor. Last month the Chamber voted with one abstention to support the project. The petitioner is offering traffic mitigation. The Chamber supports workforce housing, which is crucial to the success of N2. It is important for the city to partner with the developer.

Eugene Finkelstein, 227 Nahanton Street, is a Trustee and Board member of the Ledgebrook Condominium and a Board member of the Newton Community Farm. There are serious traffic issues. Kendrick and Nahanton intersections are at limited capacity, especially at peak hours of 7:00 to 9:00AM and 4:00 to 6:00PM.

Robert Colby, 180 Winchester Street, is the parent of two millennials, neither of whom would consider living on Wells Avenue. It is miles away from everything. The traffic is horrible. An educator, he is concerned about the impact on the schools.

Several members noted that there is a no sense of the project in context of the bigger picture for the community. There is no master plan for the area, Newton Highlands, and Upper Falls, although the petitioner has offered to partner with the city to modify existing traffic issues for Nahanton Street and has offered additional funds to develop a master plan, and a financial contribution towards the application for a MassWorks Grant. The Wells Avenue Office Park is identified in the 2007 Comprehensive Plan as an important commercial base.

Issues/questions:

- The applicant and the Law Department were asked to provide guidance on the process i.e., the Deed Restriction is before the Board, can the Zoning Board of Appeals grant waivers to the Deed Restriction as well.
- Is the proposed mitigation funding for improvements at the Nahanton and Wells and Nahanton and Winchester intersections sufficient to complete the proposed improvements. The applicant was asked to provide more details re the proposed improvements and their impact on traffic improvement. Following up the Zoning Board of Appeals request, is there a way to gain an additional access/egress?
- How will this proposal work for the area? Is this the place for residential development? A master plan now?
- Why is the building so big and why are there so many units?
- Fiscal and school impacts: what were the fiscal and school impacts of Charles River Landing in Needham?

October 28, 2014

NOTE: The Chairman reminded the public that the role of Board of Aldermen is to determine whether the deed restrictions should be amended to allow housing on one parcel, E-2 135 Wells Avenue.

Please see the attached PowerPoint presented by Jay Doherty, CEO of Cabot, Cabot & Forbes (CC&F). Also attached is a PowerPoint presented by the Planning Department.

Although the city is in the process of installing new LED lights, lighting in the office park is very poor. Signage throughout the park is inadequate and does not provide easy way finding. The petitioner believes the formation of an owners' association would be beneficial.

MassWorks Grants are tied to economic development of mixed use with housing developments. The petitioner is committed to underwrite a MassWorks Grant application, which is usually 10% of the money sought. In response to a question about a timeline for completion of the project, with the exception of Charles River Landing, similar projects done by CC&F mostly have been completed in 24-26 months.

The petitioner met with the 128 Business Council and they will partner to provide the proposed shuttle service, which the petitioner is committed to for the long haul. With the Massachusetts School of Psychology and Newton Wellesley Hospital there should be enough participants, even if there needs to be a modest charge. The project is not intended, however, to phase out car ownership.

What about a second means of egress? The petitioner said they were asked by the ZBA to identify a second means of egress, not create one. The parcel identified is owned by another party; there is the buffer zone and a Conservation easement that would need to be interrupted. The existing nonprofits and commercial uses do not seem to care as much as the city does about a second egress – they are more concerned about the badly needed Wells/Nahanton and Winchester/Nahanton intersection improvements. For example, the intersection of Nahanton and Wells is currently a Level of Service F (LOS); proposed mitigation should improve it to a LOS of D or C. However, several Aldermen feel strongly that the second egress is an important piece.

The petitioner's goal is to create a community. The first stage is to create housing, gradually introduce amenities, possibly a hotel. Although the petitioner acknowledged it is not an ideal location for family housing, the State requires the three-bedroom units. (The projection is 52 children.) Approximately one-third to one-half of the park is already other uses, including schools, childcare, and a bouncy house. The buildings in the park are antiquated, with rents at \$27 per square foot v. \$75 per square foot in East Cambridge. The petitioner represented that if 334 units are approved for this parcel and if the Rowe Street site is developed with a 40B project, this will leave the city's 40B exposure to one acre. The committee asked the Planning Department to substantiate this claim.

Public Comment

Marvin Fox has lived at 210 Nahanton Street for 33 years. It is a challenge to get in or out of his driveway because of the increase in the volume of traffic at the intersections of Winchester and Nahanton Streets, the intersection of Dedham and Nahanton Streets, the number of cars from Wells Avenue onto Nahanton Street. The addition of a bicycle lane has narrowed Nahanton Street even further. An additional 330 units of housing will make the situation much worse. He is concerned about snow removal, road maintenance, impact on the schools, and trash pickup. How can a building be constructed on a floodplain?

Sean Roche of 42 Daniel Street also spoke in June. He is a member of the Board of the Solomon Schechter Day School. He reiterated that the school is not opposed to housing, but wishes the city and developer to work collaboratively to produce the best possible development and traffic mitigations. He does believe the park has the capacity for additional commercial demand. He is aware that another owner wants to expand, which would eat up much of the parking capacity. The proposed use with 334 units has a controlled traffic pattern flow. The potential consequences if the city denies the comprehensive permit and loses its case should be considered.

Eugene Finkelstein of 227 Nahanton Street also spoke on June 25. Mr. Finkelstein reiterated his concerns about traffic, the addition of 500 more cars, the impact on sewage and schools. Mr. Finkelstein submitted a petition signed by 25 residents of the Ledgebrook Community expressing their serious concerns about the project. Also, a letter from Dannin Management Company, dated October 20, on behalf of the Ledgebrook Community and The Gables was submitted urging rejection of the amendment to the deed restriction.

A letter dated October 20, 2014 from the Urban Tree Commission expressed concern about the caliper inches that will be lost in both the number of lost trees and the amount of lost canopy. The commission strongly recommends that the proposed plan be revised to prevent this extreme and avoidable tree loss. The commission also urges that the financial requirements of the tree ordinance not be waived. The commission believes this proposal would result in the largest tree loss in city history.

Several Aldermen pointed out that the Comprehensive Plan identifies the park for commercial uses. This is the largest commercial property in the city. Other CC&F projects are not comparable, they are near public transit and retail.

Although the petitioner believes building is prohibited on Area 1A because it was probably created to buffer what is now Mt. Ida College from the manufacturing uses approved in the rezoning, the committee asked the Law Department if it could provide any information as to why it was created.

Other issues raised by the committee were:

- generally, the city is interested in mixed use, what are the Planning Department's concerns;
- how is the city looking at the area 20 years out;
- should the Board vote before the Massachusetts Area Planning Council has an opportunity to look at other ways to develop the park and make it more robust with amenities, which marketing study results will probably be early next year, or before seeing what the city wants for area;
- increase in traffic capacity;
- second means of egress;
- inflow and infiltration (I&I) mitigation;
- extension of time for the Zoning Board of Appeals to act

November 10, 2014

NOTE: This evening, the committee again noted the Law Department's memorandum dated October 17, 2014 (attached) that states that the Deed Restriction constitutes a private interest in land, the disposition of which is a legislative function pursuant to MGL c. 40, §3, and as such is not within the authority granted to the Zoning Board of Appeals.

Cabot, Cabot & Forbes provided in a 53-page communication dated November 7, 2014 responses to the Planning Department's *Continued Public Hearing Memorandum* dated October 24, 2014 as well as points raised at the hearing on October 28.

The Law Department provided a memorandum dated November 7, 2014 (attached) which addresses the initial purchase by Sylvania of the 183 acre Shaw Estate and the subsequent arrangement between Sylvania, its neighbors, and the city and the no-build restriction on Area 1A, for which the petitioner is seeking a waiver.

Alderman Crossley said that the reason for the no-build on Area 1A was still not clear. She was struck by the fact that at the time the city got its drinking water from the Charles River, perhaps this was the reason for the prohibition. Although a possibility, Assistant City Solicitor Murphy, said that even after much research, the reason will probably never be clear.

Alderman Cote asked about the possibility that the city may soon meet its 1.5% "land area threshold" under MGL c. 40B §§20-23. Planning and Law explained that the city is in the process of putting together a more precise number, but the many nuances in the formula make it a complex process and both agreed they cannot commit to a time frame. For example, Newton has over 120 acres of cemeteries, should that land be included? Several other communities are in litigation over their calculations. The Planning Department stated in its June 20, 2014 memorandum that as of April 20, 2014, the city had a total of 2,441 affordable housing units, or 7.5% of the total year-round housing stock, which is 32,346 units according to the 2010 U.S Census. This project would increase the supply of deed-restricted, affordable units in the city by 84. All of the 334 proposed units would be eligible to be included on the State Subsidized Housing Inventory (SHI). Planning noted that the amount of affordable housing in the city does not meet any of the three following criteria of c.40B.

1. 10% of housing units in a community utilized for affordable housing
2. 1.5% or more of the land area zoned for residential, commercial or industrial use (excluding publicly-owned land) contains affordable housing
3. The land area developed for affordable housing in any one calendar year does not exceed 3/10 of one percent of total city land (as determined by #2 above) or 10 acres, whichever is larger.

Ms. Ananth said that the figures included in the June memo are exclusive from the projects being reviewed.

Alderman Crossley asked the petitioner if the project could be built without all seven "blanket amendments" requested. Could any of the amendments be considered separately? Attorney

Stearns said that the first six proposed amendments are necessary to build the project as designed. Waivers from signage and lighting are not as necessary as designed.

The Chairman reiterated that the Board of Aldermen's role is whether or not to amend the deed restrictions to allow housing at 135 Wells Avenue, irrespective of any 40B calculations. The Chairman opened the hearing for public comment and asked that everyone keep their comments to three minutes. Mr. Stearns asked if the petitioner might comment for a slightly longer period. The Chairman, pointing out that the petitioner had had the opportunity to give somewhat lengthy presentations at the last two sessions, asked that the petitioner limit comments to three minutes as well. The Chairman asked and Mr. Stearns agreed that the petitioner had been given a full and fair hearing. Mr. Stearns said the petitioner would reserve his comments until members of the public finished speaking.

The following individuals spoke either on June 25 or October 28, or both, and again this evening. Please refer above for their comments.

Kathleen Kouril Greiser, 258 Mill Street,

John Koot, 430 Winchester Street

Eugene Finkelstein, 227 Nahanton Street,

Sean Roche, 42 Daniel Street

Greg Reibman, President of the Newton-Needham Chamber of Commerce

Speaking this evening for the first time:

Karen Sherman, 57 Pine Crest Road, asked why the city would lift the deed restriction. What benefit would the city get?

William Rosener, 72 Fuller Street, is opposed to amending the deed restriction.

Julia Malakie, 50 Murray Road, said it is malpractice to give up a property such as this.

Peter Bruce, Claflin Place, is a cab driver who drives all over the city. There are mistaken assumptions. Young workers want cheap rents so they can save money, not luxury apartments. The afternoon traffic is terrible in this area, particularly in winter.

Jay Doherty, CEO of Cabot, Cabot & Forbes, asked members to listen to the people on Wells Avenue. He has been working and talking with them for the past year. The Level of Service at Wells Avenue and Nahanton Street is F. Other uses are supplanting the commercial uses in the park. The park has virtually no capacity for additional commercial development. With the proposed traffic mitigation the park could support an additional 400,000 square feet of office development. The engineering viability of a second egress has been confirmed. In the future the park could contain a hotel, which is low-traffic generator. At least one third of the park is other uses now. He urged members of the Board to talk with other owners and tenants of the park.

Upon a motion by Alderman Lipof, the hearing was closed. Alderman Lipof moved denial of the petition. This is a non-starter for him. The petitioner constructs wonderful apartments, e.g., Charles River Landing. However, Needham has a grid of streets. Wells Avenue has one way in

and out. He pointed out that city hall is 82,000 square feet, Chestnut Hill Square is 250,000 square feet, Newton-Wellesley Hospital is 350,000 square feet. This proposal contains 417,000 square feet, surpassed only by the Chestnut Hill Mall at 532,000 square feet. The Comprehensive Plan speaks about the park's importance as a commercial base. This is the antithesis of smart growth. This type of project would be better suited to an area like Newton Corner. There have been approximately 17 waivers to the Deed Restriction. A right in real estate is different than zoning. He noted that local ballot question #6 relative to allowing local elected officials in certain communities to exercise more controls when a local Zoning Board of Appeals is deciding whether to approve an application for a 40B comprehensive permit was overwhelmingly approved. Our state representatives need to look at chapter 40B.

Alderman Lennon agreed this is a decent proposal but not in the right place. He has struggled with this. In comparing previous amendments to the deed restrictions, the prior amendments pale in comparison to this. He has looked at projects in Medford and Cambridge, both of which are within walking distance of less than a mile to public transportation. In his opinion, the petitioner is trying to shoehorn a project that cannot work into the site. The petitioner always circles back to the mitigation package. He urged the city to take a holistic look. It is not wise to put in a project then plan around it. He cannot support the waiver.

Alderman Cote is leaning against approving the waiver. It does not make sense to put this type of project at this location. He cited the Urban Tree Commission's environmental concerns. What about the loss of tax revenue?

Alderman Crossley feels the committee is not ready to vote this. The city lacks a master plan for this area. The analysis should drive the solution, we are talking about a need long term. The MAPC preliminary assessment will not be ready until the beginning of next year. We should also know where the city stands with 40B projects. There is a desperate need for workforce housing. Housing could work in this area, although she has concerns such as open space. That it is derived from a vision makes it interesting. The city should talk with the developer. It is possible to create a new place, a successful mixed use, if the city works with a developer to make it work. Currently, there is no capacity left for traffic without fixing the Wells Avenue/Nahanton Street intersection. She wishes the item could be held until February, so will abstain tonight.

Alderman Lappin said she was appreciative of all the residents who have taken time to attend the hearing and communicate with the Board. It is important to remember it is an office park. The Jewish Community Center's biggest problem is traffic. Traffic can be mitigated with a public/private partnership. Both intersections Nahanton and Wells and Nahanton and Winchester intersections are in the Capital Improvement Program, one slated for this summer and the other for next summer. Should the city give up tax dollars to provide housing for Needham employees? Is it possible to create smart growth? Wells Avenue doesn't have the capacity to create it. Ideally the Board would have the information from the MAPC and the numbers relative to additional 40B developments, but the question is does the city want this to remain as an office park. Waiving the Deed Restriction to allow housing would set a precedent for the entire park.

Alderman Laredo said the committee must determine if it is good public policy to lift the Deed Restriction. The city is not plagued by a lack of housing; however it does have a limited commercial tax base which places a burden on the residents. He doesn't see how plunking housing at Wells Avenue with nothing nearby helps the city. He appreciates the mitigation offered but, irrespective of a one-time payment by the developer, he must vote for what he believes is best for the residents of the city. He will not support the waiver.

The committee reviewed a draft denial board order prepared by the Law Department. It was suggested that the Board cite the loss of tax revenue as a reason for denial. Perhaps the board order should also note that all the documents submitted were reviewed by the city. Alderman Crossley disputed whether the loss of tax revenue is a reason for denial because the city does not know if revenue would be reduced as the waiver is specific to this parcel, not the park as a whole.

The motion to deny carried 4-0-1 (Crossley abstaining; Harney not voting).

Please note, the documents submitted as part of proposed amendment to the deed restrictions, mitigation funds, and proposed Comprehensive Permit currently under consideration by the Zoning Board of Appeals are too numerous to attach to any report, with the exception of the attached PowerPoints and the memoranda from the Law Department, any other documents referred to in this report as well as all other documents are available online at www.ci.newton.ma in two places:

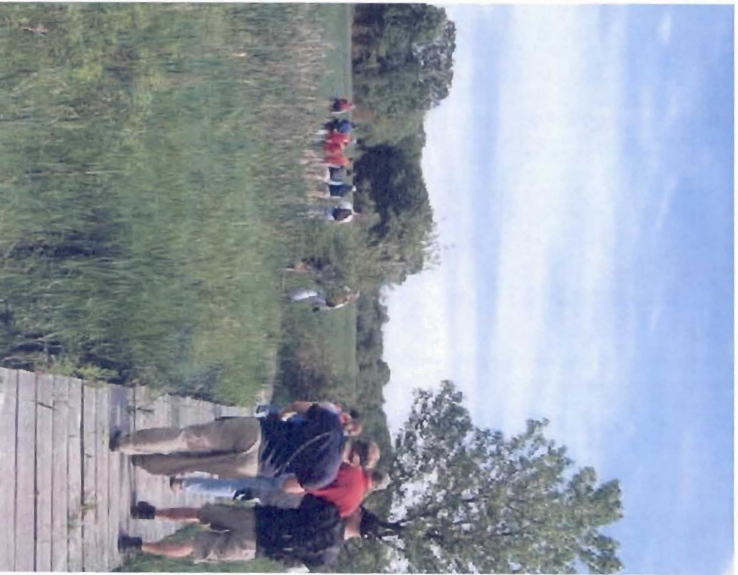
*Board of Aldermen page under Friday Packet/Wells Avenue Deed Restrictions
Planning Department page under High Interest Projects/Wells Avenue
the office of the Clerk of the Board of Aldermen, Newton City Hall.*

Respectfully submitted,

Marc C. Laredo, Chairman

135 Wells Avenue

Newton, MA



Why here, why now?

What are the benefits to Newton?

What are the proposed improvements?

Why here, why now?

What are the benefits to Newton?

What are the proposed improvements?

Workforce Housing

1. Proximity to employment
2. Transportation alternatives – daily commute not more than 30 minutes
 - a) Walking
 - b) Biking
 - c) Car Sharing
 - d) Shuttle with GPS & WiFi
3. Robust amenities
 - a) Fitness
 - b) Outdoor recreational space
 - c) Social and meeting spaces
 - d) Bicycle facilities
 - e) Pet facilities
4. Smaller living spaces
 - a) 48% studio and 1-bedroom units

Alderman Question: Why here, why now?

Support from the N² Corridor Initiative



**Newton Needham
Chamber of Commerce**

“We support a development of this nature because it aligns with our vision of the N² Corridor, as a destination where innovation sector economy businesses and their employees can work, live, play and learn.”



“As Cabot Cabot & Forbes has refined its proposal and offered to assist in financing a variety of infrastructure enhancements to Wells Ave. and the surrounding area, the Chamber’s support for this project has only become more enthusiastic.”

Respectfully,

A handwritten signature in blue ink, appearing to read 'Greg Reibman', written over a light blue horizontal line.

Greg Reibman
President, Newton-Needham Chamber of Commerce

Alderman Question: Why here, why now?

Comparable Developments

Project Name	Marlborough Hills	River's Edge	Charles River Landing	Atmark	Northwest Park	135 Wells Avenue
Municipality	Marlborough	Medford	Needham	Cambridge	Burlington	Newton
Description	Former vacant Hewlett-Packard 109 acre campus.	Suburban office campus bordering industrial area.	Needham Crossing business center, a mix of industrial, R&D, and office.	"Quadrangle": .130 acres of mostly industrial / R&D including a power substation and a refuse transfer station.	Redevelopment of 50+ year-old single-story R&D park.	Redevelopment of 40+ year old Boston Sports Club.
Employment Center	Several surrounding office / R&D parks.	700,000 SF of surrounding office.	6+ million SF in Needham Crossing and Wells Ave Park.	Approximately 1+ million SF of office / R&D.	6,000+ employees in the surrounding area.	6+ million SF in Wells Ave Park and Needham Crossing.
Multifamily	350 units in development	222 units complete <u>262 units planned</u> 484 total units	350 units	428 units	200 units complete <u>180 units planned</u> 380 total units	334 units
Retail / Amenities	30,000+ SF planned on campus	None: drive to Station Landing and Meadow Glen Mall.	Some retail on Highland Ave (e.g. Panera). Drive to Needham Street, Newton.	Good retail nearby.	Pedestrian accessible restaurants onsite. Drive to Burlington Mall.	Public café, onsite convenience and fitness. Adjacent to daycare and schools. Drive to Needham St and Chestnut Hill.
Public Transit	None	Shuttle to MBTA Wellington T Stop. The Park at River's Edge (10 acres).	None	Shuttle to MBTA Alewife T Stop.	None	Shuttle to MBTA Green Line.
Recreation	None		1 acre of Charles Riverbank.	Fresh Pond Reservation nearby	None	Direct access to 800 acre Cutler Reservation
Multifamily Mitigation	\$350,000	±\$100,000	\$575,000	\$200,000	n/a	\$500,000 (40B amount)
State Support	\$1,600,000 MassWorks grant	Extensive State support for transportation infrastructure in the area.	Add-A-Lane project designed to improve direct access to Park.	Now seeking funds for additional transportation improvements.	\$5,000,000 MassWorks grants	None
Recent Activity	Quest Diagnostics and GE Healthcare signed major leases.	295,000 SF of additional office under development	272,000 SF Trip Advisor HQ (1,400 employees). 128-key Marriott Residence Inn. Phase II Trip Advisor in planning.	Planned redevelopment of Raytheon BBN Technologies office / R&D campus.	Keurig's 424,000 SF HQ under construction. Leasing to several restaurants.	Not Applicable

Why here, why now?

What are the benefits to Newton?

What are the proposed improvements?

Alderman Question: What are the benefits to Newton?

Case Study: Charles River Landing

Charles River Landing		
Projected	FY '14 Actual	
Units	350	350
Assessed Value	\$64,000,000	\$71,000,000
Annual Property Tax	\$678,800	\$841,315
Annual Service Costs	\$390,160	Less than projected
Net Benefit	\$288,640	Greater than projected
Building Permit Fees	\$950,000	
School Aged Children	20	22 (avg. since opening)

- CRL generates an annual and sustainable net benefit for the Town of Needham.
- CRL has added approximately \$62.4M to the community's total assessment value.

Alderman Question: What are the benefits to Newton?

Fiscally Positive

135 Wells Avenue
Projected

Lessons Learned from Charles River Landing

Units	334	1. Revenue predictions accurate
Assessed Value	\$77,819,000	
Annual Property Tax	\$967,000	2. School expenses tied to unit mix
Annual Service Costs	\$787,475	
Net Benefit	\$179,525	

Building Permit Fees	\$1,100,000	3. General service assumptions are conservative
School Aged Children	up to 53*	

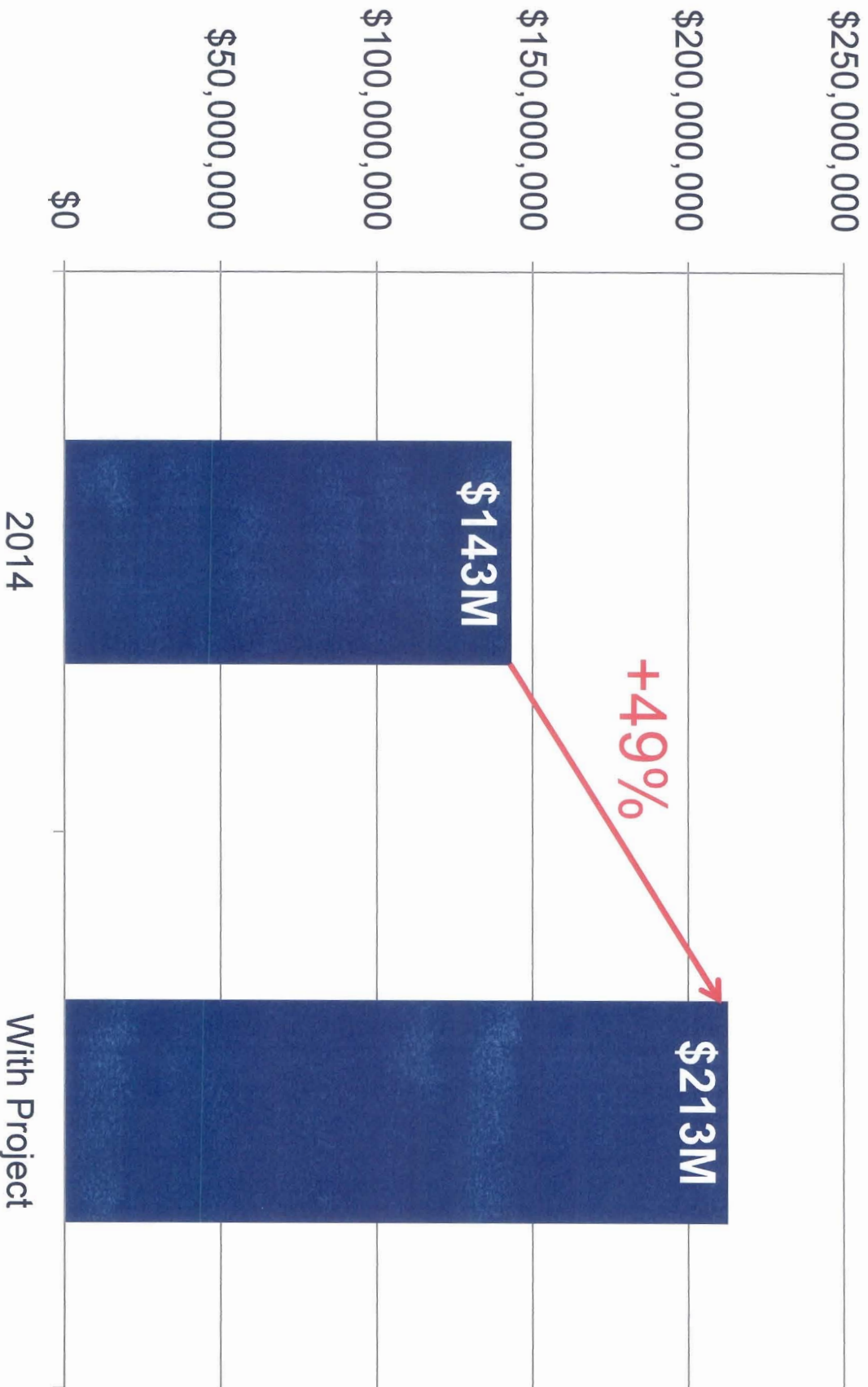
* 22 attributable to 3-bed units

- 135 Wells provides Newton with an opportunity to significantly expand its tax base in a fiscally sound manner while addressing affordable housing needs.
- At completion, 135 Wells will have added approximately \$70.3M to the community's total assessment value.

Alderman Question: What are the benefits to Newton?

Increase Tax Levy

Wells Avenue Park: Total Assessed Value



Alderman Question: What are the benefits to Newton?

Affordable Housing

- **Newton's 40B Goals**

(per Planning Department memo 6/19/14)

- +7.66 acres
- +794 units

- **135 Wells Avenue Provides:**

- 6.34 of 7.66 acres *(leaving only 1.13 acres)*
- 334 of 794 units *(accomplishing 42% of goal)*

Why here, why now?

What are the benefits to Newton?

What are the proposed improvements?

- VHB – Traffic Impact & Access Study (May 2014)
 - “Overall, the study finds that site generated traffic will not have a significant effect on traffic operations... [t]he redistribution of traffic... is expected to have a positive influence on operations...”
- Vanasse & Associates – Newton Peer Review (Oct. 2014)
 - “Traffic operations analysis was completed using the appropriate methodologies and we are in general agreement with the results and the overall conclusion that the addition of Project-related traffic... will not result in a significant impact on motorist delays or vehicle queuing...”

- **Collaboration with City & neighbors to:**
 - Reduce traffic congestion
 - Connect Wells Avenue to public transit
 - Improve commercial marketability
 - Create pedestrian friendly environment
 - Mix uses and satisfy market demand
 - Master plan and reform zoning

135 Wells Avenue

Site Abutters




Newton
Childcare Academy


MOUNT IDA
COLLEGE


dcr
Massachusetts


SOLOMON
SCHECHTER
DAY SCHOOL OF
GREATER BOSTON

CC&F Wells Avenue

Investments

ROAD IMPROVEMENTS:

- A** Rebuild Wells Avenue/Nahanton Street Intersection
- B** Rebuild Winchester Street/Nahanton Street Intersection
- C** Plans for entire corridor, Dedham Street and Mass Works
- D** Plans for second way out of Wells Ave.
- E** Build New Solomon Schechter Day School Drop Off Area

PARK IMPROVEMENTS:

- 1** Build new Wells Avenue entry features with landscaped signage
 - 2** Upgrade all light fixtures and arms
 - 3** Landscaping improvements
 - 4** Build new trail connection to Cutler Park Reservation
 - 5** Stripe Wells Avenue including a bike lane and cross walks
 - 6** Shuttle stops/waiting areas
-
- PLANNING FUNDS:**
- 1** Wells Avenue Master plan



Subject to conditions described by Applicant at 10/28/14 hearing

Alderman Question: Timeline

Project & Improvements

- 135 Wells Avenue

- Obtain approvals: Q1 2015
- Break ground: Q1 2016
- Opening: Q1 2018
- Full occupancy: Q2 2019

- Wells Avenue Improvement Package

- Planning collaboration with City and stakeholders: 2015
- Break ground: Q1 2016
- Ribbon cutting: Q2 2017

Department of Planning and Development



PETITION #210-14

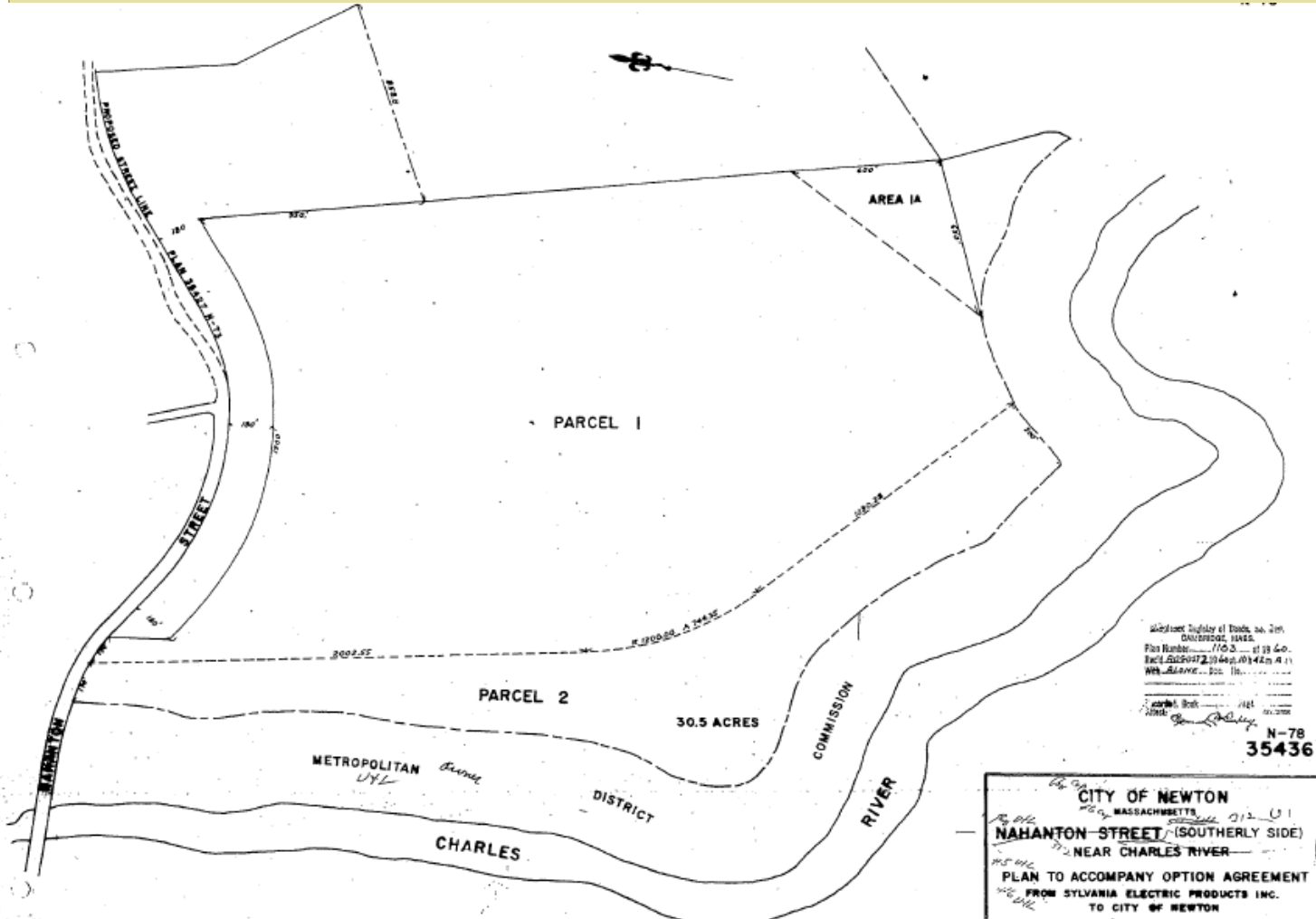
135 WELLS AVENUE

OCTOBER 28, 2014



135 Wells Avenue

Wells Avenue



- City's economic development strategy to develop this land for commercial use
- Instituted Deed Restriction to give BOA control on how area was developed

Requested Relief



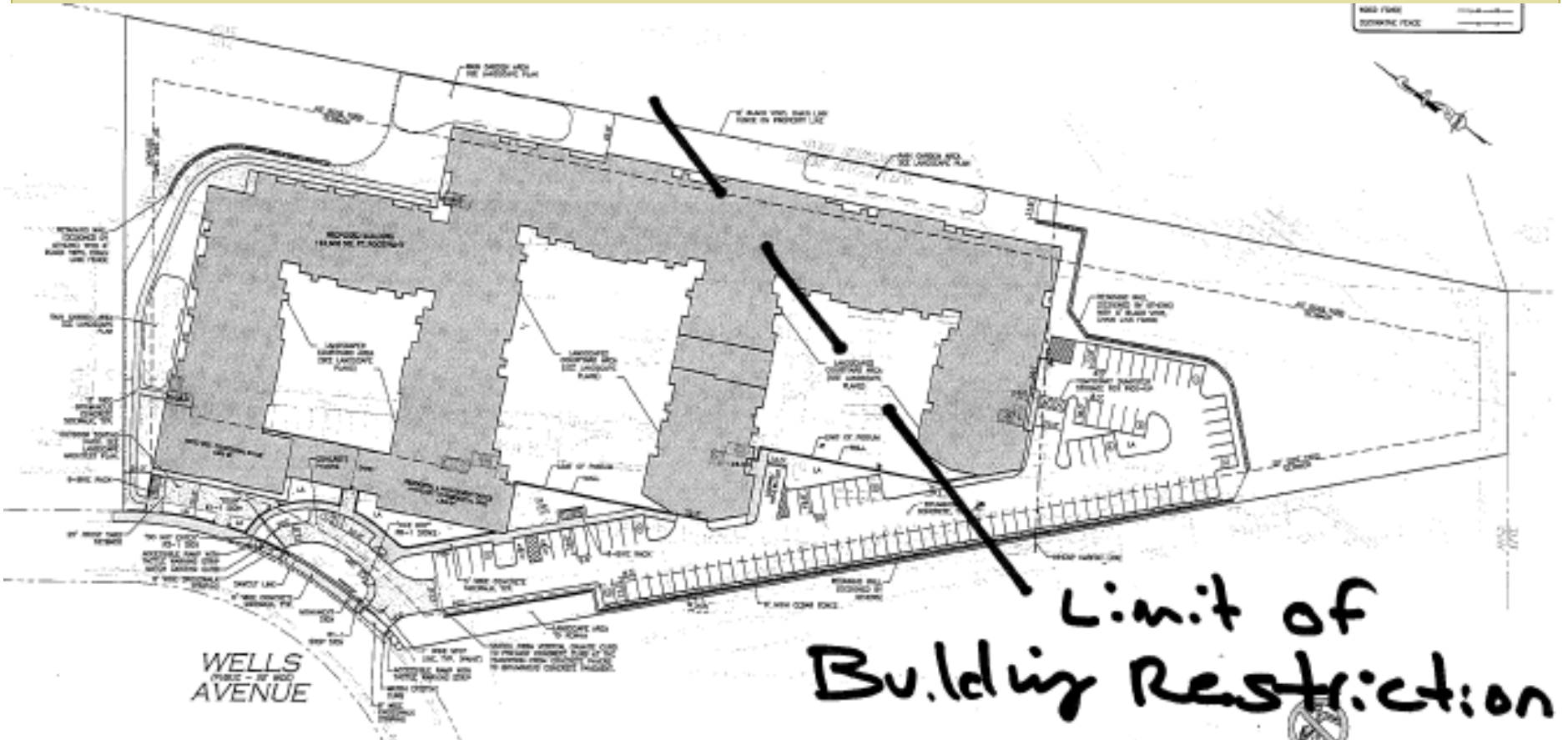
Deed Restriction:

- Amend use restrictions to allow multi-family residential use, retail sales, mixed-use café space, and rental/management/automat space
- Allow building on Area 1A (no build zone)
- Allow buildings and parking areas within 80 feet of northeasterly boundary of Parcel 1
- Amend square foot limitation on gross floor area
- Amend 40% open space requirement for each parcel
- Amend Parcel FAR limit of .25
- Remove the requirement of Planning Department review and Aldermen's approval of finished grading, topography, drainage, parking, and landscaping plans
- Signage, lighting

Applicable Dimensional Controls

Zone: Limited Manufacturing	Required/Allowed	Existing	Proposed
Lot Size	N/A	276,492 square feet	No change
Lot area per unit	N/A	N/A	828 square feet
Frontage	N/A	229.9 feet	No change
Setbacks <ul style="list-style-type: none"> • Front • Side • Rear 	25 feet 20 feet 80 feet	96.5 feet 23.9 feet 67.3 feet	25 feet 20 feet 28 feet
Building Height	36 feet	38.2 feet	69 feet (not including mechanicals)
Max number of stories	3	2	6
Max building lot coverage	25%	19.4%	48%
Minimum open space	40%		52%
Parking stalls	692		501
FAR	.25	.19	1.51

Proposed Site Plan



Comprehensive Plan



- *“The Wells Avenue area provides a substantial contribution to the City’s tax base.”* p 3-28

Comprehensive Plan



- *“The Wells Avenue area provides a substantial contribution to the City’s tax base.”* p 3-28
- Zoning for the Wells Avenue Office Park *“should continue to encourage office and business uses (perhaps more intensively) in this location and exclude other uses as a means of maintaining the City’s employment and tax base.”* p 3-28

Office Park Tenants



- Massachusetts School of Professional Psychology Graduate Program
- New England Development
- CCS – Business Outsourcing
- Massachusetts General Physicians Organization
- Dermatopathology Associated – healthcare lab
- Cyber-Ark Software, Inc.
- Big Belly Solar
- EMC Corporation
- First Wind Energy LLC
- Karyopharm Therapeutics – advanced cancer research
- Upromise, Inc.
- Solomon Schechter Day School
- Newton-Wellesley Ambulatory Care Center
- New England Cable News
- Deveaney Energy, Inc.
- Hughes Oil
- Euro-Pro
- Russian School of Mathematics


Summary of Concerns



- Introduction of residential use
- Density
- Mass of structure
- Impact on I/I
- Loss of trees
- Fiscal impact to City/schools
- Site's lack of proximity to services
 - Lack of walkability
 - Vehicle trips
- Lack of consistency with Comprehensive Plan, affordable housing goals and smart growth

MEMORANDUM

To: Zoning Board of Appeals of the City of Newton

From: Julie B. Ross, Assistant City Solicitor 

Re: The Authority of the Zoning Board of Appeals of the City of Newton to Grant the Approvals and Relief Requested by 135 Wells Avenue, LLC from the Wells Avenue Deed Restriction

Date: October 17, 2014

This memorandum addresses only the legal issues of the authority of the Zoning Board of Appeals of the City of Newton to grant the requested approvals and relief, and takes no position on the 135 Wells Avenue, LLC application for a comprehensive permit.

Question Presented:

Whether the Zoning Board of Appeals of the City of Newton (the "ZBA"), has authority under the Low and Moderate Income Housing Act, M.G.L. c. 40B, §§ 20-23, (the "Act") to grant the approvals and relief from the Wells Avenue Deed Restriction (the "Deed Restriction") requested by 135 Wells Avenue, LLC (the "Applicant") in its application for a comprehensive permit?

Short Answer:

For the reasons set forth below, the Deed Restriction constitutes a private interest in land, the disposition of which is a legislative function pursuant to M.G.L. c. 40, § 3.¹ Accordingly, granting approvals and relief from the Deed Restriction is not within the authority granted to the ZBA by the legislature under M.G.L. c. 40B, § 21 to "issue permits or approvals".

Legal Analysis:

I. History of the Wells Avenue Deed Restriction.²

The properties located at Wells Avenue in Newton are subject to a Deed Restriction that imposes a number of conditions on the development and use of these properties, in addition to the City's zoning controls. In 1960, the property's owner, Sylvania Electric Products, Inc., gave the City an option to purchase a 30.5 acre parcel of land on Nahanton Street in Newton at a

¹ See M.G.L. c. 39, § 1; and Sancta Maria Hospital v. Cambridge, 369 Mass. 586, 592 (1975).

² The Law Department refers the ZBA to Applicant's June 12, 2014 and August 1, 2014 memoranda for a more detailed history of the Deed Restriction.

reduced price. See July 6, 1960 Option Agreement, Middlesex South Registry of Deeds, Book 9630, Page 048. If exercised, the option imposed controls on the development of the remainder of the property, which were more stringent than the zoning controls in effect at that time.

In 1967, Sylvania conveyed the property to Isadore Wasserman and Stephen Hopkins, as Trustees of the Newton at 128 Realty Trust. See October 26, 1967 Deed, Middlesex South Registry of Deeds, Book 11419, Page 029. In 1969, the City exercised the option to purchase the 30.5 acre parcel pursuant to a deed from Isadore Wasserman and Edwin Howard, conveying the parcel to the City of Newton, and imposing certain development restrictions, known as the "Wells Avenue Deed Restriction" on the remaining 123.1 acre parcel retained by the owner.³ See May 22, 1969 Deed, Middlesex South Registry of Deeds, Book 11699, page 535.

The Board of Aldermen is the authority vested with oversight of the Deed Restriction, pursuant to M.G.L. c. 40, § 3 ("[a]ll real estate or personal property of the [city]...placed in the charge of any particular board, officer or department, shall be under the control of the [Aldermen]").⁴ Since 1969, the Deed Restriction has been amended on 17 occasions.

II. The Deed Restriction Is Not A Permit or Approval Within the Scope of Authority Granted to the ZBA by M.G.L. c. 40B, § 21.

A. The Groton Case Is Controlling Precedent.

It is well settled that a deed restriction is an interest in land. See *Wolfe v. Gormally*, 440 Mass. 669, 706-07 (2004) (Restrictive covenants are both an interest in real estate and an encumbrance on title); *Blakeley v. Gorin*, 365 Mass. 590, 595, (1974); (Deed restrictions administered by the Commonwealth limiting the use of the land are a property interest in land). Because the Deed Restriction is part of an agreement between Sylvania Electric Products and the City of Newton and constituted a private interest in land, it is not a "permit or approval" under M.G.L. c. 40B, § 21.⁵ Indeed, the Supreme Judicial Court (the "SJC") has explicitly held that the authority of the Housing Appeals Committee (the "HAC"), and by implication, a Zoning Board of Appeals, under the Act does not extend to transfers of interests in land, which are regulated by State law. Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 39, 41 (2008). In the Groton case, the SJC held that the HAC could not order the town to convey

³ A deed restriction is a form of a *restrictive covenant*, which is defined as "a written agreement that limits the use of property for specific purposes and regulates the structures that may be built on it." *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Edition*, (accessed October 14, 2014), <<http://thelawdictionary.org/restrictive-covenant/>>.

⁴ M.G.L. c. 40, § 3 is applicable to cities via M.G.L. c. 40, § 1; see also M.G.L. c. 40B, § 20, defining "local board" and M.G.L. c. 4, § 7, Clause Third A ("Board of selectmen", when used in connection with the operation of municipal governments shall include any other local office which is performing the duties of a board of selectmen, in whole or in part, under the provisions of a local charter.")

⁵ No court in Massachusetts has yet held that M.G.L. c. 40B abrogates the common law. Brooks v. Chelmsford Hillside Gardens, LLC, 80 Mass. App. Ct. 1106 (2011) (Rule 1:28).

an easement under the Act, and by doing so, the HAC had contravened state law. Id. at 39. Moreover, the Court clearly defined the parameters of the Act:

The Act may only be relied on to remove *locally* imposed barriers to affordable housing, not State law governing the disposition, or transfer, of land, or interests in land, owned by municipalities. To be sure, in enacting G.L. c. 40B, the Legislature indicated that, in some circumstances, compliance with locally imposed barriers may need to yield to the regional need for affordable housing, but this legislative judgment cannot be stretched to empower the committee to act as the legislative body of a municipality for purposes of land transfers. See LeClair v. Norwell, 430 Mass. 328, 336, 719 N.E.2d 464 (1999). (Emphasis in original).

Id. at 41.

The SJC also examined in detail the meaning of the words “permits or approvals” as contemplated by the Act:

The phrase “permits or approvals,” read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward. This interpretation is virtually compelled by the language, “who would otherwise act with respect to such application,” appearing in § 21. The interpretation is further supported by the examples expressly cited in § 21, namely, action typically required by local permitting authorities with respect to “height, site plan, size or shape, or building materials.”

Id. at 40.

Finally, the SJC held that the HAC, and by implication a Zoning Board of Appeals, has no jurisdiction over matters delegated by state law. M.G.L. c. 40, § 3 states that “[a]ll real estate or personal property of the town, not by law or vote of the town placed in the charge of any particular board, officer or department, shall be under the control of the [Aldermen].” The Groton case plainly states that the type of permits or approvals contemplated by M.G.L. c. 40B, § 21 does not extend to interests in land.

B. The White Barn Decision Is Distinguishable From The Groton Case.

The HAC decision in White Barn Lane, LLC v. Norwell Zoning Board of Appeals, HAC No. 08-05 (July 18, 2011), is inconsistent with the holding of the SJC in the Groton case.⁶ In White Barn Lane, the Subdivision Control Law was the controlling state law and the interests in

⁶ An appeal of the White Barn Lane decision was taken by the intervening abutter, the Norwell ZBA, and by White Barn Lane, LLC, and those three cases are pending in Plymouth Superior Court. Docket Nos. PLCV2011-00963-B, PLCV2011-00907-B, and PLCV2011-00954.

question were the subdivision covenants, in particular, the Town of Norwell Planning Board Covenant that restricted the original owner and successors in title.⁷ White Barn Lane, HAC No. 08-05 at 26. In the appeal of the Norwell Zoning Board of Appeals' decision to decline to explicitly waive the Planning Board's covenant, the HAC held that "a decision to modify a covenant is a question under local law, and therefore appropriate for consideration by the Board... ." Id. at 28. In the White Barn Lane decision, the HAC acknowledges the Groton case, but nevertheless acts in direct contravention of the Groton holding. Id. It should also be noted that the White Barn Lane decision is merely an HAC decision, whereas, the Groton case is a decision of the SJC, which is controlling precedent.

III. Whether The Mayor Is A Local Official And The Board Of Aldermen Is A Local Board Who/That Would "Otherwise Act" With Respect To A Comprehensive Permit Is Irrelevant In The Context Of A Deed Restriction.

Whether or not the Mayor is a local official and the Board of Aldermen is a local board who/that would "otherwise act" with respect to a comprehensive permit is irrelevant in the context of a deed restriction, because the fact remains that the ZBA's authority with respect to comprehensive permits is *limited by statute to permits and approvals and does not extend to interests in land*. M.G.L. c. 40B, § 21; Groton, 451 Mass. at 40.

IV. The Historical Treatment Of The Deed Restriction Does Not Make It Subject To The ZBA's Jurisdiction.

The Applicant argues that the historical treatment of the Deed Restriction by the Board of Aldermen in granting various amendments since 1969 are akin to "local permits or approvals" and therefore subject to the ZBA's jurisdiction under M.G.L. c. 40B. See Applicant's Memorandum, August 1, 2014, at p. 10. The Applicant is incorrect. The historical treatment of the Deed Restriction has no bearing on the ZBA's authority to act in this instance, because, as previously stated, the ZBA's jurisdiction *does not* extend to interests in land. Groton, 451 Mass. at 41 (emphasis added). Even if the HAC or a court should find that the Deed Restriction has been treated in a manner similar to local regulations (therefore more akin to permits or approvals) the Board of Aldermen, not the ZBA, is the authority explicitly charged with the administration of the Deed Restriction. Any amendments made to the Deed Restriction were consistent with the authority vested in them by Deed and M.G.L. c. 40, § 3, and c. 39, § 1.

⁷ The White Barn Lane case is distinguishable from the Wells Avenue Deed Restriction because it involved a covenant imposed by the Norwell Planning Board, whereas the Wells Avenue Deed Restriction was accepted by the City pursuant to an option agreement granted to the City by the owners of the property, and which established the parameters of the Deed Restriction. The Groton case involved an improper determination by the HAC that it had the authority to order the town to convey an easement to the developer in order for the developer to regrade and clear vegetation on a portion of the town's property. Groton, 451 Mass. at 38.

V. Conclusion.

Both statutory and resulting case law are abundantly clear that the authority of the ZBA under the Act does not extend to interests in land. For the reasons stated above, the ZBA lacks the authority to grant the approvals and relief from the Deed Restriction as requested by the Applicant.

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

TO: Land Use Committee of the Board of Aldermen

FROM: Ouida C.M. Young, Associate City Solicitor
Dennis A. Murphy, Assistant City Solicitor



DATE: November 7, 2014

RE: Wells Avenue Deed Restriction – Area 1A

In 1960, Sylvania Electric Products, Inc. purchased the 183 acre Shaw estate off Nahanton Street in Newton with the hopes of building a \$15 million science park. At the time, Sylvania rented space nearby in Needham, so that site was convenient to its existing workforce. It was zoned for residential use and would need to be rezoned to allow Sylvania's contemplated use.

This memo briefly addresses the complex arrangement between Sylvania, its neighbors and the City in connection with rezoning the property and imposing certain deed restrictions, particularly the no-build restriction on Area 1A, a three acre triangle in the southeast corner. After reviewing records of the Law Department, Aldermen Documents and the Registry of Deeds, the memo concludes that Sylvania may have imposed the Area 1A restriction to appease one or more of its neighbors, to ameliorate environmental concerns regarding watershed protection, or simply due to topography because Area 1A contained a prominent knoll that was designated to be retained on the plans.

Background

In general, the Sylvania deal involved granting the City an option to purchase (for \$300) a 30.5 acre tract of its land along the Charles River in exchange for agreeing to rezone most of the remainder to limited manufacturing for the science park. In order to vet the proposal, the City retained a planning consultant, Charles E. Downe, who analyzed revenue to cost ratio for various possible uses on the site, conducted a traffic study, calculated the acreage and drew a plan. From Mr. Downe's reports, it seems clear that the additional tax revenues from the industrial use were a key factor in the zoning change.

Of the 183 acres Sylvania owned, only 123 acres were to be rezoned. Some 30 acres were to remain Single Residence A, and the other 30.5 acres were optioned to the City. Based on the proposed restrictions, the 123 acre Limited Manufacturing zone would have at least 74 acres of open space and only 18 acres of buildable area.

After the rezoning, some abutters sued to annul the change on the grounds that the City could not enact a zoning amendment and also impose deed restrictions on the same land. They took the case to the state's highest court and lost. In its decision, the SJC differentiated zoning

regulations from deed restrictions: "It does not infringe zoning principles that, in connection with a zoning amendment, land use is regulated otherwise than by the amendment. Zoning regulations, as Sylvania points out, exist unaffected by, and do not affect, deed restrictions."¹ The Court specifically held that the restrictions at issue are not zoning restrictions.²

Despite its court victory, Sylvania never built its science park. Instead, it sold to a private developer (Wasserman), who in 1968 amended the Option Agreement to develop an industrial park. Among the material changes, the Amended Option Agreement expanded the allowable area to be developed, reduced the required open space (from 60% to 40%), and increased the term of the restrictions from 30 to 99 years. The City exercised its option in 1969, and the resulting deed dated May 22, 1969 conveys the 30.5 acres (Parcel 2) to the City. Appurtenant to Parcel 2 that same deed incorporates restrictions on the remaining 123 acres (Parcel 1), including the no-build restriction on Area 1A (condition 7).

The deed restrictions have been amended several times over the years. In a 1972 amendment to the deed restriction (#734-72), the Board of Aldermen adopted the Flood Plain and Watershed Zoning Ordinance, which among other things requires a 2/3 vote of the Board for approval of any permission thereunder. In 1981, the City deeded an easement over its 30.5 acre Parcel 2 to the United States for flood management, which further restricted the use of that land, including a prohibition against any building or excavation. No changes have ever been made to the restriction on Area 1A.

Genesis of Area 1A

When Sylvania applied in 1960 to change the zoning from Single Residence A to Limited Manufacturing, the plan did not include the 3.1 acre triangular site in the southeast corner of the property. From the inception of its plan, Sylvania never intended to use that land as part of its science park. The attorney for Sylvania referenced that parcel in his remarks to the Claims and Rules Committee of the Board of Aldermen (5/9/1960) as designated for recreational use. True to its word, in 1962 Sylvania split that triangular parcel from its property under an ANR plan and in 1966 deeded it to the neighboring Oak Hill Park Association ("OHPA") for nominal consideration, with a restriction that it be used only for recreational purposes.³

In addition to the gift to OHPA, Sylvania made a deal with its other neighbor, Mt. Ida College, in the form of a land swap whereby the 3000 foot eastern property boundary was straightened out in a direct line to Nahanton Street. The land to the east went to the college and the land to the west, to Sylvania.

Area 1A is a triangular parcel that lies immediately adjacent to the similarly sized land given by Sylvania to OHPA and borders the boundary with Mt. Ida College. The restriction against any building or structure in Area 1A was in the original draft Option Agreement proposed by Sylvania to the City in 1960, and remained unchanged throughout various iterations. And the land swap with Mt. Ida College was proposed before Sylvania even petitioned for a

¹ Sylvania Elec. Prods. Inc. v. City of Newton, 344 Mass. 428, 434 (1962)

² Id. at 436.

³ Oak Hill Park was a planned development of some 315 homes built in 1948 for GIs returning from the war.

zoning change. From this sequence of events, Area 1A may have been restricted to appease the concerns of abutters and to provide a buffer to those adjoining properties.

Another possibility is that Area 1A was restricted to protect sensitive environmental resources. Area 1A lies upgradient from and adjacent to the land then-owned by the City's Water Works Reservation (now owned by the Metropolitan District Commission). At one time, the City drew its public drinking water from the Charles.

In addition, the 1969 deed that adopted the restrictions from the 1960 Option Agreement also has an additional restriction, which makes the entire Sylvania/Wasserman parcel subject to the Order of Conditions of the Department of Natural Resources (#P-628) dated December 13, 1968. The Order of Conditions incorporates a stipulation dated November 22, 1968 between the Department and the owner, which states:

- The land that is the subject matter of this application . . . is essential to public or private water supply or to proper flood control [and]
- That certain portions of the above referenced land may be utilized provided that adequate perpetual protection of other areas is guaranteed [and]
- That the applicants, their successors, heirs or assigns acknowledge and agree that the rights of all parties, with respect to the land covered by the application, have been adjudicated in this proceeding, and that this stipulation shall be binding and considered "res-judicata" in any future proceeding.

The upshot of this stipulation is that DNR approved the work for the entire site based on the plans that showed various protections for sensitive resource areas bordering riverfronts, which are protected by G.L. c. 131, § 40.

A third possible reason for restricting Area 1A was due to its unique topography. From the earliest plans, the prominent knoll in that location was designated to be retained. One of the major concerns with the original project was how grading the site would affect the watershed. In a June 19, 1968 letter commenting on the proposed amendment to the Option Agreement, the Newton Conservators recommended that the Aldermen tighten the restrictions, not loosen them as proposed, in order to protect the integrity of the Charles River floodplain. The Conservation Commission letter of November 12, 1968 voiced similar concerns about the need to protect the wetland, marsh and waterways tributary to the Charles. Based on the concerns raised at the time, retaining the knoll to maintain the grade and protect the natural watershed may have been the impetus for imposing the no-build restriction on Area 1A.

Conclusion

From the review of available records, it is reasonable to conclude that the Area 1A restriction may have been to buffer abutters, to protect the floodplain and watershed, to retain the knoll shown on the plans, or for a combination of these reasons.