

CITY OF NEWTON

IN BOARD OF ALDERMEN

LAND USE COMMITTEE REPORT

TUESDAY, DECEMBER 15, 2009

Present: Ald. Mansfield (Chairman), Ald. Hess-Mahan, Albright, Merrill, Vance, and Fischman, Brandel, and Sangiolo; also present: Ald. Baker, Danberg, and Alderman-elect Fuller

City staff: Candace Havens (Chief Planner), Ouida Young (Associate City Solicitor), Linda Finucane (Chief Committee Clerk), John Daghlian (Associate City Engineer)

#244-09 S. R. WEINER ASSOCIATES INC./CHESTNUT HILL SHOPPING CENTER, LLC/C&R REALTY TRUST petition for a SPECIAL PERMIT/SITE PLAN APPROVAL and EXTENSION OF NONCONFORMING USE for restaurants in excess of 50 seats; to increase the number of seats in two existing legal nonconforming restaurants currently having in excess of 50 seats; to permit a new restaurant over 50 seats and an associated request for a parking waiver at 1-27-33-35 BOYLSTON STREET, Ward 7, CHESTNUT HILL, on land known as Sec 63, Blk 37, Lot 25, 26, 27, 18A, containing approx 767,306 sf of land in a district zoned BUSINESS 1. Ref: Sec 30-24, 30-23, 30-21(b), 30-11(d)(9), 30-19(d), 30-19(m) of the City of Newton Rev Zoning Ord, 2007 and Special Permit nos. 401-03, 317-03, 317-03(6).

ACTION: APPROVED 5-0 (Brandel, Fischman not voting; Fischman recused)

NOTE: This item was discussed on November 10 (see report) and again on December 1, when it was held to await requested changes to the parking and traffic management plans. Candace Havens presented the petitioner's proposed changes. The parking management plan included a designated parking coordinator whose job would share information at least twice per year with tenants regarding employee parking and to promote the use of that parking area. The transportation coordinator will promote alternative modes of transportation. The plan now calls for the addition of bike racks and a bus shelter for the route 60 bus. The petitioner agreed to lower the threshold calling for parking mitigation from 95% to 90% occupancy. Much of this evening's discussion focused primarily on whether to require that employees always park in areas designated for employees or should this be triggered only by reaching the 90% level. It was decided that this mitigation would only be triggered by the 90% level, but as referenced in the parking management plan, employees would be encouraged to use the designated areas at other times. The fact that these rules would only apply to new tenants was discussed. The committee requested that the petitioner work with the City Solicitor to create a clause that would be added to all renewal leases. This clause would encourage the use of employee parking areas as well as reference the mitigation possibilities that might be needed should the 90% level be triggered. As a condition, the order will require two after parking studies: one to be performed the December after the new 275 seat restaurant opens and the other approximately a year later at the discretion of the Director of Planning. In addition, the Director of Planning may require additional after studies if conditions

warrant. Alderman Vance moved approval with an extensive list of findings and conditions contained in the draft board order. Alderman Vance's motion was approved 5-0, with Alderman Brandel not voting and Alderman Fischman recused.

#208-09 TREXLER M. & JUDITH W. TOPPING petition for a SPECIAL PERMIT/SITE PLAN APPROVAL to re-grade portions of a yard for retaining walls/berms and landscape areas in excess of 4 feet at 132 FARLOW ROAD, Ward 7, NEWTON, on land known as Sec 72, Blk 35, Lot 10, containing approx 62,378 sf of land in a district zoned SINGLE RESIDENCE 1. Ref: Sec. 30-24, 30-23, 30-5(b)(4) of the City of Newton Rev Zoning Ord, 2007.

ACTION: APPROVED 5-0 (Brandel, Fischman not voting; Fischman recused)

NOTE: This is a petition for a special permit and site plan approval to place retaining walls greater than four feet high in the front setback of this existing single family residence. The petition was filed as a result of an enforcement action and stop work order by the Inspectional Services Commissioner, issued in October 2008. At that time, there was regrading work underway that was allegedly begun in 2005 on several portions of the site, which is a 62,500 sq. ft. lot that also abuts the cul-de-sac end of Franklin St. on the west and Hood St., a private way, at its northeast corner. The site slopes down from south to north, from Farlow Rd. to Hood St. by approximately 70 ft. The two retaining walls for which relief is sought were already constructed prior to the filing of the petition, and additional retaining walls on the western side of the site (not in the setback), an extension of the driveway, and a large area of regrading, filling and terracing had also been constructed. In addition, much of the new steep slopes had been covered with stone (referred to by the petitioners as rip-rap, but by the Associate City Engineer as rubble stone) to try to prevent erosion.

This has been an extraordinarily difficult petition, not only because the work for which the relief is sought had already been completed, but because the conditions on the site that neighbors on both the east and west sides of the site objected to were not subject to the provisions of the special permit sought. At the time of the stop work order, the previous ordinance provision that required a special permit for grade changes in excess of 3 feet, would likely have applied to most of the site. But the petition was not filed until after the Board amended section 30-5(b)(4) to apply only to retaining walls within the setback. Nevertheless, the stop work order also applied to violations of section 30-5(c)(1) that prohibits grading that results in the erosion of soil and the alteration of the runoff of surface water onto abutting properties, and the Planning and Engineering Departments recommended to the Committee that these problems be resolved prior to the issuance of a special permit.

The public hearing on this petition was opened on September 22, 2009, and continued to October 20 and again to November 10, when it was closed. Working sessions were then held on December 1 and December 15.

Public hearings

The petitioners' attorney, Michael Pierce, initially explained that the ISD concern had been raised about the construction of the two retaining walls in the front setback, that the new walls on the west side of the site are just out of the setback, and that all the planned alterations to the site had been completed except for some drainage facilities. However, he said, his clients would work with the Board to address all the site issues. He also reported that a small paved turnout area from the driveway had been constructed next to the back door, and that this was new impervious surface. He explained that the retaining walls for which relief is requested are not visible from the street, because they are below street grade, and they create no drainage issues. He said that all these improvements, including the terracing and rip-rap slopes at the rear of the house had been constructed by a landscape contractor hired by the petitioners at the suggestion of their abutting neighbors at 43 Hood Street to deal with an erosion and drainage problem in the back yard of the Hood St. property. The rip-rap was installed in 2006, he said, to create some level lawn through terracing and to slow the run-off. But heavy rains in 2008 caused significant run off on to the Hood St. property and the petitioners asked the DPW for assistance. The City lowered the catch basin on Farlow Rd. in front of the house, and Mr. Pierce said that this has improved the situation. He said that the Associate City Engineer has requested plan modifications regarding drainage that is continuing, and that landscaping has been installed to cover the rip-rap. He also reported that the rip-rap was obtained from a Leominster quarry, the soil from Sam White's company in Dedham, and sod from a Rhode Island farm, since there had been allegations that improper fill had been used.

The petitioners' engineer, Mike Kosmo of E.M. Brooks Co., said he had been working on the designs for this property since 2001, which initially were for a circular driveway in front of the house which has been built. He said his clients have offered to rebuild an existing concrete retaining wall on the property line which is about 11 ft. high. He also said the petitioners have offered to remove any rip-rap that has spilled over onto the abutters' property at 43 Hood St. and rebuild their wall.

Ald. Hess-Mahan reported that he had been contacted by the owners of 43 Hood St. and 120 Farlow Rd. (abutters to the west) and had accompanied John Daghlian, Associate City Engineer, on a visit to the Hood St. site. He said the grade change appeared to have been 5-6 feet and there are drainage issues that should be addressed before any action is taken on the special permit request. Ald. Albright asked what the conditions were before the rip-rap was installed, and Mr. Pierce explained that it was a partially wooded slope. Ald. Fischman asked what the landscape plan proposed for this area, but Mr. Pierce said that the plan did not address it. Mr. Kosmo explained that his company was not involved in the design prior to the landscape construction, except as surveyors for the existing conditions plan, but they were brought in again after notice of the violation. Mr. Pierce suggested that it would be valuable to hold the hearing open and for the Committee to schedule a site visit.

Attorney Jason Rosenberg, representing Gary Blair and Annie Paquette of 43 Hood St. said that he has never seen construction of this type in a residential area and that it is one of the most unusual cases in which he has been involved in 38 years. He said none of the work was done under the supervision of a surveyor or engineer, and until the fill and

rocks were brought in, his clients had not had water scouring their back yard. He said he believes the slope is unstable and the soil improper and that the drainage must be considered an integral whole that all goes into detention system on the petitioners' property. He then introduced Marvin Davidson, a structural and geotechnical engineer from Newton, who explained that previously the flow had gone in a northerly direction, but now it has been redirected northeast onto the 43 Hood St. property. Mr. Davidson said that the grade is raised by 3 ft. at the property line, and although he was not authorized to do soil borings on the property, he saw evidence of silty fill with stones on top that had been installed, with no compaction and no proper erosion control. He also noted that the existing 11 ft. high concrete retaining wall was in poor condition and is in need of repair.

Verne Porter, another engineer representing the residents of 43 Hood St. agreed with the Associate City Engineer's analysis and recommendations. Mr. Rosenberg asked that the hearing be kept open in order to test the soil on the slope and to create existing and proposed grading plans so that drainage calculations can be developed.

Susan Conant, 6 Chamberlain Rd. testified that as the abutter to the southeast there was no negative impact, but the landscape improvements to the site were positive impacts for her property.

Gary Blair of 43 Hood St. said he had tried and failed to contain or redirect the water flowing onto his property, and has asked the petitioners to cover the rip-rap, which has been in place for 3 years. He said he has suffered stress from this and incurred \$15,000 in legal and engineering fees. Bob Svikhart of 120 Farlow Rd, the abutter to the west, explained that he had filed the request for zoning enforcement in 2008. He said that the grade had already been raised by 15 feet and that he feared that any additional fill might damage a significant tree next to his property which, although it belongs to the petitioner, has been cared for by him and his wife. Andrea Kemler of the same address said she thought a portion of retaining wall next to her property was in the setback, and that the construction was damaging their garage.

the hearing was continued to October 20, and a site visit to both the subject property and 43 Hood St. was scheduled for October 19, at which several Committee members were in attendance. On October 20, Mr. Pierce requested that the hearing be continued again, since the engineer from Brooks had been ill and couldn't complete the plan. Ald. Albright asked that all alterations on the site be considered as part of the plans submitted. The hearing was continued to November 10, and although the petitioners' plans had still not been received in time by that date for the Engineering Division to review, it was closed and a working session scheduled for December 1.

Working Sessions

At the December 1 working session, the Committee was presented plans that proposed a two-tiered retaining wall of 3 ½ & 4 feet below the house and adjacent to the neighbors at 43 Hood St., in the setback but pulled away from the property line and curving towards the petitioners' lot to direct the runoff within the subject property. Although the area

below and between these walls was proposed to be lawn, the petitioners proposed to maintain the existing rubble in the area above. This design clearly established that this area would need special permit relief. By memo, Mr. Daghlian found the proposed infiltration system insufficient for more than the 2-year storm, and asked that it be redesigned. He also asked that the remaining rip-rap be removed and loam and seed added, and that a landscape plan be submitted for the areas affected by the grade change. Moreover, the retaining walls were proposed to be constructed with Versa Block, and the abutters had asked that they be split-faced in an earth tone color.

The petitioners' arborist's report found the existing maple tree between 120 and 132 Farlow Rd. to be in poor health and they agreed to have it removed and the stump ground. But a question of whether they were willing to have it replaced was not answered.

Several committee members expressed their displeasure that the information to act on the petition still wasn't available. Ald. Hess-Mahan asked what would happen if the item were chartered at the last meeting of the year. Ms. Young suggested that this might lead to a constructive approval, since recent interpretations of the Mullin Rule only allow Board members to "make-up" for missing one session of the public hearing, and this petition was heard on 3 nights. However, both Attorneys Pierce and Rosenberg said they were committed to a schedule of providing plans and information needed in a timely manner, and Ald. Vance moved to hold the item for a meeting on 12/15. That motion was approved 7-1, Ald. Hess-Mahan opposed.

On this date, the Committee found that the plans had been changed once again, and that the petitioners and the abutters on Hood St. had now agreed to a plan to restore the hillside to its original conditions before 2005, removing all the rubble and regrading the entire area without terraces or retaining walls. They would also create a swale parallel to the property line that would divert water onto the subject property.

Mr. Daghlian, however, noted that drainage issues are still not resolved. He said that the water from the new driveway turnaround will be captured in the drain, go into the detention tank, and then be infiltrated to meet the requirements of the 100-year storm. However, any water from the existing driveway will cause this system to overflow into the new swale in any event more than a 5-year storm, from which it will eventually reach the abutter below #43 Hood St. and then discharge out to the street itself. This is against City policy, he said, which for at least 10 years has been to infiltrate as much water as possible. He suggested a connection be made from the detention tank to an existing City drain in Franklin St., but he could not be sure how far the connection from the end of that drain extended into the petitioners' property since the lines are 110 years old and there are no record plans. The only way to determine that would be for the petitioner to have that line surveyed with a TV camera, since the City will not do that on private property. Mr. Daghlian prepared a "worst-case" cost estimate to make this connection, which he said was \$9,550, in addition to almost \$34,000 to install the rest of the drainage system.

Mr. Pierce pointed out that the route that Mr. Daghlian proposed to install the drain connection would damage substantial trees, and further believed that the purpose was to

handle runoff from pre-existing impervious areas, which is not required by the Ordinance. Furthermore, with the new grading design, this area is not within the jurisdiction of the special permit. Ms. Young agreed. Mr. Pierce added that the downhill abutter, Mr. Danis, had already seen a reduction of stormwater flow from the work the City had done this year on Farlow Rd., and that he is satisfied with the present plan.

Mr. Daghlian observed that the swale will cause a point discharge where there was only previously sheet flow, and this will lead to water running down Hood St. and creating icy conditions. Ms. Young, a resident of the area, acknowledged that this was a current problem.

Mr. Rosenberg stated that his clients are pleased with the new plan, and although they would like to see the overflow connection, they will not demand it. They did ask, however, that the swale be extended uphill to capture some of the runoff above the driveway. Mr. Kosmo agreed to do this.

Ald. Baker said he shared the Associate City Engineer's concern that this design could have an adverse effect on Hood St. in larger storms. He asked if there was any way the City could connect this on-site drainage system to the Franklin St. drain outside the special permit. Ms. Young replied that there is no easement for the City to undertake construction on the subject property, and that Hood St. has no drains to tie into. Mr. Daghlian suggested that Hood St. residents could petition the City to make drainage improvements in a private way.

Ald. Brandel, whose insight will be missed, noted that improving conditions on Hood St. would be a tangible public benefit that this petition is otherwise lacking.

Ms. Havens reported that the petitioner has agreed to replace the tree between #120 and #132 Farlow Rd., and that this could be a condition of approval. She also reported that there still has been no detailed landscape plan submitted, but with restoring the original slope, this is not a great concern.

Ald. Vance made a motion to bring the question of whether to require that the drainage be tied in to the City's system by moving that such a condition not be included any approval. That motion passed 5-0-2, (Brandel and Sangiolo abstaining) with one absent. He then leapt at his final chance to move approval of a Ward 7 petition, with the findings and conditions found in the draft Board Order and additional conditions to extend the swale uphill and to replace the maple tree that will be removed. The motion was approved 5-0-2 (Brandel and Sangiolo abstaining) with one absent.

#272-09 HERRICK ROAD REALTY TRUST petition for a SPECIAL PERMIT/SITE PLAN APPROVAL to erect at 39 HERRICK ROAD, Ward 6, NEWTON CENTRE (Lot 7) a 3-story mixed-use building containing 4 dwelling units and ground floor commercial space with a 75-seat restaurant, with underground parking and associated parking waivers (allow 1¼ parking spaces per housing unit; allow off-street parking facilities to be located on a separate lot; waive 9 parking spaces; waive 3

bicycle parking spaces; allow frontage to be measured along a public footway) and to construct a retaining wall greater than 4 feet within the rear/side setbacks and waive 18 existing parking spaces on Lot 7 Herrick Road, on land known as Sec 61, Blk 35, Lots 6 and 7, in a district zoned BUSINESS 1. Ref: Sec 30-24, 30-23, 30-19(d)(2), (8), (9), 30-19(f)(1), (2), 30-19(k), 30-19(m), 30-15(b)(2), 30-15 Table 3, 30-5(b)(4) of the City of Newton Rev Zoning Ord, 2007.

ACTION: APPROVED 5-0 (Brandel, Fischman not voting; Fischman recused)

NOTE: This is a petition to build a new mixed use commercial/residential building in Newton Centre immediately adjacent to the MBTA Green Line station and the Cypress St. municipal parking lot. The proposed building would be three stories, with a 75-seat restaurant occupying the entire first floor, and four residential units on the second and third floors. A portion of the parking requirements would be provided by a one-level underground garage that would be below the building and much of the site. The relief sought includes a parking waiver of 27 stalls, which includes 9 stalls to satisfy the requirements for the uses being created on the site, and 18 stalls of the private parking lot that is currently on the site and will be displaced by this project. The Board is also being asked to reduce the required number of stalls to support the housing from 2 per unit to 1 ¼ per unit because of their location in an apartment building and convenient to public transit and services, which is an effective additional waiver of 3 stalls, for a total reduction of 30 stalls from the zoning requirements. Relief is also necessary to allow the height of the building to exceed 24 feet and two stories, as the 3-story building proposed is 30.2 feet in height, to allow for a retaining wall greater than 4 feet in height in the side and rear setbacks to provide access to the garage, to reduce the front setback requirement, to allow a restaurant of more 50 seats, and to allow a multi-family dwelling in a BU-1 zoning district.

The proposed driveway providing the only access to the underground garage traverses under City-owned property (the Health and Human Services Department at 1294 Centre St., formerly the Newton Centre Branch Library). If this proposal were approved, the petitioner must also obtain an underground easement from the Mayor. The authorization to grant such an easement has already been approved by the Board on April 6, 2009, following a public hearing and recommendation by the Real Property Reuse Committee. The petitioner also asked for special permit relief to measure the frontage of the property along the public footpath that connects Herrick Rd. with the Cypress St. lot, but the Law Department maintains that the land for this footpath was taken by eminent domain by the City, and is not simply an easement on the property as the petitioner claims. Therefore, the City believes that for the project to move forward if a special permit is granted, the petitioner will have to seek and receive a variance from the Zoning Board of Appeals.

The public hearing on this petition was held on October 20, 2009. Although there was an extensive presentation, no members of the public spoke although there was subsequent written and informal communication from a member of the Newton Centre Task Force and one resident of Herrick Rd. They supported the concept of the project, but were concerned that the layout of the site was not ideal and that circulation and traffic are potential problems. The residents of the adjacent 29-unit apartment building, owned by the petitioner, were not notified of the hearing as they are in rental units. The Committee

expressed some concern that these residents will lose their dedicated off-street parking when this building replaces the current 18-stall parking area. The petitioner's attorney, Terry Morris, argued that all the units are on one year leases and when the current leases expire, parking will not be offered as an option with the new leases. Only 9 residents currently rent the spaces here. He contended that they will either move to another location with parking, or dispose of their cars, and new tenants who do not need parking will be attracted to the units. Parking will not be available for tenants of the existing building in the new garage.

Working sessions were held on November 17, December 1 and December 15. Much of the discussion in the working sessions was devoted to understanding how the site would work. The petitioner proposed that valet parking would be available at all times for the restaurant, which is propose to be a "fine dining" facility only open in the evenings. The valets would utilize a portion of the underground garage, as well as spaces, if available, in the Cypress St. lot, and the petitioner is negotiating with the Health Dept. for an agreement to use the space vacant in the evenings there as well. A condition of the approval would prohibit valet use of on-street meters and neighboring residential streets for customer parking (although patrons who self-park could use these facilities.

Another concern of the Committee was the functionality of and access to the garage. The garage contains 20 stalls, and the City's Assistant Traffic Engineer confirmed that the maneuvering spaces were adequate and not constrained by columns, except for one space near the entrance, which should be reserved for compact cars. The entrance and exit to the garage utilizes an existing service driveway serving the existing apartment building. A utility building (likely a former incinerator) would be demolished and the current dumpster would be replaced with one on the site of the new building and the three uses (current apartments, new residences, and restaurant would utilize the same dumpster, which would, of course, need to be emptied more frequently. Because a portion of the garage access road, which runs between the subject property and the Piccadilly Square building of Herrick Rd., is too narrow for 2-way traffic, an automatic traffic light system is proposed to be installed to provide safe traffic flow. The other access to the site, which will be used by patrons of the restaurant, will also require an easement over the other lot owned by the petitioner and will require the removal of one metered parking stall adjacent to the MBTA bridge. The petitioner agreed to replace that space with one on his property but which is accessed from the Cypress St. municipal lot. This space would either be metered for public parking, or be the site of a ZIP car, at the option of the City.

The ground level access to the site will also contain 5 parking spaces which may be used by patron of the restaurant. Traffic flow will be one way, with cars exiting though the Cypress St. lot. This access is controlled by a revocable license from the City, so that it could be altered if, for example, the Cypress St. lot is ever replaced by a multi-level parking deck. The petitioner showed some conceptual plans demonstrating how this type of future development, including additional retail or housing development on City land, could be integrated with his proposal. He also showed that the garage under his building is oriented so that it could connect with a municipal garage at that level, if that were desired.

The Committee also gave attention to the footpath, noting that it would be reconstructed at a standard 7 ft. width (currently variable), in concrete, with a rehabilitated MBTA fence (constructed and maintained by the petitioner), new lighting, and landscaping separating the path from the building.

After all the aspects of the rather complex plans were clarified, Ald. Albright moved approval of the petition, with the findings and conditions documented in the Board Order. Ald. Sangiolo expressed her concern that this petition takes away existing parking from Newton Centre residents, but Ald. Hess-Mahan replied that this is a good example of smart growth, which employs this density of development at site convenient to public transit and so lessen the need for parking. Ald. Danberg noted that, in light of all the parking waiver requests that the Board has seen recently, she believes that the route to addressing these issues is through a requirement for payment in lieu of meeting parking standards, which she and the Chair have docketed for consideration by the next Board. Ald. Hess-Mahan suggested to this petitioner that they initiate discussions with the City on this topic, noting that this parking waiver request is quite extensive.

The motion was approved 5-0-2, with Ald. Brandel and Sangiolo abstaining.

The Chair thanked the Committee for their dedication and support, and they thanked him for his service. And if you have read this report this far, you ought to consider asking the new President of the Board to assign you to this Committee, maybe even to appoint you Chair, as you truly have dedication to this subject!

I want to thank my two predecessors in this seat during my tenure on the Board for the examples they gave me to carry out this responsibility, former Ald. (now Senator) Cynthia Creem, and Ald. Susan Basham. And I didn't have to become an attorney to do it! Finally, of course, these petitions couldn't be moved forward without all the efforts and expertise of Chief Committee Clerk Linda Finucane, Chief Planner Candace Havens, and Associate City Solicitor Ouida Young. Thanks so much!

Respectfully (and finally) submitted,

George E. Mansfield, Chair

With assistance on this report from Ald. Susan Albright, and for the last 6 years, Vice Chair (always on call) Ald. Mitch Fischman

Respectfully submitted,
George E. Mansfield, Chairman