

CITY OF NEWTON

IN BOARD OF ALDERMEN

LAND USE COMMITTEE REPORT

TUESDAY, SEPTEMBER 16, 2008

Committee members present: Ald. Mansfield (Chairman), Ald. Albright, Merrill, Hess-Mahan, Fischman, Brandel, Sangiolo and Vance; also present: Ald. Yates, Coletti and Baker

City staff: Candace Havens (Chief Planner), Alexandra Ananth (Senior Planner), Ouida Young (Associate City Solicitor) and Linda Finucane (Chief Committee Clerk)

Informal discussion with members of the HIGH PERFORMANCE BUILDING COALITION

Prior to the Committee's regular business, at their request, representatives of the High Performance Building Coalition gave an informal presentation to the Committee. Newton residents Deb Crossley, Betsy Harper, and Jonathan Kantar represented the Coalition. They recognized that the Board had recently adopted an additional general criterion for the approval of special permits [Zoning Ordinance Sec. 30-24(d)(5)], which charges the Board to find that the petitioner has made a significant contribution to energy conservation and the preservation of natural resources. They saw one of their roles might be to help the Board decide what is "significant," and why meeting this criterion is important.

Ms. Crossley explained that new and renovated buildings present huge opportunities for energy conservation, noting that 70% of greenhouse gas emissions come from buildings. The City's Energy Action Plan, she said, sets a goal of reducing these emissions by 50%, and the Comprehensive Plan includes many objectives that build upon this goal. How buildings meet these sustainability goals can be measured by a number of standards or metrics, including but not limited to LEED certification, and Ms. Crossley distributed a chart of options that is attached to this report. Also attached is a draft of potential questions that the Land Use Committee and its staff could ask petitioners to help evaluate the sustainability of a proposed project. She noted that reducing energy demand and the efficiency of mechanical systems are the most important elements to achieve these goals, and distributed a series of "energy pyramids" that illustrate this concept (see attachment). She added that these proposals don't necessarily cost more money, and/or that up-front costs are balanced by long-term savings, and that the measures cannot be inconsistent with the State Building Codes.

Ms. Harper also referred to the energy pyramid, stressing that the most important step is to first reduce demand for energy. One major method of reaching this objective is to design and build a tight building. She also discussed the employment of renewable energy designs, but noted that renewables account for less than 10% of energy savings, with wind, thermal, solar, photovoltaic and green roof technologies, in that order, representing increasing costs relative to impact. She also referred back to the metrics, and suggested that the Board should encourage including a number of the possible points within the LEED criteria, even if a project cannot achieve the full LEED

certification. She noted that the Advanced Buildings Core Performance criteria are mainly applicable to commercial buildings, and that Energy Star Certification criteria are rather limited in their application for petitions before the Board.

Ms. Havens offered to draft some guidelines from this presentation for the Committee to review. The Coalition members offered to provide assistance both in reviewing these guidelines, as well as in the Committee's review of the petitions themselves.

#302-07(2) 62 CARLTON, LLC./LEWIS J. MILER & ANNETTE FURST petition for a SPECIAL PERMIT/SITE PLAN APPROVAL for a change of grade in excess of 3 feet in order to construct a single-family dwelling with an accessory 3-car garage in excess of 700 square feet at 62 CARLTON ROAD, Ward 5, WABAN, on land known as Sec 55, Blk 14, Lot 6, containing approx 28,077 square feet of land in a district zoned SINGLE RESIDENCE 2. Ref: Sec. 30-24, 30-23, 30-5(b)(4), 30-8(b)(7) of the City of Newton Rev Zoning Ord, 2007.

ACTION: APPROVED 5-3, Brandel, Sangiolo, Merrill, nay

NOTE: The petitioners are seeking a special permit for a change in grade in excess of three feet to construct a 5,981 sq. ft. single family dwelling on a vacant lot at 62 Carleton Road in Waban, adjacent to Kettle Pond. The property drops off sharply from the street, and is currently developed with a tennis court about 10-12 feet below the sidewalk grade. The petitioners own the adjacent lot at 60 Carleton Road which is developed as a single family house, as are all of the lots in the immediate neighborhood. A portion of the lot is within a wetland buffer zone, and the Conservation Commission has restricted all work beyond a one-foot high retaining wall located between the proposed dwelling and the wetland. A similar petition was submitted last fall, but was withdrawn after the public hearing when it was determined that the submitted ANR subdivision plan, dividing this lot from 60 Carleton Road, did not provide adequate frontage for both lots according to zoning requirements. At that time it was also clear that there was substantial neighborhood opposition to this plan.

The public hearing on this petition was held on May 13, 2008. The petitioners' attorney explained that the ANR plan was now compliant with zoning, and the subject lot has 107 ft. of frontage. In addition, he said, his clients had dropped their request for a garage in excess of 700 s.f., having reduced it to 699 s.f. They also tried to respond to neighbors concerns by decreasing the width of the house from 86 to 80 ft., the depth from 42 to 40 ft., and reorienting one of the three garage stalls from the front to the side of the house. This increased to side yard for the abutter to the right from 17 to 24 feet. The project architect pointed out that from the front, the house will be 1 ½ stories and have the appearance of a large Cape Cod-style structure, while from the rear it will be 2 ½ stories high because of the grade change. As such, the Planning Department report noted, the structure does not appear to be overwhelmingly large and fits in with the streetscape of varying size homes, mostly built in the 1930's. However, they also noted that the driveway width, 17 ½ feet, should be reduced to reduce the amount of impervious cover on the site. The change of grade

in excess of 3 ft. covers an area of 4,290 s.f., with a maximum fill of 13 ft., requiring 1,400 cu. yds. of fill brought to the site.

The petitioners' attorney also explained that the plans have been approved by both the Director of Urban Forestry and the Associate City Engineer. He said that a home could be built at the lower existing grade by right, and would be less visible from the street, but access and parking would be problematic. The Planning Department noted that access to the proposed third garage bay on the side could also be difficult in the proposed plan.

Ald. Coletti asked how the site would be accessed during construction and where materials and a dumpster would be stored. The petitioners' representative replied that the owner would grant a construction easement across #60. Attorney Mark White, representing several neighbors of the site, said that the developer and his attorney have been very cooperative in adjusting the plans, but the neighbors are all opposed to developing this site. He stated that the petition serves the interests of the owner, but does not promote the public convenience and welfare. The only portion of the lot that is buildable because of wetland restrictions, he said, requires a 12 ft. grade change. He described the proposal as a "monster house," because of its width and its height in the rear, and one of the few the Board could prevent. He claimed that it would not be feasible to build on this portion as a matter of right.

Several neighbors then testified. Charlie Clee of 5 Kelveden Rd., across from the site, said that the applicants are not hearing the neighborhood even though they are talking with them. It appears, he said, that the house is not decreasing in size with redesign, and they are still trying to build the biggest house possible on this constrained site, while the 3-foot grade change allows them to primarily raise the grade around the house and call the bottom story a basement, excluding it from the floor area calculation and from the number of stories. He pointed out that the first floor, one story above the basement, was actually 3 feet below the street level. Ald. Hess-Mahan asked what size house would be acceptable, and Mr. Clee replied that 6,000 s.f. would be okay if that included the basement. Joe Doucey of 59 Carleton Rd. said that the house design was not in keeping with the character of the neighborhood, not only in its size, but also because of its reduced setback from the street. Ellen Seigel of 122 Nehoiden Rd. also found the house too big for the developable land, and submitted a petition with 78 neighborhood signatures opposing the petition. She proposed as an alternative not only a 6,000 s.f. house including the basement, but a house whose width was similar to most others in the neighborhood.

Errol Yudelman, of 70 Carleton Rd.—the abutter on the right, among others, spoke of his concern about an 8 foot retaining wall in the side setback and the impact this would have on the natural surface drainage and an existing tree on his property. Tom Ebling of 144 Nehoiden Rd. noted the width of the proposed house is two times most others in the neighborhood, and expressed his preference for a by-right alternative. Jack Fabiano of 31 Homewood Rd. urged the committee to protect the Kettle Pond in its natural state. He said that three neighbors had spent \$100,000 to restore the pond, which has its only access from his dead-end street. He urged members to visit

Homewood Rd. to see the perspective of the site from there. Amy Wolf of 133 Waban Ave. also spoke of the value of the view of the property from the pond.

Ald. Yates asked for clarification from the ConCom whether all drainage will be retained on site and, if so, what is the effect upon the pond. The committee requested a site visit, and Ald. Brandel asked the City Engineer to attend. It was not possible to schedule a single site visit that all members could attend in June, so there were two times set aside for members to choose from. This meant, however, that neither the all the petitioners' representatives nor City staff could be present at these times to answer questions from the members. On June 5 & 6, those who could attend did see the layout of the house with a smaller footprint.

Because the petitioners recognized that additional revisions to the plans might help both the neighbors and the committee to accept the proposal, on June 24 they requested and were granted an extension of time to act through September 17, 2008. At the first working session on this petition, held on August 12, the petitioners presented a third revision that reduced the floor area of the house (not counting the basement) to 5,205 sq. ft., the width from 81 ft. to 64 ft., and increased the setback from the neighbor's property at 70 Carleton Rd. from 24 ft. to 40.5 ft. In addition, this plan reorients all three garage stalls to the right side of the building. Although reducing the size of the dwelling increases the amount of fill necessary for the project, the new plans reduced the area of the 3-foot grade change, the lot coverage, and increased the percentage of open space. These changes did not require any further action from ConCom, and the Associate City Engineer approved the revised drainage plan and found it had no impact on abutters or on Kettle Pond. However, he asked for an operation and maintenance plan for the drainage system that the owner had not submitted. They did submit the framework of a construction management plan, with several details to be completed.

Ald. Brandel reported that the neighborhood was still strongly opposed to this proposal based on its impact on their homes and on the pond. Attorney White reported that the neighborhood had met and discussed the revised plan, with the goal of reaching a compromise. A draft agreement was proposed to support the special permit, but it is still not unanimous. The main concerns are that the 3-foot grade change provision requiring a special permit might be amended or eliminated by the Board in the future, and then the permit for this site and its conditions would be null and void. Ms. Young stated that it was her opinion that this is legally correct. In such a case, the petitioners' have only agreed to honor the permit as a 3-year contract, prohibiting any external changes during that time. Nonetheless, Mr. White stated, the developer has acted in good faith.

Ald. Sangiolo asked how such a contract would be enforced. The petitioners' attorney said that it would be enforced by the neighbors, and it was his belief that the contract is ready for signature and needs only a few details worked out. Ald. Fischman asked that this contract be executed before a full Board vote is taken. Ald. Albright asked what the standard finding should be for a 3-foot grade change permit. Ms. Havens replied that the Board should find that there is no adverse impact on abutters and on the neighborhood. Ald. Yates added that since drainage is a primary concern in such a permit, he didn't see how the committee could go forward without an

approved operation & maintenance plan. Ald. Hess-Mahan said that he expects the questions about amendments to the 3-foot grade change ordinance to be resolved without affecting this petition. He added he was pleased with the change to the retaining wall and the reduction in the front façade.

Ald. Brandel then moved to deny the petition, finding that the proposed plan does not benefit the City, the neighborhood, or the pond, and the house is out of scale with its surroundings. The project architect then noted that he had a plan for a much larger house, approximately 8,000 sq. ft., with a driveway engineered without the necessity of a 3-foot grade change. Ald. Yates observed, in his opinion, there would need to be perfect compliance with the drainage plan or the pond and the abutters would suffer negative impacts, yet neither the committee nor the City Engineer has the benefit of an operation & maintenance plan to evaluate. Ms. Young commented that there is no evidence of how perfect compliance must be, and so this would not be a valid reason to support the denial motion. The Chair called for a vote on the motion, and it failed by a tie vote of 3-3-1, with Brandel, Merrill, and Sangiolo voting in favor, Fischman, Albright and Hess-Mahan voting against, and Mansfield abstaining. Ald. Albright said she was concerned that a denial by the Board would not hold up on appeal. Ald. Brandel stated that his objective was to convince the petitioners to withdraw the application, revise the plans again with real input from the neighborhood, and refile for a new public hearing. The Chair said he would like to give the petitioners another chance to reach an agreement with the affected neighbors, submit the missing material, and come back to a working session in September for the committee to make a recommendation to the Board. He explained that, because of September holiday schedules, this would require an additional extension agreement from the petitioners. The petitioners' attorney reluctantly agreed to a minimal extension through the first October Board meeting, and will discuss specific dates with Ms. Young. Ald. Hess-Mahan move to hold the item, and this was approved by a 6-0-1 vote, Ald. Brandel abstaining.

At the beginning of this second working session on this petition, Ms. Havens reported that the design of the proposed house had been changed slightly again, this time increasing the floor area from 5,205 sq. ft. to 5,343 sq. ft. Neither figure includes the lower level, which is considered a basement in zoning definitions. Most of the increase is a result of narrowing and filling in the front entrance, reported to be a response to neighbors' concerns about the design. The area to the right side of the house was also redesigned, narrowing the driveway and saving an existing tree and with two new options for a retaining wall. Option A would use a longer wall, but use less fill. Option B would reduce the exposure of the wall, but require more fill to be brought to the site. Also, the garage that faces this side of the site is now designed with 3 separate doors. (The garage area is now 699 sq. ft., so does not need special permit relief.)

Ms. Havens also reported that the Planning Department now believes the revised draft Construction Management Plan is adequate, and a drainage Operations and Management Plan has been submitted to and reviewed by the Associate City Engineer. She added that the landscape plan has not changed, and that there will be no need for Conservation Commission action as long as the

petitioner keeps all disturbance of the site above the existing stone wall at the rear, as he has agreed to do.

Apart from the issues above, the principal reason the Committee held this petition in August was to give the petitioner and the neighbors, both represented by attorneys, a chance to enter into a formal agreement regarding this project. But this had not happened, and Ald. Brandel and Mansfield reported that just prior to the meeting, they had met with the attorneys of both parties to see if some compromise could be reached that the Committee could support. Ald. Brandel explained that the main area of disagreement was over a provision to keep the project from changing once a special permit was approved, either by coming back to the Board for an amendment or in a situation where the underlying need for the relief (grade change of more than 3 feet) was changed or eliminated from the Zoning Ordinance, possibly negating the need for the owners of this site to adhere to the approved plan. He said that the final difference between the petitioner and the neighbors is that the petitioner has proposed a condition that would freeze the approved permit for 5 years, but the neighbors are seeking at least 10 years.

Ald. Vance asked whether a condition such as this has ever been attached to another special permit. Ms. Young replied that she did not know of one, because any special permit can always be modified by a subsequent Board, and the condition itself could be so eliminated. The Chair said that both parties were aware of this, but he felt that the presence of the condition would be a strong message to any subsequent Board of the clear intent of this Board. Ald. Hess-Mahan suggested that we could advise a future Board of our intent through the findings. But Ald. Yates recalled a situation on Chestnut St. where he thought that didn't work. Ms. Young then discussed the Chestnut St. petition, pointing out the differences from this one, including an appeal to the ZBA.

Ald. Albright also referenced the denial of a recent consistency ruling on a rear lot petition in Newtonville, where a petitioner was required to follow the original plans. Ald. Coletti added that plan elevations were not followed in the construction of houses on Columbia Ave., but expressed his concern about attaching a condition such as this to this property.

Ald. Vance, who had missed the previous working session, asked about the contingency of eliminating the 3-foot grade change provision in the Ordinance. Ms. Young reiterated that eliminating the requirement for this relief would put this permit, if approved, as well as many others, into questionable status. However, she added, there is a very simple remedy the Board could adopt to avoid this situation: simultaneously adopt an Ordinance provision to grandfather all previously approved grade-change special permits with their existing zoning status.

Ald. Yates then explained the status of the proposal before the Zoning and Planning Committee to modify or eliminate this provision. He said there had been only a scoping session on the proposed changes, and he there might be other issues raised regarding the elimination of special permit requirements for grade changes. In the case of the present petition, he supported the neighborhood's need for a greater degree of comfort that the petition that is approved will be the one that is built for the "reasonable future." Ald. Fischman made some further attempts to clarify

the issue, but Ald. Vance asked if it would be legitimate for the Board to deny the petition on the basis of a lack of a “no changes” guarantee. Ms. Young responded that while she knew of no case law on this point, there are cases that say that the expected difficulty in enforcing permit provisions nor the personality of the owner are not legitimate reasons for denial.

At this point, Ald. Brandel again moved denial of the petition, finding that the plans inappropriately propose to fill what once was a stream that feeds a pond that is a central feature of the neighborhood. The community, in his view, is dramatically affected by the proposal, but the project offers very little benefit to the community in return. While he agreed that asking for a 20-year deed restriction was too much, anything less than 10 years’ protection is too little. With an agreement between the petitioner and the neighborhood, he could support the project.

Ald. Hess-Mahan found the current revised design acceptable, and did not agree that it had adverse effects on the neighborhood. Ald. Albright agreed, and noted that there seems to be substantial, if not complete, agreement among the parties. But Ald. Merrill expressed support for the motion to deny. Ald. Yates agreed that the criteria for a special permit have not been met by this petition. Ald. Fischman asked about the by-right alternative development, and the petitioner referenced a plan that illustrated a development option at a lower grade with a very steep driveway. Ald. Sangiolo noted that, although the Board would not have the opportunity to add protections and conditions to a by-right plan, she felt the Conservation Commission would have a lot of involvement. She said she had requested the ConCom minutes to help understand their position, but has not received them. Ald. Coletti asked to see the findings on the last three grade change permits granted for homes on Kessler Way, suggesting that if the Committee had supported these, they should support the present request. Ald. Brandel replied that a major difference was that there were not an existing neighborhood affected by those grade changes, as the subdivision road that created the major change had already been built.

The vote on the motion to deny failed 3-5, with Ald. Brandel, Sangiolo and Merrill voting in favor.

Ald. Albright then moved approval, including site plan option A with lesser fill and a narrower driveway. She found that the grade change would have no adverse effects on abutters, the pond or the surrounding neighborhood; that all work will be inside the existing retaining wall, thus protecting kettle pond; that existing trees will be protected and maintained, complying with the Tree Preservation ordinance; and that drainage is appropriately designed for site constraints. She added a finding that there has been extensive work by the applicant with the neighborhood to modify the footprint and massing of the house to minimize its visual impact. She also included the conditions that the petitioner install granite curbs and a concrete sidewalk abutting the property, that there will be no site work or landscaping beyond the one-foot retaining wall without ConCom approval, that a final Construction Management Plan, Operations and Maintenance Plan and façade materials and colors, walls and fencing all be subject to staff approval, and finally that the petitioner has agreed not to seek any modifications to the plan for a minimum of five years.

Ald. Mansfield stated that although he would have greatly preferred to see an agreement between the petitioner and his neighbors at the conclusion of all the changes to the plan, and furthermore believed that it ultimately would be preferable if this site remained unbuilt, the option before the committee was clearly the best that can be expected. If he chose not to support this motion, the resulting recommendation of the Committee would be either a failure to deny or a failure to approve, neither of which he found to be an appropriate report to the Board. He advised the petitioner that 16 positive votes will be required to grant the special permit, and it is currently not clear that those votes will be forthcoming.

On the motion, the petition was approved by a vote of 5-3, Ald. Brandel, Sangiolo and Merrill voting nay.

#179-08 FB NEWTON PROPERTIES, LLC/FB NEWTON PROPERTIES c/o PARAGON PROPERTIES petition for SPECIAL PERMIT/SITE PLAN APPROVAL to demolish an existing retail/restaurant building and to construct a new building for retail/restaurant building with a basement and rooftop parking at 215-227 NEEDHAM STREET, Ward 5, on land known as Sec 51, Blk 28, Lot 8G, containing approx 70,837 sf of land in a district zoned MIXED USE 1. Ref: Special Permit #610-89, 30-24, 30-24(d)(5), 30-23, 30-21(b), 30-20(f)and (l), 30-19(h)(2) and (3), (j)b and 30-19(m) of the City of Newton.

ACTION: HELD 8-0

NOTE: The time to act on this petition was extended in July until 10/22/08. A detailed report on the public hearing and 8/12/08 working session has already been distributed. The discussion on the revised plans and conditions that had been submitted by the petitioner prior to this meeting did not begin until quite late in the evening, approximately 10:30 PM. The first matters considered this evening were regarding the traffic analysis, plans for improvements to the Tower Rd./Needham St. intersection, and for Needham St. itself. This discussion consumed considerable time, and the Chair also found that some of the revised plans had not come in soon enough to be fully reviewed by the Planning Department. In addition, questions about the site plans and circulation raised by Committee members led the project architect to provide further useful insight into how the vehicles and pedestrians would experience the site, but also led to additional questions.

As it approached midnight, it became clear that it would not be possible to act on this petition at this meeting, and the Committee developed a list of additional request for the 10/7 meeting. These included a request from Ald. Fischman for an analysis and cost estimate from McMahan Associates on the feasibility of an interim solution to the need for a traffic signal at Tower Rd., and a written recommendation from the Traffic Council or City Traffic Engineer on the intersection; a request from Ald. Yates for more detail on the sustainability of the building design, and a report from the Mayor and/or Planning Director on the status of previously approved 25% Needham St. plans (that Ald. Coletti contended had been rejected by the State); and a request from Ald. Coletti for a statement from the Fire Department on the adequacy of the fire suppression

system in the basement garage, as well as information from the petitioner on their security plans, lighting plan and snow removal plan. The chair also asked for comments from the attorney for the abutting property, Paragon Towers, on the recently-submitted revised Construction Management Plan.

The attorney for the petitioner reluctantly agreed to request an additional 2-week extension for Board action, until 11/5/08. The item was then held unanimously.

Further details on the discussion at this session will be included in the final report with the Committee's recommendation.

The meeting was adjourned at 11:55 PM.

Respectfully submitted,

George E. Mansfield, Chair