

We, the undersigned owners of land in Newtonville, Ward 2, Newton, MA under the provisions of Massachusetts General Law Chapter 40A, Section 5, hereby state our written protest to:

City Council Docket No. 95-17, a proposal for a change of zone to Mixed Use 4 for

- (i) all of the land located at 10-12 Washington Terrace, 6-8 Washington Terrace, 875 Washington Terrace, 867 Washington Street, 857-859 Washington Street, 845-855 Washington Street and 245-261 Walnut Street, also identified as Section 21, Block 29, Lots 11, 12, 17, 18, 19A, 20 and 21, Ward 2, currently zoned Business 1 and Business 2, and
- (ii) a portion of the land located at 16-18 Washington Terrace, 869 Washington Street, 861-865 Washington Street, 241 Walnut Street, 22 Bailey Place, 14-18 Bailey Place, and a private way known as Bailey Place, also identified as Section 21, Block 29, Lots 10, 13, 14, 16, 19, and 22, Ward 2, currently zoned Business 1, Business 2, and Public Use.

The proposed use of the site, a 5-story structure containing 46,000 square feet of retail store space and 160 apartments, is the same project that was the subject of a previous Petition (docket # 180-16) by the same developer. These abutters filed a Protest to that Petition that was determined to be effective under Chapter 40A, section 5 to require a three-quarters majority vote by the Newton City Council. After hearings before the Land Use Committee, the developer withdrew that Petition, stating that he did not have sufficient votes for approval. The newly filed Petition makes no changes in the development. Instead, it requests a zoning change for only a portion of the project, the only purpose of which is to circumvent the three-quarters majority requirement. Therefore, the new Petition is still subject to the neighbors' Protest under Chapter 40A, section 5.



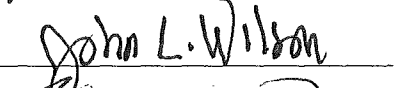

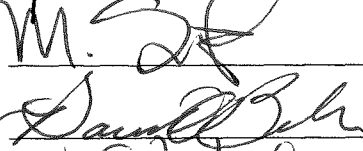

As abutters to the development, we renew our objections to the proposed zoning change. The Project is out of character with the adjacent residential neighborhood and business district in the village of Newtonville. The excessive size, height, and density of the proposed steel-frame development will erode the integrity of the abutting Newtonville Historic district (including structural damage to historic buildings), increase traffic and parking density, displace affordable housing, drive up residential and commercial rents, and radically undermine the village model on which Newton is based. The enclosed pages enumerate 11 reasons for our petition objecting to the request for special permits and rezoning.

RECEIVED
 Newton City Clerk
 2017 MAY 25 AM 11:16
 David A. Olson, Clerk
 Newton, MA 02459

Signature

Print Name

Newtonville Address

1.		Ellen Fitzpatrick	20 FOSTER STREET
2.		Mari Wilson	30 Foster Street
3.	John L. Wilson	John L. Wilson	30 FOSTER STREET
4.		Blanche Foz	16 Page Rd.
5.	Adel Foz	Adel Foz	16 Page Rd.
6.	Bette F White	BETTE A WHITE	14 Foster St.
7.	Ralph Abele	Ralph W. Abele	15 Page Rd
8.	Ellen Abele	Ellen Abele	15 Page Rd
9.	Robert H. Smith	ROBERT H. SMITH	40 Foster St.
10.	Elizabeth B. Smith	Elizabeth B. Smith	40 Foster St.
11.	Sudha Gray	SUDHA MAHESHWARI	118 Lowell Ave
12.	Garvin Shatkin	Garvin Shatkin	118 Lowell Ave.
13.	Kim Davis	Kim Davis	128 Lowell Ave.
14.	Jon Davis	Jon Davis	128 Lowell Ave.
15.		William R. Koss	142 Lowell Ave
16.	Francesca Koss	FRANCESCA KOSS	142 LOWELL AVE
17.	M. Smith	Meghan Smith	34 Foster St
18.		DAVID BELSON	34 FOSTER ST
19.		DAVID J. Smith	34 Foster St.
20.			
21.			

Abutters' Reasons for Protesting Newton City Council Petition #95-17

1. Size and Height of the Development out of Character with Village Concept

The current municipal plan, evidenced by the existing zoning districts and described on the Municipal web site, is to maintain Newton as a city of 13 villages. Current zoning in this area allows for two stories, and we believe this development and zoning plan is sound. The 5-story plan of the Washington and Walnut Street development and lack of setbacks from the street are entirely out of line with the scale of the rest of the village, which is predominantly one- and two-story buildings. In the 1960s, the village of Newton Corner was stripped of its human-scale village character by over-sized and ill-designed developments, while in contrast, Newton Center—despite being the largest village in Newton—has maintained a village character due to the modest size and scale of its buildings. We are concerned that the height, size, and scale of the Washington Street development will lead Newtonville down the path to becoming the next Newton Corner.

2. Lack of Buffer Zone to Protect Adjacent Newtonville Residential Historic District

The abutting Local Historic District on Foster Street, Lowell Ave. and Walnut Street are in an MR1 zone. Rezoning the Washington Street parcel to MU4 would provide no transitional area between the site and the residential MR1 zone. Furthermore, the density, aesthetic design, scale and massing of the proposed development and the area's rezoning as a MU4 fundamentally undermines and compromises the integrity of the abutting Newtonville Local Historic District which the Board of Aldermen itself recognized as worthy of historic preservation in its 2002 creation of the Local Historic District. As the City of Newton's own Historic Preservation Guidelines states: "By formally recognizing the area, the City clearly acknowledged the historical significance and architectural integrity of the area contained within the boundaries of the Newtonville Historic District. The Newtonville Historic District has an intact historic fabric with a variety of styles representative of its primary period of growth and development as a streetcar suburb of Boston. The study which formed the basis of the historic designation describes the cohesive nature of the neighborhood resulting from the overall massing, scale, lot size, setbacks and craftsmanship of its buildings." Although the proposed Washington Street development does not fall within the local historic district, it shares an immediate boundary with the district. On its own questionnaires to builders, the city asks if a project is within 150 feet of a historic district, thus clearly acknowledging that adjacent historic properties are worthy of protection from new building. Not only will the Washington Street development level buildings which the City's Historical Commission has declared to be "preferably preserved," the proposed structures will literally overshadow and irrevocably alter the character of the immediately adjoining historic neighborhood. Such a decision would thereby diminish "the cohesive nature of the neighborhood" that the City itself deemed worthy of preservation in 2002.

3. Potential for Site Construction to Cause Structural Damage to Historic Dwellings

More information is necessary about the effects of pile-driving construction and digging an underground garage upon the structural integrity of surrounding homes. Pile-driving will most definitely cause property damage to adjacent 19th-century fieldstone foundation homes that are structurally sensitive to vibrations. Damaged historic windows, foundations, plaster walls and ceilings are prohibitively costly to replace "in kind" or indeed impossible to replace, and not necessarily covered by homeowner's insurance. Damage caused by pile-driving occurred to sewer pipes, foundations, and walls in homes near construction of the Atrium in Chestnut Hill and near Newton North High School, and similar damage is certain to occur to homes near the

Washington Street project. The abutters should not be held financially responsible for this damage to our homes, but efforts should also be made to prevent such damage from occurring in the first place. Most importantly, the construction will erode the integrity of historic buildings that are theoretically protected by the city-approved historic district.

4. Traffic Impact and Site Access

A credible study of traffic impacts has not been done. The intersection of Washington & Walnut is not designed to accept the additional volume of traffic required to support the new construction and large commercial businesses, nor is the intersection of Washington & Lowell. Walnut Street between Washington Street and Newton North High School is a crowded north/south traffic conduit and may need redesign to deal with the increased traffic as well as significant pedestrian population going to the commuter rail and high school.

The access to and from the site is not designed to provide for traffic to return north on Walnut Street and east on Washington Street. This lack of design capability will increase traffic and vehicle speed on nearby residential neighborhood streets, including Foster Street, Page Road and Lowell Avenue. Because the site access on Walnut Street is within 100 feet of the busy intersection at Walnut and Washington Streets, northbound traffic trying to turn left into the site will likely have a negative impact upon the functioning of the intersection. Current southbound traffic on Walnut Street is routinely backed up to Page Road and Turner Street, and this development could significantly push that backup all the way to Watertown Street. Traffic congestion will impact the intersections of Walnut and Commonwealth, Watertown, and Cabot Streets, as well as Washington and Crafts Street. A thorough, reputable traffic study must include impacts on traffic lights at least one light away from the immediate project area. All Newton residents and workers who drive through Newtonville will be impacted by the increased traffic congestion caused by the difficulties of the site access.

5. Lack of Adequate Parking

The developer is asking for numerous waivers for parking when it is still unclear whether his major commercial tenants will be restaurants, retail, or a health club, all of which have different parking projections. The current request for 1.25 spots per housing unit is also clearly insufficient. This parking insufficiency is likely to cause spillover into adjacent streets such as Lowell Avenue which is dangerously narrow when cars are parked on both sides of the street. This parking insufficiency may be particularly acute in winter due to snow piles and the overnight parking ban on city streets. The parking waiver request also does not take into account the fact that 12 – 15 of the parking spaces on Washington Street between Lowell and Walnut Streets are frequently filled with delivery trucks of the US Postal Service.

6. No Increase in Affordable Housing in Newtonville

Approximately 24 units of affordable apartments are being displaced by the project, and the percentage of affordable units (15%) planned in the development will barely replace those units. The project does not, as it suggests, significantly add to the number of units available to our lowest income residents.

7. Need for an Economic Impact Report concerning Commercial and Residential Rent

The high rents in the new development have the potential to drive up local rent prices, thereby decreasing the stock of naturally occurring affordable housing in Newtonville and altering the makeup of the village population. Rezoning the 'Washington Place' site to MU4 would result in changing the character of the business district on Washington and Walnut Streets, which is currently populated by independently owned businesses. The high rents in the development may

drive up prices of commercial rent in the adjacent business district and push out small businesses in Newtonville, thus further altering the character of the village. For a development this large, the City Council should request a study of the economic impact upon rents in the village and environs.

8. Lack of a Thorough Review of Environmental Effects of the Project

The developer of a project of this magnitude should be required to produce an environmental impact review, but none has been conducted. Since the project will demolish a gas station, the ground ought to be studied for gasoline contamination. Digging for an underground garage may affect rock ledges or ground water tables, so those environmental impacts should be assessed to determine that there is no significant adverse impact on the environment.

9. Noise, Lighting, and Other Disturbances to Abutters

The residential abutters would be subjected to escalating traffic, noise, lighting and density impacts which would violate Newton's Zoning Ordinance for an MR1 district. Nighttime lighting of the parking lot and apartment buildings will disturb residential abutters on Foster Street, whose bedrooms directly overlook the site. Constant traffic going in and out of the site will create noise and air pollution that will disturb local residents of homes a few feet away from the two site exits/entrances. Noise of construction and commercial activity (such as truck deliveries in early morning) and displacement of rodents during construction will also negatively affect abutters.

10. Possible Impact on Other Municipal and State Services

160 new apartments will have a financial impact on city services, such as schools and waste removal, and will increase ridership on MBTA bus and commuter rail lines, but no details have been forthcoming about impacts on these services. It is reasonable to expect that sizeable numbers of children will reside in the Washington Street development, a fact which must be taken into consideration when projecting enrollments and ensuring adequate staff and classroom space at Horace Mann (soon to be Carr), Day Middle, and Newton North. The current Carr School Use plan does not mention the potential addition of these new students.

11. Unknown Effects of 2 Other High-Density Developments in Newtonville

A 36-unit development on Court Street and a 68-unit mixed-use development on Austin Street with 5000 square feet of commercial space were approved in 2015. The effects of these projects on Newtonville's traffic congestion, parking demand, and school enrollment are unknown. It would be misguided for the city to consider rezoning the 'Washington Place' site at this time before the impacts of these other high-density developments can be registered and felt.

RECEIVED
Newton City Clerk

2017 MAY 25 AM 11:16

David A. Olson, GMC
Newton, MA 02459

May 24, 2017

BY EMAIL: oyoung@newtonma.govOuida C.M. Young, Esq.
Deputy City Solicitor
Newton City Hall
1000 Commonwealth Ave.
Newton Centre, MA 02359

Re: Protest to rezoning Petition #95-17, Orr Block, Newtonville

Dear Ouida:

Attached is the renewed Protest to the rezoning of the dozen or so parcels of land in Newtonville on Bailey Place, Washington Street, Washington Terrace and Walnut Street known as the "Orr Block" that are the subject of Petition #95-17 submitted by Mark Newtonville, LLC. (5/17/17 Neighbors Protest, attached hereto) The Protest itself, which has or will soon be filed with the City Clerk's Office, contains a statement of reasons. This letter articulates the legal basis for requiring a three-quarters supermajority vote for the new rezoning petition, as was required by the original protest.

Your memo dated January 11, 2017, ruled that the prior protest against the original project successfully invoked the supermajority vote requirement of G.L. c. 40A, s. 5. By letter dated September 12, 2016, the City Clerk also found that the original protest succeeded in requiring the three-quarter vote. (9/12/16 Clerk's Ruling, attached hereto) As an initial matter, this renewed Protest has been signed by nearly all of the same signatories as the original protest, and includes nearly all of the same statement of reasons. So, the Protest itself is much the same as the first time around.

Similarly, the project itself has not changed. As the Planning Department's Public Hearing Memorandum for this project stated, Applicant's new Petition is "largely unchanged from the previous project with the exception of the zoning change request." (4/28/17 Memo, at 2 of 11) The revised Petition seeks to rezone to MU-4 only the 2.13 acre (92,907 square foot) portion of the parcel on which the buildings would sit; the remaining .71 acre (31,049 square feet) would stay zoned BU1 or BU2. As the Planning Department notes, this change increases the density from a FAR of 1.92 to 2.49, and lot area per unit from 725 to 581 square feet. (*Id.*) In addition to the 20-30% increase in density (depending on whether you compare increased FAR or decreased lot area per unit), "[t]his rezoning creates a split lot, dividing the lot into two separate zoning districts," which may be unprecedented in the City of Newton. (4/4/17 Zoning Memo, at 2)

The new northerly boundary of the revised Petition would shift the portion of the Orr Block to be rezoned to as much as 90.1 feet and as little as 37.64 feet from the property line. (3/30/17 Surveyor's Metes and Bounds Description and Plan, attached hereto) Applicant's artful effort to defeat the Protest by creating a so-called "buffer zone" should be rejected. Nothing in the Newton Zoning Ordinance supports the creation of an artificial division within a project and calling it a "buffer zone". As you know, the City has never before dealt with a similar effort to defeat an otherwise valid Protest, and no Massachusetts court has yet squarely addressed this issue.

The term "buffer" is not defined in the Newton Zoning Ordinance ("NZO"), but references to that term in specific provisions may be instructive. For example, the intent clause of the ORD (Open Space/Recreation District) refers to "buffers" "to separate and screen incompatible uses." (NZO 2.1 2.E) Similarly, although c. 40A, s. 5 does not define "buffer", by analogy section 9B of that same chapter authorizes municipalities to enact zoning bylaws or ordinances to establish "buffer zones" adjacent to solar energy systems. G.L. c. 40A, s. 9B. Consistent with the NZO and c. 40A, a buffer or buffer zone is intended as a setback between different, incompatible uses.

The 37'-90' buffer proposed in the revised Petition does not fit this zoning concept of a buffer zone. The new line has been transparently drawn around the buildings in order to reap the density bonus accorded under MU-4. The 37'-90' area of roadway and parking lot is not the kind of open space designed to ease the transition between uses of differing intensity. To the contrary, the area behind the buildings where no zoning change is proposed remains an integral part of the Project and contains some of the most negative impacts on the neighbors: it includes the only entrances and exits for vehicles to the property and a two-lane road at the very northern edge of the property on which vehicles will travel to the 108 ground level parking spaces and the 243 underground parking spaces. Moreover, special permit relief has been requested for both the rezoned portion of the lot as well as the buffer strip, which further demonstrates the interrelatedness of the two areas. A true buffer zone would stand alone independent of the rezoned use and shift these incompatible uses away from the residential properties.

The end of your January 11, 2017, Memo references a zoning treatise by Rohan, who cites cases outside Massachusetts in which buffer zones defeated zoning protests. That was the starting point of my research. The few buffer zone cases from outside Massachusetts do not control because most involved a statute distinct from c. 40A, s. 5 that incorporated a specific distance that was satisfied by the rezoning petition. There is one case, Herrington v. County of Peoria, 11 Ill. App. 3d 7 (1973) (attached hereto), that provides an analytical roadmap for evaluating the effect of a buffer strip on a rezoning protest.

In Herrington, the Illinois appeals court reversed a trial court judgment allowing a parcel of agricultural land to be rezoned for an auto race track. The developer omitted from its rezoning petition three 30-foot strips of land along three sides of the parcel in an apparent effort to defeat plaintiffs' protest. The Appeals Court ruled that allowing such a buffer strip to defeat an otherwise successful zoning protest "would be at a variance with the purpose and spirit of the law." Id. at 12. The Herrington decision considered a number of factors, including:

- “Will the use of the unincluded property be related to and dependent upon the proposed use of the described property?”
- May the described property be used in accord with its altered zoning classification independent of and without regard to the use of the intervening area?” Id.

The answers to these questions in Herrington are the same in this instance. As mentioned above, the third of an acre carved out of the zoning change would be used as a roadway for access to surface and underground parking, loading docks and trash collection to support the retail businesses and residential units that are an integral part of the development project. Just as in Herrington, where the 30 foot wide buffer strip was also to be used as an access road, the proposed uses on the rezoned land and unchanged buffer strip are “mutually dependent and related”. Id. Allowing a buffer strip where the use is mutually dependent and related to the use on the rezoned parcel would undermine the purpose of the protest statute: “the purpose of the statute is not served if a protest of near-by owners can be prevented merely by not including a buffer strip from the rezoning petition.” Id., at 13.

Other cases in which a true buffer zone effectively defeated a rezoning protest turn on differences in the language of the protest statute. North Carolina’s protest statute, for example, triggers a supermajority vote requirement for a zoning change when at least 20% the owners of “either of the area of the lots included in such propose change, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending one hundred feet therefrom.” N.C.G.S. s. 160-176. The Massachusetts protest statute includes the same 20% requirement, and the “immediately adjacent” language, but the depth of the Protest Corridor in Massachusetts extends 300 feet, not just 100 feet as in North Carolina.

Three cases from the North Carolina Supreme Court invalidated zoning protests where the buffer zone extended beyond the protest corridor. In Heaton v. City of Charlotte, 277 N.C. 506 (1971) (attached hereto), a timber company asked to rezone some 43 acres of a 112 acre tract of land for residential development. The Court ruled plaintiffs protest invalid, based on two prior cases, because the rezoned portion of the tract was beyond the hundred foot buffer zone: “We therefore hold that in order for plaintiffs to invoke the provisions of G.S. s. 160-176 they must own twenty percent of more of the area extending 100 feet from the rezoned tract. Plaintiffs do not own lots in such area because of the 100 foot buffer zone.” Id. at 527.¹

¹ See also Penny v. City of Durham, 249 N.C. 596 (1959) (same where 150 foot buffer zone); Armstrong v. McInnis, 264 N.C. 616 (1965) (same where 101 foot buffer zone); accord St. Bede’s Episcopal Church v. City of Santa Fe, 85 N.M. 109 (1973) (same where 100 foot buffer zone); Pfaff v. City of Lakewood, 712 P.2d 1041 (CO App. Ct. 1985) (same where 100 foot buffer zone); Schwarz v. City of Glendale, 190 Ariz. 508 (1997) (similar where 160 foot buffer zone satisfied 150 foot protest corridor); Eadie v. Town Bd. of N. Greenbush, 22 A.D. 3d 1025 (NY App. Div. 2005) (same where 100 foot buffer zone); Ryan Homes v. Mendon Town Bd., 7 Misc.3d 709 (2005) (same where 101 foot buffer zone satisfied 100 foot protest corridor).

Notably, the North Carolina protests did not turn on the “immediately adjacent” language, which is similar in both statutes. It was based on the fact that the 100 foot buffer zone put protester’s properties beyond the 100 foot protest corridor under the NC statute. Under the reasoning of Heaton and the other similar cases, a buffer zone in Massachusetts may successfully defeat a rezoning protest only if it were 300 feet, which is the applicable protest corridor in Massachusetts. The issue is not what size buffer effectively mitigates adjacent properties from the rezoned land. This issue is simply whether, as in Heaton, the buffer zone includes the entire protest corridor, which obviates the need for a supermajority vote because the concerns of the protest statute have been satisfied. In fact, Herrington distinguished Heaton on precisely this basis. Herrington, 11 Ill. App. 3d at 13.

As a matter of good zoning, and consistent with Herrington and Heaton, it makes no sense to split a lot into different zones where the uses on each part of the same lot are mutually dependent, where both the unchanged and rezoned areas require zoning relief, and where the buffer strip is only a small portion of the protest corridor. That is precisely the unprecedented action Applicant seeks in this Petition for the sole purpose of circumventing a previously successful Protest. This transparent subterfuge should be rejected.

Considerations of fairness and the statutory purpose of c. 40A, s. 5, also support a rejection of the developer’s subterfuge strategy. The statute is designed to protect the interest of property owners in the stability and continuity of zoning regulations and to assure them an opportunity to voice their objections and to require increased scrutiny and support for zoning changes. At the public hearings on the prior Petition, objections were raised by several City Councilors that the project was too large and had negative impacts on the surrounding neighborhood. The developer publicly conceded that he did not have sufficient support to approve the project under the three-quarters majority required by the successful Protest. Rather than modifying the project in response to those concerns to gain more support, he is instead trying to use the artifice of divided zoning for the project to change the voting rules. This is unfair to the neighbors and disrespectful of the salutary purpose of c. 40A, s. 5, as well as unwarranted and unprecedented in Newton and in Massachusetts.

We ask that you opine to the City Council that this renewed Protest, like the original, effectively invokes the provisions of G.L. c. 40A, s. 5 that require a three-quarter supermajority vote to pass the rezoning Petition. I would welcome the opportunity to discuss this further.

Very truly yours,

/s/

Dennis A. Murphy

cc: David A. Olson, Newton City Clerk
Stephen Buchbinder, Esq.
Michael E. Scott, Esq.
Robert H. Smith, Esq.