

THE
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January 12, 2017

SENT VIA EMAIL TO:
nkhan@newtonma.gov
AND IN-HAND TO

Marc C. Laredo, Chairman
The Land Use Committee
City of Newton
1000 Commonwealth Ave.
Newton Center MA 02459

Re: Petition Nos. 180-16(2) and 179-16

Dear Chairman Laredo:

Please be advised that this office represents Patrick J. Slattery and the P&K Realty Trust II. Mr. Slattery owns the property known as and numbered 227 Walnut Street in Newton. His property is a direct abutter to the properties commonly referred to as the “Orr Block” in Newtonville upon which the developer, Mark Newtonville LLC, seeks (i) a zoning change, and (if approved) (ii) several special permits, as well as (iii) site plan approval, to construct the development known as “Washington Place.” The Trust owns the property known as and number 221 Walnut Street in Newton. Its property lies within 300 feet of the “Orr Block,” and is an abutter to an abutter to the project site.

Both Mr. Slattery and the Trust have several concerns about the proposed zoning change, Mark Newtonville LLC’s application for special permits, and its request for site plan approval. These concerns are set forth below. Respectfully, Mr. Slattery and the Trust ask that the Land Use Committee publicly address them before issuing any recommendation to the Newton City Council on this significant zoning matter.

I. Slattery/Trust Concerns Over the Proposed Zoning Change

The “Orr Block” upon which Mark Newtonville LLC proposes to construct Washington Place consists of approximately 2.85 acres of land on the north side of Washington Street between Walnut Street and Washington Terrace in Newtonville. Presently, it is zoned Business 1 and Business 2. This designation restricts the property to commercial uses with limited exceptions. However, as the developer wants to include upwards of 170 residential units as part of a mixed-use development, Mark Newtonville LLC has sponsored a proposed zoning change

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that would transform the Orr Block's zoning designation to "Mixed Use 4." If approved, this change would allow the developer to apply for special permits that would sanction a mix of commercial and residential uses only at this specific location. See Zoning Ordinances at §§ 4.2.1.C and 4.2.2.B. Should this occur, the City of Newton would be providing Mark Newtonville LLC with a significant economic advantage over other property owners in Newtonville, including Mr. Slattery and the Trust.

On its face, this proposed zoning change appears to constitute impermissible "spot" zoning. Impermissible spot zoning occurs when there is "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot."¹ See e.g., *Whittemore v. Bldg. Inspector of Falmouth*, 313 Mass. 248, 249 (1943). Here, the proposed zoning change looks to single out the Orr Block for different treatment (i.e. mixed-use development) in order to provide a singular economic advantage to one private property owner (i.e. Mark Newtonville LLC). If so, it falls squarely within the definition of impermissible "spot" zoning. See *Whittemore*, 313 Mass. at 249. Therefore, Mr. Slattery and the Trust respectfully ask the Land Use Committee to publicly address this concern as part of its ongoing assessment of the proposed zoning change.

Mr. Slattery and the Trust also petition the Committee to publicly address their concern that the proposed zoning change may constitute impermissible "contract" zoning. This occurs when a municipality promises to rezone a property in exchange for a payment made by the person or entity seeking the rezoning. Here, there is an appearance that the City of Newton is agreeing to change the zoning designation for the Orr Block to Mixed Use 4 for Mark Newtonville LLC in exchange its payment of approximately \$1 million to the City. While this may not be the case, Mr. Slattery and the Trust respectfully ask that the Land Use Committee publicly address this concern at its next hearing.

II. Slattery/Trust Concerns Over the Proposed Special Permits²

On the presumption that the zoning change will be approved, and the Orr Block will be rezoned to Mixed Use 4, Mark Newtonville LLC has applied for several special permits "to construct a mixed-use development consisting of three buildings with heights up to 60 feet and 5-stories incorporating 171 residential units, approximately 40,000 square feet of commercial space and 346 parking spaces." See Continue Public Hearing Memorandum of Barney Heath, Director of Planning and Development, dated January 6, 2017. These special permits are required because the proposed development is in a mixed-use district of 20,000 square feet or more. See Zoning Ordinance at § 4.2.2.B.

¹ "Spot" zoning analysis is warranted even where several properties are singled out for different treatment from that accorded to similar surrounding lands indistinguishable from them in character, all for the economic benefit of the owners of those lots. See *Canteen Corp.*, 4 Mass. App. Ct. at 289.

² Mr. Slattery and the Trust oppose all attendant waivers sought by the developer or attached to this project.

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The criteria for when the Board of Aldermen may grant a special permit in a mixed-use district is set forth in § 7.3.3 of the Zoning Ordinance. It provides as follows:

7.3.3 - Grant of Permit

- A. A special permit from the Board of Aldermen for any purpose for which a permit is required under this Chapter shall be granted only by 2/3 vote of all the Board of Aldermen.
- B. The Board of Aldermen may grant a special permit when, in its judgment, the public convenience and welfare will be served, and subject to such conditions, safeguards and limitations as it may impose.
- C. The Board of Aldermen shall not approve any application for a special permit unless it finds, in its judgment, that the use of the site will be in harmony with the conditions, safeguards and limitations of this Sec. 7.3, and that the application meets all the following criteria:
 - 1. The specific site is an appropriate location for such use, structure;
 - 2. The use as developed and operated will not adversely affect the neighborhood;
 - 3. There will be no nuisance or serious hazard to vehicles or pedestrians;
 - 4. Access to the site over streets is appropriate for the types and numbers of vehicles involved; and
 - 5. In cases involving construction of building or structures or additions to existing buildings or structures, if those proposed buildings or structures or additions contain individually or in the aggregate 20,000 or more square feet in gross floor area, the site planning, building design, construction, maintenance or long-term operation of the premises will contribute significantly to the efficient use and conservation of natural resources and energy.
- D. The Board of Aldermen shall not approve any application for a special permit *unless* it finds that said application complies in all respects with the requirements of this Chapter. In approving a special permit, the Board of Aldermen may attach such conditions, limitations, and safeguards as it deems necessary to protect or benefit the neighborhood, the zoning district and the City. Such conditions may include, but are not limited to, the following:
 - 1. Requirement of front, side or rear yards greater than the minimum required by this Chapter;

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2. Limitation of the number of occupants, size, method of time of operation, or extent of facilities; and
3. Requirement of off-street parking or other features beyond the minimum required by this, or any other applicable Chapter.

In this case, Mr. Slattery and the Trust maintain that Mark Newtonville LLC has failed to demonstrate that the proposed development satisfies all of the requirements of § 7.3.3 of the Zoning Ordinance, and therefore the Board of Aldermen would be precluded under § 7.3.3.C from granting it the special permits it seeks.

First, the existing project site is not an appropriate location for the proposed development. As discussed above, it is not presently zoned for the mixed-use project that the developer has proposed. Regardless of this fact, however, the Orr Block is also not an appropriate location for the proposed development because the project appears to unlawfully appropriate a public way (i.e. Bailey Place) in the project locus. Once duly laid out, a public way like Bailey Place continues to be such until legally discontinued. *See Preston v. Newton*, 213 Mass. 483 (1913). Chapter 82 of Massachusetts General Laws governs the discontinuance of public ways in cities. These statutory procedures are the exclusive methods for discontinuing a public way in Massachusetts. *See Mahan v. Town of Rockport*, 287 Mass. 34, 37 (1934) (“A town way may be discontinued by vote of the town and not otherwise.”), citing M.G.L. c. 82, § 21. In this case, however, there has been no vote of the City Council to discontinue Bailey Place.³ Accordingly, it continues to be a public way that divides the proposed development site and renders the Orr Block an inappropriate location for the proposed development.

Second, the proposed development will adversely affect the Newtonville Historic District. Not only is the density of this project simply too much for it to absorb, the project design itself is not in harmony with surrounding buildings and structures comprising the Newtonville Historic District. Moreover, there is no transition space between the project site and this historic district. Taken together, these factors significantly detract from the quality of neighborhood and will decrease the value of surrounding homes. As such, Mr. Slattery and the Trust ask this Committee to require Mark Newtonville LLC to submit a new design for the project that is more appropriate and complimentary to the character of the Historic Newtonville District.

Third, the current parking and roadway layout identified by the developer on the most recent site plan will create a nuisance to Mr. Slattery and the Trust for several reasons. As an initial matter, the developer has not sufficiently explained how it will control and minimize noise, dust and odors generated by vendor deliveries to and garbage removal from the project site. Furthermore, the developer has also not addressed the issue of snow removal on the project

³ Even if such vote were to occur, and the discontinuance of Bailey Place as a public way was approved, the issue then arises as to the City’s proper disposition of the real property that formerly comprised that public way – which, as you know, must be done in compliance with the Uniform Procurement Act (i.e. M.G.L. c. 30B).

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site. This will undoubtedly require the use of trucks, bobcats and snow blowers, which cause loud noises and create a nuisance for abutting property owners. To minimize the adverse impact of these activities, Mr. Slattery and the Trust request that the developer be precluded from accepting any deliveries to the project site, removing trash therefrom, and utilizing any snow removal equipment on the north side of the project area after 10:00 pm and before 7:00 am.

In addition, it can reasonably be anticipated the parking needs of residents and visitors to the project site will spill-over onto Walnut Street. This will significantly reduce available parking on this road. To minimize this impact, Mr. Slattery and the Trust ask that the Committee recommend that the two (2) hour on-street parking restriction that presently exists on Walnut Street be preserved.

Fourth, access to the project site using the proposed Walnut Street entrance that abuts Mr. Slattery's property is inappropriate. The roadway is simply too narrow to allow for the safe passage of vehicles along the north side of the project site. The inability of cars and trucks to navigate this access point will create safety and traffic problems on Walnut Street, and generate significant traffic-related noise and hazards in front of and adjacent to Mr. Slattery's property. Therefore, Mr. Slattery and the Trust request that the developer revise the site plan to either remove this proposed access point on Walnut Street (as was the case in the original plan), or redesign the roadway to make it more harmonious and conducive to the health welfare and safety of all abutters

Given the requirement under § 7.3.3 of the Zoning Ordinance that an applicant satisfy all of the criteria set forth in § 7.3.3.C (1 to 5), and the shortcomings identified above, this Committee should recommend that the Board of Aldermen deny the special permits that Mark Newtonville LLC seeks. In the alternative, it should recommend that the Board attach the necessary conditions, limitations, and safeguards discussed here to protect the neighborhood, the Newtonville Historic District, and our clients' properties.

III. Slattery/Trust Concerns Over the Proposed Site Plan

Also on the presumption that the zoning change will be approved, and the Orr Block will be rezoned to Mixed Use 4, Mark Newtonville LLC has applied for site plan approval. The purpose of site plan approval is "to protect the health, safety, convenience and general welfare of the inhabitants of the City by providing for a review of plans for certain proposed uses and structures in order to better control potential impacts on traffic, parking, municipal and public services, utilities, and environmental quality in the City, to administer the provisions of this Chapter and to ensure that the proposed uses and structures will be located, designed and constructed in a manner which promotes the appropriate use of land and upholds the purposes and objectives set forth in Section 2A of Chapter 808 of the Acts of 1975." See Zoning Ordinance at §7.4.1.

To accomplish this goal, § 7.4.5 of the Zoning Ordinance sets forth the procedure for site plan review and approval. It provides as follows:

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B. When conducting a site plan approval, the Board of Aldermen shall consider the application in light of the following criteria.

1. Convenience and safety of vehicular and pedestrian movement within the site and in relation to adjacent streets, properties or improvements, including regulation of the number, design and location of access driveways and the location and design of handicapped parking. The sharing of access driveways by adjoining sites is to be encouraged wherever feasible;
2. Adequacy of the methods for disposal of sewage, refuse and other wastes and of the methods of regulating surface water drainage;
3. Provision for off-street loading and unloading of vehicles incidental to the servicing of the buildings and related uses on the site;
4. Screening of parking areas and structures on the site from adjoining premises or from the street by walls, fences, plantings or other means. Location of parking between the street and existing or proposed structures shall be discouraged;
5. Avoidance of major topographical changes; tree and soil removal shall be minimized and any topographic changes shall be in keeping with the appearance of neighboring developed areas;
6. Location of utility service lines underground wherever possible. Consideration of site design, including the location and configuration of structures and the relationship of the site's structures to nearby structures in terms of major design elements including scale, materials, color, roof and cornice lines;
7. Avoidance of the removal or disruption of historic resources on or off-site. Historical resources include designated historical structures or sites, historical architectural elements or archaeological sites; and
8. Significant contribution to the efficient use and conservation of natural resources and energy for projects proposing buildings, structures, or additions to existing buildings or structures, if those proposed buildings, structures, or additions contain individually or in the aggregate 20,000 or more square feet in gross floor area.

C. The Board of Aldermen may condition approval of a site plan submittal in a manner consistent with the objectives set forth in these criteria.

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To accomplish the stated purpose of site plan review, this Committee should recommend that the Board of Aldermen condition their approval of the developer's site plan so that the objectives expressed in § 7.4.5.B (1 to 8) of the Zoning Ordinance are attained. To do that, several revisions to the existing site plan are necessary to better control potential adverse impacts that the proposed development will have on Mr. Slattery's and the Trust's properties.

First, the developer should be required to revise the existing site plan to ensure the convenience and safety of vehicular and pedestrian movement in relation to Mr. Slattery's and the Trust's properties. See Zoning Ordinance at § 7.4.5.B(1). To accomplish this, Mark Newtonville LLC must eliminate of the access driveway on Walnut Street. It should also be required to situate the nearest building on the project site at least ninety (90) feet from Mr. Slattery's lot line in order to create a uniform perimeter for all north side abutters.

Second, the existing site plan must be revised to provide better screening for vehicles exiting the on-site underground parking garage from Mr. Slattery's adjoining property. See Zoning Ordinance at § 7.4.5.B(3). As presently proposed, the garage ramp to that underground parking area includes a system of flashing lights and audible bell warnings that will be triggered each time a vehicle exits the garage. Furthermore, the headlights of vehicles exiting the underground garage at night and during the early morning hours will glare directly into the carriage house on Mr. Slattery's property. Such conditions are simply unacceptable. Accordingly, to protect the health, safety, convenience and general welfare of Mr. Slattery and the inhabitants of the carriage house, Mark Newtonville LLC must relocate the underground parking garage to a more appropriate and less harmful location to satisfy the requirement of § 7.4.5.B(3).

Third, the developer should be required to revise the site plan to provide better screening of the parking areas and structures on the project site from Mr. Slattery's adjoining property. This can be done by requiring Mark Newtonville LLC to include trees along the entire the north side the project area – including along the lot line with 227 Walnut Street. Only after the developer modifies its proposed site plan to reflect each of these changes should this Committee recommend that the Board of Aldermen grant site plan approval to it for the project.⁴

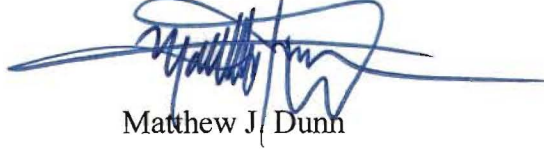
Conclusion

It is Mr. Slattery's and the Trust's sincere hope that the concerns raised in this letter will be adequately addressed by the developer, this Committee or the Board, and ultimately incorporated into the final recommendation, zoning amendment, special permits and site plan. In the event that they are not, however, then Mr. Slattery and the Trust reserve their right to (i) contest the validity of the proposed zoning change pursuant to M.G.L. c. 240, § 14A, and (ii) seek judicial review of the special permits and site plan approval under M.G.L. c. 40A, § 17.

⁴ Section 7.4.5.B(7) requires the Board to consider the developer's removal or disruption of historic resources on or off-site. In this case, the existing site plan calls for the removal of at least three (3) historic buildings from the project site and the disruption of the Newtonville Historic District (see p. 4 *supra*). Accordingly, these factors also warrant further consideration from this Committee in formulating its recommendation to the City Council.

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Very truly yours,

A handwritten signature in blue ink, appearing to read "Matthew J. Dunn", with a long horizontal flourish extending to the right.

Matthew J. Dunn

MJD

Cc: clients (via email)
Stephen J. Buchbinder, Esq. (via email)