HILL LAW

May 24, 2017

BY EMAIL: oyoung@newtonma.gov

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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.