



**City of Newton, Massachusetts**  
Department of Planning and Development  
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#135-18

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Ruthanne Fuller  
Mayor

Barney S. Heath  
Director

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## **PUBLIC HEARING MEMORANDUM**

Public Hearing Date:	March 6, 2018
Land Use Action Date:	May 8, 2018
City Council Action Date:	May 21, 2018
90-Day Expiration Date:	June 4, 2018

DATE: March 2, 2018

TO: City Council

FROM: Barney Heath, Director of Planning and Development  
Jennifer Caira, Chief Planner for Current Planning  
Neil Cronin, Senior Planner

SUBJECT: **Petition #135-18**, for SPECIAL PERMIT/SITE PLAN APPROVAL to amend Board Order #190-12(3) to restructure conditions pertaining to inclusionary zoning at **429 Cherry Street**, Ward 3, West Newton, on land known as Section 33, Block 12, Lot 12, containing approximately 13, 398 sq. ft. of land in a district zoned Business Use 1. Ref: §7.3.3, and §7.4, of Chapter 30 of the Newton Revised Zoning Ordinance, 2015.

The purpose of this memorandum is to provide the City Council and the public with technical information and planning analysis which may be useful in the special permit decision making process of the City Council. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Land Use Committee of the City Council will want to consider in its discussion at a subsequent Public Hearing/Working Session.



**429 Cherry Street**

## **EXECUTIVE SUMMARY**

The property located at 429 Cherry Street consists of a 13, 398 square foot lot improved with a two-story structure formerly occupied by the Newton Community Service Center. The property is located in the Business Use 1 (BU-1) zone in West Newton. The petitioner received a special permit (Board Order #190-12(3)) to demolish the existing structure construct a three-story mixed-use building incorporating 13 residential units and first-floor office space (**Attachment A**). The petitioner is required to provide inclusionary zoning units due to the total number of units in the development. Inclusionary zoning units require a three-step approval process involving the City and the Department of Housing and Community Development (DHCD). Board Order #190-12(3) required the petitioner to complete all steps prior to the issuance of a building permit. The petitioner requests to restructure certain of those steps; therefore, the petitioner requires an amendment to the Board Order #190-12(3).

The Planning Department consulted with DCHD for best practices to ensure inclusionary units are provided in accordance with DHCD and the Department of Housing and Urban Development (HUD) guidelines, and ultimately, be eligible to be listed on the Subsidized Housing Inventory (SHI). Staff believes the Council Order can be amended while still requiring the petitioner to complete the certification process in accordance with DHCD and HUD guidelines.

### **I. SIGNIFICANT ISSUES FOR CONSIDERATION**

When reviewing this request, the Council should consider whether:

- The specific site is an appropriate location for the proposed modifications to Board Order #190-12(3). (§7.3.3.C.1.)
- The proposed modifications to Board Order #190-12(3) will adversely affect the neighborhood. (§7.3.3.C.2.)
- The proposed modifications to Board Order #190-12(3) will create a nuisance or serious hazard to vehicles or pedestrians. (§7.3.3.C.3.)
- Access to the site over streets is appropriate for the types and numbers of vehicles involved. (§7.3.3.C.4.)

### **II. PROJECT DESCRIPTION AND ANALYSIS**

#### **A. Land Use**

The principal use of the site is and will remain mixed use.

#### **B. Building and Site Design**

The petitioner is not proposing any changes to the structure or site.

C. Inclusionary Zoning

Board Order #190-12(3) requires the petitioner to provide three inclusionary zoning units in the development. Inclusionary units require a three-step approval process involving the petitioner, the City, and DHCD to ensure the inclusionary units are approved and eligible for listing on the SHI. The Planning Department drafted Board Order #190-12(3) requiring the petitioner to complete the approval process prior to the issuance of a building permit. The petitioner seeks to amend this condition to restructure the requirements.

In summary, the three stages of certification for inclusionary units is detailed below. Board Order #190-12(3) required the petitioner to complete the following steps prior to the issuance of a building permit.

1. The petitioner submits an Inclusionary Housing Plan (IHP) for review and approval to the Director of Planning and Development. The IHP provides a breakdown of all units in the development including bedroom type, square footage, finishes, floor plans, and level(s) of affordability for inclusionary zoning units. The IHP also includes an Affirmative Fair Housing Marketing and Resident Selection Plan (AFHMRSP) with information for the lottery for resident selection. The IHP is approved by the Director of Planning and Development and signed by the Mayor.
2. The petitioner submits the Local Action Unit application, including the IHP, AFHMRSP, and draft regulatory agreement to DHCD for review and approval. Once approved, the petitioner can begin marketing the lottery for the inclusionary zoning units at the development.
3. The petitioner enters into a Regulatory Agreement and Declaration of Restrictive Covenants with the City and DCHD concerning the inclusionary zoning units. This agreement is recorded at the Middlesex Registry of Deeds.

Current Planning consulted with the Housing Division and DHCD for best practices when structuring Council Orders that provide inclusionary zoning units. Staff has learned the IHP, AFHMRSP, and draft Regulatory Agreement and Declaration of Restrictive Covenants should be approved and submitted to DHCD as part of the Local Action Unit application prior to the issuance of a building permit. Prior to the issuance of a temporary certificate of occupancy, the petitioner should complete the lottery for the inclusionary units and record the Regulatory Agreement and Declaration of Restrictive Covenants at the Middlesex Registry of Deeds. Staff believes Board Order #190-12(3) can be amended accordingly while still ensuring the inclusionary zoning units are provided per DHCD and HUD guidelines and eligible for listing on the SHI. At this time, the IHP has been approved by the Director of Planning and the Local Action Unit application, including the IHP, AFHMRSP and draft regulatory agreement have

been submitted to DHCD for review and approval.

III. TECHNICAL REVIEW

A. Technical Considerations (Chapter 30, Newton Zoning Ordinance):

The petitioner is seeking the following relief:

- Amend Board Order #45-10

IV. PETITIONER'S RESPONSIBILITIES

The petition is considered complete at this time.

**ATTACHMENTS:**

**Attachment A:** Board Order #190-12(3)

**Attachment B:** DRAFT Council Order #135-18



CITY OF NEWTON  
IN BOARD OF ALDERMEN

December 2, 2013

ORDERED:

That the Board, finding that the public convenience and welfare will be substantially served by its action, that the use of the Site will be in harmony with the conditions, safeguards and limitations set forth in the Zoning Ordinance, and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the Zoning Ordinance, grants approval of the following SPECIAL PERMIT/SITE PLAN APPROVAL to construct a three-story (36.5') multi-family structure with 13 units (with a 1.47 FAR), 904 sq. ft. of office space on the first floor, an 18-stall below grade parking garage, a retaining wall greater than four feet in height in the setback, and to waive 11 parking stalls and certain parking dimensional standards, in accordance with the recommendation of the Land Use Committee and the reasons given by the Committee therefor, through its Chairman, Alderman Ted Hess-Mahan.

*Procedural Background.*

The original decision of the Board of Aldermen granting the above described Special Permit/Site Plan Approval (the "Project"), dated December 3, 2012, for property located at 429 Cherry Street, West Newton, MA (the "Site") was appealed by the Greater Boston Chinese Cultural Association, Inc. (the "GBCCA"), an abutter, to the Massachusetts Land Court. See *Greater Boston Chinese Cultural Assoc., Inc. v. Scott F. Lennon et als*, Civil Action No. 12 MISC 475002.

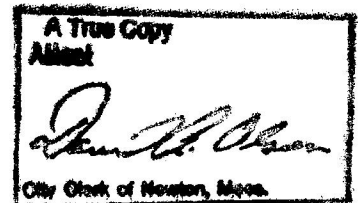
Pursuant to an Assented-to Motion to Remand filed by Young Investments, LLC (the "Petitioner"), Sands, J., entered an Order dated January 30, 2013, returning the application for the Project back to the Board of Aldermen for a new public hearing to afford the GBCCA an opportunity to fully raise any issue or concern it has with the Project at that public hearing. The Order further directed that following the close of the public hearing, the Board was to issue its decision in accordance with G.L. c. 40A, §9, and a copy of such decision was to be filed by the Petitioner with the Land Court, which retained jurisdiction over the case.

*Remand Public Hearing.*

A new public hearing was duly noticed for October 15, 2013, and notice of such hearing was mailed to all parties in interest. On October 15, 2013, the Petitioner requested that the public hearing be postponed to November 12, 2013, in order to allow time for a Memorandum from the City of Newton's Engineering Division commenting on the revised Topographic Site Plan dated October 11, 2013, which shows a dedicated overflow pipe that connects to the City's drainage system, to be available for public comment. The Land Use Committee of the Board (the "LUC")

Property Address: 429 Cherry Street, Newton

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Newton City Clerk  
2013 DEC -4 AM 11:50  
David A. Olson, CM  
Newton, MA 02459



granted the requested postponement, and the public hearing opened on November 12, 2013, before the LUC.

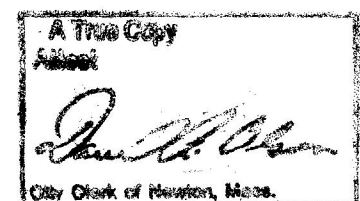
At the November 12<sup>th</sup> public hearing, the Petitioner's attorney presented a summary of the proposed Project, incorporating by reference the complete record of the Board's decision from the first public hearing and subsequent working sessions originally held on the Petition. The Project architect, John Pears of Perkins Eastman, also gave testimony regarding the Project plans, including the requested waiver of 11 parking spaces and relief from various parking dimensional controls. The Project engineer, Joseph Porter of VTP Associates, Inc., then summarized the drainage system that will be installed for the Project. A letter from Leon A. Bombardier, P.E., dated November 12, 2013, was also presented describing the shoring system that will be used during excavation for the Project.

At the close of the Petitioner's presentation, counsel for the GBCCA stated the basis for the GBCCA's opposition to the Project, including concerns with the increased intensity of use the Project would bring to the Site, with residential uses present in the evening and on weekends when the GBCCA's use of its property is most active; the location of a tall building 5+' off the property line of the GBCCA blocking light and air; increased traffic and parking demand that would result from the Project in an area which already has a parking shortage and traffic congestion at certain times of the day (GBCCA provides no on-site parking for its members or for the numerous programs it provides on-site); potential damage that could result to the GBCCA building during construction from excavation activities as well as from changes to the water table that may exacerbate problems the building already has with drainage and water infiltration in the basement; and an insufficient plan for managing storm water that depends, in part, on connecting the Project's storm water system to the City's storm water system during periods of heavy rain. See, Letter of Jack McElhinney, Esq., to the Board of Aldermen, dated October 11, 2013. Testimony regarding the impact of the Project was also provided by two members of the GBCCA, with particular concern being the proposed drainage system for the Project.

The public hearing was continued to November 19, 2013, to allow the GBCCA to provide the LUC with any additional comments or concerns and to afford it time to review the revised plan and the Memorandum from the City's Engineering Division, dated November 6, 2013, regarding the proposed drainage system. At the continued public hearing, the Associate City Engineer John Daghljan summarized his memorandum dated November 13, 2013, which responded to questions raised at the November 12, 2013 public hearing.

Specifically, Associate City Engineer Daghljan stated that the elevation of the basement floor had been raised during the initial proceedings before the LUC, and that there is a separation of 3.5 feet between the basement floor slab and the high water table. He also stated that the Project's drainage system would handle 80% of stormwater drainage on-site in the 100 year storm, with 20% of the drainage being handled through a dedicated overflow service connection into Cheese Cake Brook, which is part of the City's drainage system. He stated that private parties are allowed to connect to the City's drainage system if all stormwater drainage cannot be handled on-site.

At the Project's location, Cheese Cake Brook is contained in a box-like culvert that crosses



Cherry Street. Associate City Engineer Daghlion believed that Cheese Cake Brook could handle the addition storm water and that the Petitioner will be required to perform a CCTV of the box culvert; repair the same if necessary; and annually clean the box culvert. He also testified that the Project would improve the current stormwater drainage situation by creating a drainage system at the Project's site where there is currently no drainage system. In his view, the GBCCA would still need to maintain its own drainage system. Finally, Associate City Engineer Daghlion described the inspections that would occur during construction with regard to the removal of any urban fill discovered at the Site.

Jack McElhinney, Esq., counsel for the GBCCA also testified and reiterated his client's concerns regarding drainage and the capacity and condition of Cheese Cake Brook, as well as the proximity of the basement slab to the high water table. A member of the GBCCA expressed concerns regarding the condition of the catch basin at 429 Cherry Street and stated that the GBCCA's drainage system flowed through a pipe located on the Project's site. The Project engineer, Joseph Porter, then testified that he had not seen any pipe during his inspections at the Project Site.

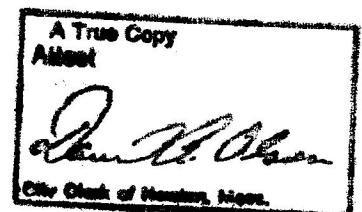
At the conclusion of testimony, the public hearing was then closed. The LUC then held a working session on November 19<sup>th</sup>, and voted to recommend approval of the Project to the Board and forwarded a draft written Board Order to the Board for consideration.

Finding that all applicable provisions of the Zoning Ordinance have been complied with and taking into consideration the testimony and evidence provided by all interested parties, the Board GRANTS approval of this Special Permit/Site Plan approval based on the following findings, as recommended by the LUC of the Board:

With regard to special permit §30-11(d)(8):

1. The Site is an appropriate location for the proposed 13 unit multi-family dwelling for the following reasons:
  - a) The use will provide additional housing units on an underutilized parcel that is within an existing village center, within walking distance to the West Newton commuter rail station and an MBTA Express bus to Boston and to other amenities including restaurants, shops, and retail service establishments. Locating multi-family housing of this type in a village center is in accordance with the recommendations of the 2007 *Newton Comprehensive Plan*.
  - b) The Project will include both business and residential uses and will serve as a transition from the commercial to the residential areas of West Newton.
  - c) The proposed dwelling units are one-bedroom and two-bedroom relatively small units in terms of square footage, which are in short supply in the City's housing inventory.

With regard to special permit §30-5(b) (4):



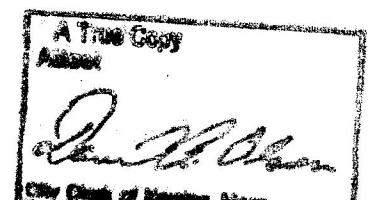
2. A retaining wall greater than four feet in height within a side setback will not create a nuisance or serious hazard to vehicles, pedestrians, or abutting properties because it will be well-screened, fenced, has only a minor reveal facing the abutter, and will not create any drainage problems for the abutting properties.
3. The retaining wall is necessary to provide access to the underground parking garage, which permits a more efficient use of the Site by removing surface parking.

With regard to special permit §30-15, Table 3:

4. A three-story structure that is 35.6 feet in height will not adversely affect the neighborhood because the proposed elevation at the highest point of the roof will be lower than that of abutting buildings including the GBCCA at 437 Cherry Street and the condos at 56-66 Webster Street, both of which present a three-floor façade facing the subject Site.
5. An FAR of 1.47 is appropriate in the context of the neighborhood, which is a dense village center and the additional mass is in keeping with the scale of the surrounding commercial buildings and is also required to accommodate the objective of providing additional affordable housing.

With regard to special permit §30-19(d)(1) and (d)(11); §30-19(h)(3); §30-19(h)(4)(a); §30-19(g)(2); and §30-19(m):

6. The Board finds that exceptions to the parking requirements including a waiver for 11 required parking stalls, to allow for a maneuvering aisle of 22 feet, to allow for a driveway width of 12 feet and to waive the dimensional requirements for stall length, are in the public interest and that such exceptions are in the interest or protection of environmental features for the following reasons:
  - a) The Project will provide 19 parking stalls, locating 18 stalls in the basement garage and one van accessible handicap parking stall at grade in the front setback. A total of 30 stalls parking stalls (2 stalls per dwelling unit and 4 stalls for the office use) would be required without a waiver. The Board finds that the relatively small average size of the planned apartments would likely attract tenants disposed to use public transportation or to have only one automobile per unit, making a parking waiver appropriate at this Site. Covered bicycle parking will also be provided in the below-grade garage to encourage the use of alternative modes of transportation.
  - b) The Site is within walking distance of the West Newton commuter rail station, an MBTA Express bus route to Boston, adequate public parking and a broad spectrum of neighborhood amenities.
  - c) Additionally, the Board finds that the office and residential uses are complementary and will allow for coordinated usage of the garage at different times by commercial and residential users. Accordingly, the Board concludes that



the number of parking spaces required by the Zoning Ordinance would be more than necessary to meet the realistic demand for parking that could be expected to be generated at the Project.

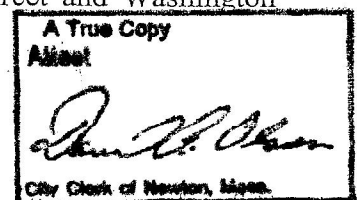
- d) The 12 foot access driveway on the north side of the building is appropriate and will not create a nuisance or hazard to vehicles because residents, who will be familiar with the parking layout, will be the primary users of the parking facility. Furthermore, the driveway includes a warning system (i.e., a flashing light) when vehicles are entering or exiting the garage alerting drivers that the driveway accommodates two-way traffic.
- e) With respect to the dimensional relief for a maneuvering aisle width of 22 feet, a turning template has been presented that provides evidence that maneuvering space in the garage is functional. Since the parking structure will only service the residents of the building, the traffic volume will be light. The Board finds that a waiver for aisle width is appropriate for the type and number of vehicles that will be accessing the Site.
- f) With respect to the two undersized parking stalls for which a waiver is being granted, the Board finds that although parking stalls #1C and #2C are not dimensionally-compliant with respect to stall length, a waiver is appropriate since the two stalls are located at the end of a row and will not likely interfere with the safe use of the parking facility.

With regard to special permit §30-24(f) and (f)(16):

- 7. The Board finds that a density bonus is appropriate as three affordable units will be provided where only two units are required. The additional unit will contribute to the housing goals of the Comprehensive Plan and increase the diversity of the City's housing stock.

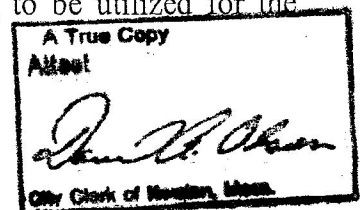
With regard to the Site plan approval criteria under §30-23(2)(a)-(h):

- 8. The Board finds that the Project has been designed to ensure the safety of vehicular and pedestrian movement within, and in relation to, the area of the Project for the following reasons:
  - a) The Project includes certain safety features including i) a flashing light warning system when vehicles are entering or exiting the garage alerting drivers that the driveway accommodates two-way traffic, ii) signage for 'right turns only' to avoid conflicting vehicular movements on Cherry Street and iii) the elimination of the driveway on the south side of the building. Further, the existence of a traffic signal at the intersection of Cherry and Webster streets permits breaks in the traffic flow to create a safe environment for access to and egress from the Site.
  - b) The petitioner will provide a contribution of \$3,500 towards the installation of a pedestrian-activated signal at the intersection of Cherry Street and Washington



Street to provide safe access to the commuter rail and bus stop on the south side of Washington Street.

9. The Board finds the methods for disposal of waste and methods of regulating surface water drainage are adequate for the following reasons:
- a) To avoid negative impact on adjacent properties, waste generated from the Site will be stored in a properly-vented subterranean vault adjacent to the garage for collection by a private disposal contractor using vehicles appropriately-sized for the Site. Trash collection is limited to between the hours of 9:00 AM and 4:00 PM on weekdays subject to revision only by agreement with the owner and direct abutters.
  - b) The City Engineering Division has reviewed the most recently revised engineering plans and details presented at public hearing and referenced in condition #1 herein; its Review Memorandum raises no major concerns with respect to this Project. The elevation of the garage floor has been raised 3½ feet above the water table in response to concerns raised by the GBCCA. The Associate City Engineer notes that the drainage design needs an overflow connection to the City's drainage system since the proposed on-Site system can only store and infiltrate 80% of the runoff from the Site for a 100-year storm event. He notes that an overflow connection is not unique as there are several dozen throughout the City that have been approved over the years due to Site constraints.
  - c) According to the testimony of the Project engineer, VTP Associates, and Project architect, John Pears of Perkins Eastman, the revised plans referenced in condition #1.a and 1c., and the Engineering Division Memorandum, the garage floor elevation has been raised 2.5 feet, which places it 3.5 feet above the water table. Accordingly, the Board finds that the Project will not disrupt the flow of groundwater in the area nor cause flooding.
10. Because of the nature of the uses at the Site, the Board does not anticipate the heavy presence of service vehicles. The Board did review the plans for how service vehicles would reach the Site. The plans provide for access to the garage level with direct access to all floors by elevator.
11. With the exception of the one at-grade handicap stall, all the parking will be below grade. The Board finds that this one space is effectively screened from the nearest abutter by means of a "green-screen fence" as shown on the Landscape Plan, revised 9/17/12.
12. The Board finds that the Project has avoided unnecessary topographical changes and that the installation of the building foundation/garage does not require deep excavation since it is taking advantage of the existing topographical variation from the front to the rear of the Site. Additionally, according to the Shoring Design Plan prepared by the Project architect, John Pears of Perkins Eastman, and validated by an evidentiary letter from the structural engineer, the Board finds that the method of shoring to be utilized for the





excavation is standard in the industry and is commonly used to prevent destabilization or damage to the foundation of abutting buildings.

13. The Board finds that the utility lines will be undergrounded from the street to the Site (Condition #8).
14. The Board finds that the proposed building is appropriate in the context of the neighborhood and will serve as a transition from the commercial to the residential areas of West Newton. The petitioner has incorporated a number of building treatments that help to mitigate the mass of the structure including articulating the façade so that there are no large uninterrupted walls and the placement of windows and balconies will add interest to the building's exterior.
15. The Board finds that no historical resources currently exist on the Project Site and that demolition of the existing building requires no historic review under the City's historic ordinances.

In light of the above findings and the following conditions imposed by this Board Order, the Board of Aldermen finds that the public convenience and welfare of the City will be served, and that the criteria of §§30-11(d)(8), 30-5(b)(4), 30-15, Table 3 as to building height and FAR, 30-19(d)(1), (d)(11), 30-19(h)(3), 30-19(h)(4)(a), 30-19(g)(2), 30-19(m), 30-23, 30-24, 30-24(f) and (f)(16) for granting Special Permits/Site Plan Approvals will be satisfied.

PETITION NUMBER: #190-12

PETITIONER: Young Investments/Newton Community Service Center  
(hereinafter use of the term "Petitioner" shall include Young Investments/Newton Community Service Center's successors and assigns)

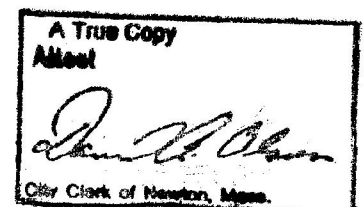
LOCATION: 429 Cherry Street

OWNER: Newton Community Service Center Inc.

ADDRESS OF OWNER: 492 Waltham Street, Newton, MA 02465

TO BE USED FOR: Three-story, multi-family building with 13 residential units, 904 square feet of office space and an 18-stall below-grade parking structure

CONSTRUCTION: Wood-frame structure with cement board and wood clapboard siding

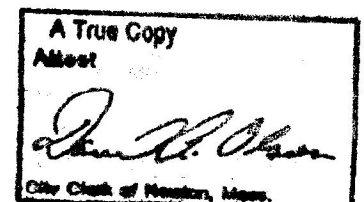


EXPLANATORY NOTES: Section 30-11(d)(8), to allow a multi-family use in a Business 1 zone; Sections 30-5(b)(4), to allow the construction of a retaining wall greater than four feet in height within a required setback; Section 30-15, Table 3, to allow a building height of 35.6 feet and three stories; Section 30-15, Table 3, to allow an FAR of 1.47; Sections 30-19(d)(1), (d)(11) and 30-19(m), to waive 11 required parking stalls; Sections 30-19(h)(3) and 30-19(m), to allow a maneuvering aisle of 22 feet for 90-angled parking; Sections 30-19(h)(4)(a) and 30-19(m) to allow a driveway width of 12 feet for two-way traffic; Sections 30-19(g)(2) and 30-19(m), to waive the dimensional requirements for stall length; Sections 30-24(f) and (f)(16), to employ the density incentive to lower the minimum lot area per unit requirement; Sections 30-23 and 30-24.

ZONING: Business 1 District

Approved subject to the following conditions:

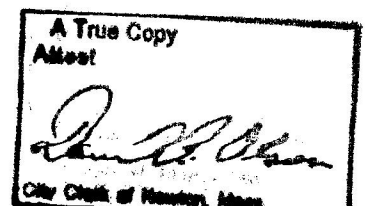
1. All buildings, parking areas, driveways, walkways, landscaping and other Site features associated with this Special Permit/Site Plan approval shall be located and constructed consistent with:
  - a. Site Plans Showing Proposed Conditions at 429 Cherry Street, Newton, MA” dated December 6, 2011 and last revised on October 11, 2013, signed and stamped by Joseph R. Porter, Professional Land Surveyor, and Marc Besio, Civil Engineer, and consisting of four sheets including:
    - i. Proposed Conditions
    - ii. Detail Sheet 1
    - iii. Detail Sheet 2
    - iv. Detail Sheet 3
  - b. “Landscape Plan, 429 Cherry Street, Newton, MA”, dated September 13, 2012, revised September 17, 2012 by James K. Emmanuel, Landscape Architects.
  - c. “429 Cherry Street for Young Construction”, revised November 15, 2012, prepared by Perkins Eastman, containing the following sheets:
    - i. Sheet A 101, Garage and First Floor Plans
    - ii. Sheet A 102, Second and Third Floor Plans
    - iii. Sheet A 201, Proposed Elevations
    - iv. Sheet A 301, Proposed Building Sections
    - v. Sheet A 401, Proposed 3D views
2. The petitioner will comply with all applicable recommendations of the Engineering Division of the Department of Public Works, dated November 6, 2013, as well as the restrictions and



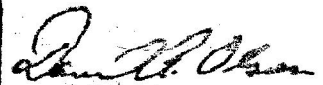


specifications in the Construction Management Plan, dated November 16, 2012, as either may be amended and approved in accordance with Condition 11(g).

3. The petitioner reserves the right to modify the placement of windows on the north façade to minimize alignment of these windows with those on the Townhouses at West Newton Square, subject to an administrative review by the Commissioner of Inspectional Services.
4. Exterior lighting will consist only of residential-style fixtures and will not spill on to adjacent properties. There will be no electrical outlets or lighting fixtures provided on any of the balconies on the north side of the building.
5. In the event that this rental building is converted into condominiums, the petitioner shall incorporate language into the condominium documents that ensures the continued compliance with the requirements of the Inclusionary Housing Plan.
6. The petitioner shall submit, on an annual basis, an operations and management report to the City Engineer indicating that the drainage system and pumps are functioning properly and have been inspected on a regular basis. In the event that this rental building is converted into condominiums, the petitioner shall incorporate language into the condominium documents that ensures the continued compliance with the requirements of this condition.
7. The petitioner shall maintain all landscaping associated with this Special Permit/Site Plan approval in good condition. Any plant material that becomes diseased or dies shall be replaced on an annual basis with similar material.
8. The petitioner shall underground all utilities from the street to the building.
9. The trash enclosure shall be maintained in sanitary condition with proper ventilation provided in the trash enclosure area to avoid a negative impact on adjacent properties. Trash pickup will only occur between the hours of 9 a.m. and 4 p.m. on weekdays, subject to revision based on an agreement between the petitioner and abutters.
10. If the demand for parking for the petitioner's uses routinely exceeds the supply as determined by the Transportation Director and the Director of Planning and Development, the petitioner shall submit a Parking Management Plan at the request of the Commissioner of Inspectional Services, subject to review and approval by the Director of Planning and Development in consultation with the City Engineer.
11. No building permit shall be issued pursuant to this Special Permit/Site Plan approval until the petitioner has:
  - a. recorded a certified copy of this board order, which includes the Operation and Maintenance plan for Stormwater Management as an attachment, for the approved special permit/Site plan with the Registry of Deeds for the Southern District of Middlesex County.
  - b. filed a copy of such recorded board order with the City Clerk, the Department of Inspectional Services, and the Department of Planning and Development.
  - c. obtained a written statement from the Planning Department that confirms the building permit plans are consistent with plans approved in Condition #1.



- d. submitted to the Law Department and the Associate Director of Housing and Community Development a fully-executed copy of a regulatory agreement with the City of Newton and the Massachusetts Department of Housing and Community Development as required by the Local Initiative Program.
  - e. submitted an Inclusionary Housing Plan for review by the Newton Housing Authority and the Director of Planning and Development that is certified as compliant by the Director of Planning and Development as required by Section 30-24(f)(8) of the Newton Zoning Ordinance.
  - f. conducted a pre-construction inspection of property at 437 Cherry Street and 56-66 Webster Street to document baseline conditions for structural integrity of the buildings and filed a copy of that inspection report with the Director of Planning and Development, the City Engineer, and the abutters at 437 Cherry Street and 56-66 Webster Street.
  - g. submitted final engineered plans, an Operations and Maintenance plan for Stormwater Management, Construction Management Plan, and dewatering plans for review and approval by the City Engineer.
  - h. complied with the recommendations in the Engineering Division's memo, as applicable, to the satisfaction of the City Engineer.
12. No occupancy permit for the use covered by this special permit/Site plan approval shall be issued until the petitioners have:
- a. filed with the City Clerk, the Department of Inspectional Services, and the Department of Planning and Development a statement by a registered architect or engineer certifying compliance with Condition #1.
  - b. submitted to the Department of Inspectional Services, and the Department of Planning and Development, and the Engineering Division, a final as-built survey plan in digital format.
  - c. completed all landscaping in compliance with Condition #1
  - d. complied with the Inclusionary Housing Ordinance.
  - e. received a statement from the City Engineer that the storm water municipal tie in and public sidewalks have been built according to City standards.
  - f. conducted a post-construction inspection of 437 Cherry Street and 56-66 Webster Street to document changes, if any, to the structural integrity of the building, and submitted them to the City Engineer and to the abutters with return receipt submitted to the Director of Planning and Development and the Commissioner of Inspectional Services.
  - g. contributed \$3,500.00 towards the installation of a pedestrian count down signal at the intersection of Cherry Street and Washington Street.
  - h. the Commissioner of Inspectional Services may issue one or more certificates of temporary occupancy for all or portions of the building constructed subject to this special permit prior to installation of landscaping required in condition 12c,

A True Copy  
Attest  
  
City Clerk of Newton, Mass.

provided the petitioner shall first have filed with the Director of Planning and Development a bond, letter of credit, cash or other security in the form satisfactory to the Director of Planning and Development in an amount not less than 135% of the value of the aforementioned remaining Site improvements to ensure their completion.

Under Suspension of Rules

Readings Waived and Approved

20 yeas 0 nays 2 absent (Aldermen Fischman and Sangiolo) 2 recused (Aldermen Leary and Swiston)

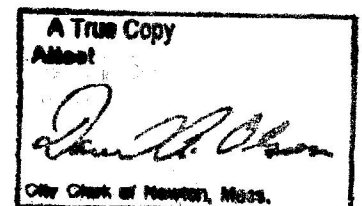
The undersigned hereby certifies that the foregoing copy of the remand decision of the Board of Aldermen (now known as the City Council) granting a SPECIAL PERMIT/SITE PLAN APPROVAL is a true and accurate copy of said decision, the original of which having been filed with the CITY CLERK on December 4, 2013. The undersigned further certifies that all statutory requirements for the issuance of such SPECIAL PERMIT/SITE PLAN APPROVAL have been complied with and that all plans referred to in the decision have been filed with the City Clerk.

ATTEST:




(SGD) DAVID A. OLSON, CITY CLERK  
Clerk of the City Council

I, David A. Olson, as the Clerk of the City Council and keeper of its records and as the City Clerk and official keeper of the records of the CITY OF NEWTON, hereby certify that within twenty days since the filing of the original decision on SPECIAL PERMIT/SITE PLAN APPROVAL #190-12 on December 3, 2012, in the Office of the City Clerk an APPEAL to said decision pursuant to M.G. L. Chapter 40, Section 17 was filed in the Land Court Department of the Trial Court, Civil Action No. 12MISC475002. By Order of said Court, the original decision was remanded to the City Council for a new public hearing and the remand decision granting a SPECIAL PERMIT/SITE PLAN APPROVAL, was filed with the CITY CLERK on December 4, 2013. The remand decision granting said SPECIAL PERMIT/SITE PLAN APPROVAL was upheld by Judge Sands, of the Land Court, and the Appeals Court of Massachusetts has affirmed that the City Council acted properly in granting said SPECIAL PERMIT/SITE PLAN APPROVAL (Summary Decision of the Appeals Court #15-P-1336 attached). No request for

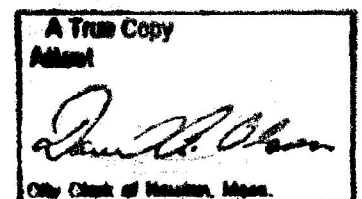


further appellate review of the Appeals Court Decision has been filed and the time to file such request has expired.

ATTEST:



(SGD) DAVID A. OLSON, CITY CLERK  
Clerk of the City Council



NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1336

THE GREATER BOSTON CHINESE CULTURAL ASSOCIATION, INC.

vs.

BOARD OF ALDERMEN OF NEWTON & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, The Greater Boston Chinese Cultural Association (GBCCA), appeals from a judgment entered by a judge of the Land Court granting partial summary judgment to the defendant, Young Investments, LLC (Young), a real estate development company seeking to construct a building on property it owns in Newton abutting GBCCA's property.<sup>2</sup> In his decision on the parties' cross motions for summary judgment, the judge upheld the December 2, 2013, order of the defendant, the board of aldermen of Newton (board), which approved Young's site plan and granted Young's application for special permits. GBCCA

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<sup>1</sup> Young Investments, LLC.

<sup>2</sup> The parties stipulated to the dismissal of count II of GBCCA's second amended complaint with prejudice prior to the entry of judgment. As such, this partial motion for summary judgment related to the only remaining claim at issue (count I), and the case as a whole has thus been decided by the Land Court.

argues that the judge did not make "independent findings that [Young's proposed building] meets the criteria for issuance of a valid special permit," and that the judge "erred in upholding the board's unreasonable interpretation of the [Newton zoning ordinance's (ordinance)] ambiguous side-yard setback provision." We affirm the judgment.

Discussion. "Pursuant to Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974), summary judgment shall be rendered . . . [if] there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 393 (2003) (quotation omitted). "We review the Land Court judge's summary judgment decision de novo. Because the judge does not engage in fact finding in ruling on cross motions for summary judgment, we owe no deference to his assessment of the record." Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 517-518 (2011) (citation omitted).<sup>3</sup> We assume, without deciding, that GBCCA has standing.<sup>4</sup>

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<sup>3</sup> We need not reach the question whether the judge abused his discretion in refusing to strike exhibits one through five attached to the affidavit filed by Young in support of its motion for partial summary judgment because we have not considered them. We also need not reach the question whether the judge abused his discretion in allowing GBCCA's motion to strike portions of the affidavit filed in support of Young's motion for partial summary judgment.

<sup>4</sup> As GBCCA loses on the merits, we need not resolve this issue.

"Because the record compiled for summary judgment is open to our independent consideration, we have made an independent compilation of the relevant facts to frame the ultimate legal question whether summary judgment is appropriate." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 123 n.1 (1997). As GBCCA injected documents into the record, "[w]e . . . treat them as proper parts of the summary judgment record" and consider them for their full evidentiary value. Boston v. Roxbury Action Program, Inc., 68 Mass. App. Ct. 468, 469 n.3 (2007).

1. Side yard setback. GBCCA challenges the board's approval of Young's site plan which would place the proposed building 5.6 feet away from the common lot line shared by GBCCA and Young. The side yard setback line for the proposed building, whose height is 35.6 feet<sup>5</sup> and in a Business 1 zoning district, is determined by reference to the ordinance's § 30-15, Table 3, note 2 (footnote 2), which states, "1/2 bldg. ht. -- one-half the building height or a distance equal to the side yard setback of the abutting property at any given side yard except, when abutting a residential zone, the setback shall be

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<sup>5</sup> In spite of some inconsistency in the record, the parties agree in their briefs that the height of the proposed building is 35.6 feet.

one-half the building height or fifteen feet, whichever is greater."<sup>6</sup>

We disagree with GBCCA's contention that the clause "whichever is greater" applies regardless whether the lot line abuts a residential zone, and conclude that it applies only to the distances in the residential zone exception clause preceding it. Our interpretation follows the "general rule of statutory, as well as grammatical, construction that a clause is construed to modify only the last antecedent unless there is something in the subject matter or dominant purpose of the provision that requires departure from this rule."<sup>7</sup> Massachusetts Zoning Manual § 12.2(f), at 12-10 (Mass. Cont. Legal Educ. 2010 & Supp. 2015), citing Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829, 833 (1985). See Mauri v. Zoning Bd. of Appeals of Newton, 83

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<sup>6</sup> Although a residential district abuts Young's property to the north and northwest, both Young's and GBCCA's properties are in a Business 1 district, so the specific side yard setback along the common lot line does not trigger the exception clause for that particular setback.

<sup>7</sup> We also construe the ordinance "sensibly, with regard to its underlying purposes and, if possible, as a harmonious whole." Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 129 (1999) (citation omitted). Note 3 to Table 3 of § 30-15 (footnote 3) provides that "[w]hen abutting a residential or public use zone, the rear setback in the Business 1-4 Districts shall be 1/2 building height or 15 feet, whichever is greater." The clause in footnote 3 -- "whichever is greater" -- clearly cannot apply when there is no abutting residential or public use property, reinforcing our belief that the rule of the last antecedent applies to footnote 2.



Mass. App. Ct. 336, 342 (2013). The board was thus presented with two side yard setbacks to select from: a distance equal to GBCCA's side yard setback along the common lot line (4.7 feet) or one-half the height of the proposed building (17.8 feet); absent a mandate in the ordinance to the contrary, the board was permitted to exercise its discretion and choose the lesser distance.<sup>8</sup> See Van Arsdale v. Provincetown, 344 Mass. 146, 149-150 (1962).

Alternatively, were we to adopt GBCCA's position that footnote 2 is ambiguous, we would reach the same conclusion. The board's interpretation of the side yard setback requirement is not unreasonable, given that the proposed building will be farther from the common lot line than GBCCA's building, and we defer to the board's interpretation of its own ordinance. See Livoli v. Zoning Bd. of Appeals of Southborough, 42 Mass. App. Ct. 921, 923 (1997); Tanner v. Board of Appeals of Boxford, 61

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<sup>8</sup> The side-yard setback is uniformly 4.7 feet, even though only a portion of GBCCA's building is that close to the common lot line. See § 30-1 of the ordinance (defining "[s]etback line" as "[a] line equidistant from the lot line which establishes the nearest point to the lot line at which the nearest point of a structure may be erected"); § 30-15(e) (repeating portions of set back line definition).

Mass. App. Ct. 647, 649 (2004). We see no error in the board's approval of Young's proposed side yard setback of 5.6 feet.<sup>9</sup>

2. Special permit. Section 30-24(d) of the ordinance provides that "[t]he board of aldermen shall not approve any application for a special permit unless it finds, in its judgment, . . . that the application meets all the . . . criteria [listed in § 30-24(d)(1)-(5)]." GBCCA argues that the judge erred in upholding the board's decision because the board failed to make the findings required by § 30-24(d)(2)-(4) and lacked sufficient evidence to make those findings.<sup>10</sup> We disagree and recite the evidence in the summary judgment record that warrants the board's findings, viewing the evidence in the light most favorable to GBCCA. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 699 (2012).

a. Section 30-24(d)(2). Section 30-24(d)(2) of the ordinance requires that the board find that "[t]he use as developed and operated will not adversely affect the neighborhood." Young has proposed a three-story, mixed-use

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<sup>9</sup> GBCCA's argument that both the board and the judge failed to give meaning to the phrase "any given side yard" in footnote 2 is meritless.

<sup>10</sup> Although GBCCA now claims that we must consider the board's findings as to § 30-24(d)(1) of the ordinance, that claim was waived below when GBCCA responded to Young's third and fourth interrogatories by conceding that the only special permit criteria not properly supported in the board's decision were § 30-24(d)(2)-(4).

building in West Newton village in a Business 1 zoning district. Renderings of the proposed building suggest that its above-grade height of 35.6 feet will be comparable to existing, neighboring structures. The peak elevation of the proposed building will be ninety-two feet, which is comparable to that of GBCCA's building (93.47 feet) and 56-66 Webster Street (99.23 feet).<sup>11</sup> The planning department of Newton observed that

"[a]lthough the building will be larger than many in the neighborhood, the petitioner has incorporated a number of building treatments that help to mitigate the mass of the structure. The building features an articulated facade so that there is in no case one large uninterrupted wall. The placement of windows and balconies also adds interest to the building's exterior. . . . The petitioner submitted a landscaping plan that softens the appearance of the structure as well as breaks up its overall mass."

The planning department concluded that the floor area ratio of the proposed building "is appropriate in the context of the neighborhood." Although Young's site plan required the use of a density incentive, see § 30-24(f)(16) of the ordinance, this will result in three "inclusionary units" in the building, which the planning department concluded was "in accordance with the objectives in the Comprehensive Plan."<sup>12</sup> The planning department also made the following observations about the suitability of Young's proposed building:

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<sup>11</sup> 56-66 Webster Street abuts Young's property.

<sup>12</sup> The judge explained that the Comprehensive Plan, adopted by the board in 2007, "makes certain recommendations in anticipation of future population growth, with a goal of stemming the decline in rental housing in [Newton]."

"The 2007 Comprehensive Plan seeks to provide additional housing units on underutilized parcels within village centers that are in close proximity to public transportation options, while providing a diversity of housing sizes and types and contributing to the stock of affordable units. This proposal will help to accomplish all of these objectives by providing smaller rental units within walking distance to bus and rail transportation and other amenities within the village center."

GBCCA maintains that the proposed building would adversely affect the neighborhood because the transportation system cannot support the business and the thirteen residences that Young has proposed. GBCCA acknowledged in its deposition that there was public transportation near the proposed building but nevertheless contended that the buses and the commuter rail do not "run frequently" and that buses do not run on Sundays. GBCCA also contended that its members feel that the commuter rail is "not very convenient to use." However, public transportation will not be required to reach various amenities that are within walking distance, and because the proposed building will have nineteen parking spaces, some residents may be able to drive their own vehicles rather than rely on public transportation. As GBCCA conceded in its deposition that it has conducted no study about the effectiveness of the existing public transportation system in West Newton, its claim that the current transportation system is inadequate is unduly speculative.

b. Section 30-24(d)(3). Section 30-24(d)(3) of the ordinance allows the board to grant a special permit when it finds that "[t]here will be no nuisance or serious hazard to vehicles or pedestrians." Young's site plan features two-way traffic on a single, twelve-foot wide driveway on the northern side of the property, leading to and from the proposed building's underground garage entrance. Young intends to install a signal light and signage to alert drivers that two-way traffic is permitted on the driveway. Although two of the underground parking stalls will be undersized, the planning department concluded that "[those] stalls are located at the end of a row and will not likely interfere with the safe use of the parking facility." GBCCA acknowledged during its deposition that its concern as it relates to parking and traffic is about the number of parking spaces, not the layout of the parking garage; it is not concerned with the layout of the driveway and entrance to the parking garage. We therefore need not reach the question whether the driveway or the undersized spaces will be a "nuisance or serious hazard to vehicles or pedestrians."

To help ensure pedestrian safety, the planning department commented that Young "will provide a contribution of \$3,500 towards the installation of a pedestrian-activated signal at the intersection of Cherry Street and Washington Street to provide

safe access to the commuter rail and bus stop on the south side of Washington Street."

There is also nothing in the record that would lead us to conclude that the northern retaining wall, which required a special permit to build inside the northern setback, would be a "nuisance or serious hazard to vehicles or pedestrians."

Based on diagrams of that retaining wall, it will be largely shielded from the view of the northern abutters by a composite fence. Further, because GBCCA abuts Young to the south, there is nothing in the record that would lead us to believe that a retaining wall near the northern edge of Young's property could harm GBCCA or its visitors.

c. Section 30-24(d)(4). The board may grant a special permit if it finds that "[a]ccess to the site over streets is appropriate for the type(s) and number(s) of vehicles involved." There is a municipal parking lot near Young's property that may decrease the need for parking on Young's lot during weekdays, but based on GBCCA's deposition, we conclude that this lot is frequently busy on evenings and weekends. The planning department observed that "[c]overed bicycle parking will be provided in the below-grade parking garage to encourage the use of alternative modes of transportation." Massachusetts Bay Transportation Authority bus stops and a commuter rail stop are also within walking distance of the proposed building. This

evidence supports the planning department's conclusion that "[s]ince this parking structure will only service the residents of the building, the traffic volume will be light."

The garage for the proposed building has a twenty-two foot wide aisle, two feet less than normally required by the ordinance, but a "turning template" was provided to the planning department to establish that there was adequate maneuvering space. The planning department concluded that "a waiver for aisle width is appropriate for the type and number of vehicles that will be accessing the site."

Although GBCCA claimed in its deposition that traffic would increase when the proposed building was occupied, GBCCA conceded that it did not have evidence to dispute the planning department's conclusion that additional traffic generated by the proposed building would be "light." The board was not required to find that the proposed building would generate no new traffic, only that "[a]ccess to the site over streets is appropriate for the type(s) and number(s) of vehicles involved."

The board made a finding for each of these three criteria. There was ample evidence on the summary judgment record to warrant each of these findings. We have independently ascertained that the board "[made] an affirmative finding as to the existence of each condition of § 30-24(d)(2)-(4) of the ordinance required for the granting of the . . . special permit,

. . . [and we] independently [conclude] that each of those conditions [was] met." Vazza Properties, Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 311 (1973) (citations omitted). Upon our review of the undisputed evidence before us, we conclude that Young's intended uses of the property for which the board granted the special permits are in "harmony with the general purpose and intent of the [ordinance] . . . and that . . . there is nothing in the [summary judgment record] to suggest that the board's decision was based on a legally untenable ground, or . . . [was] unreasonable, whimsical or arbitrary." Caruso v. Pastan, 1 Mass. App. Ct. 28, 29-30 (1973) (quotation omitted).

Conclusion. The board acted properly in granting Young's application for special permits and approving Young's site plan. Young has "carr[ied] its burden by showing that [GBCCA] has no reasonable expectation of proving" the contrary, and GBCCA has failed to "show, with evidence, the existence of a material dispute" (emphasis added) about any issue before us that would lead us to a contrary conclusion.<sup>13</sup> Marhefka v. Zoning Bd. of

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<sup>13</sup> GBCCA conceded in its response to Young's interrogatories that "GBCCA [did] not contend that any evidence presented to the Board was 'not true,'" and also conceded during its deposition that the board had some evidence before it to support each of the findings now appealed.



Appeals of Sutton, 79 Mass. App. Ct. at 518. See Mass.R.Civ.P.

56(e), 365 Mass. 824 (1974).

Judgment affirmed.

By the Court (Kafker, C.J.,  
Hanlon & Neyman, JJ.<sup>14</sup>),

*Joseph F. Stanton*

Clerk

Entered: August 29, 2016.

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<sup>14</sup> The panelists are listed in order of seniority.

CITY OF NEWTON  
IN CITY COUNCIL

ORDERED:

That the Board, finding that the public convenience and welfare will be substantially served by its action, that the use of the Site will be in harmony with the conditions, safeguards and limitations set forth in the Zoning Ordinance, and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the Zoning Ordinance, grants approval of the following SPECIAL PERMIT/SITE PLAN APPROVAL to amend Board Order #190-12(3) to restructure conditions pertaining to inclusionary zoning, as recommended by the Land Use Committee for the reasons given by the Committee, through its Chairman, Councilor Gregory Schwartz:

1. The specific site is an appropriate location for the amendments to Board Order #190-12(3) because the site is governed by a special permit allowing the construction of a three-story building which will contain inclusionary zoning units. (§7.3.3.C.1)
2. The proposed amendments to Board Order #190-12(3) as developed and operated will not adversely affect the surrounding neighborhood. (§7.3.3.C.2)
3. The amendments to Board Order #190-12(3) will not create a nuisance or serious hazard to vehicles or pedestrians. (§7.3.3.C.3)
4. Access to the site over streets is appropriate for the types and numbers of vehicles involved. (§7.3.3.C.4)

PETITION NUMBER: #135-18

PETITIONER: 429 Cherry Street, LLC

LOCATION: 429 Cherry Street

OWNER: 429 Cherry Street, LLC

ADDRESS OF OWNER: 109 School Street, Newton, MA 02472

TO BE USED FOR: Three-story, multi-family building with 13 residential units, 904 square feet of office space and an 18-stall below-grade parking structure

CONSTRUCTION: Wood-frame structure with cement board and wood clapboard siding

EXPLANATORY NOTES: §7.3.3 and §7.4 to amend Board Order #90-12(3) to restructure the conditions pertaining to inclusionary zoning

ZONING: Business 1 District

This special permit supersedes, consolidates, and restates provisions of prior special permits to the extent that those provisions are still in full force and effect. Any conditions in prior special permits not set forth in this special permit #190-12(3) are null and void.

Approved subject to the following conditions:

***Conditions associated with this Special Permit/Site Plan Approval, Order #135-18:***

1. All buildings, parking areas, driveways, walkways, landscaping and other Site features associated with this Special Permit/Site Plan approval shall be located and constructed consistent with:
  - a. Site Plans Showing Proposed Conditions at 429 Cherry Street, Newton, MA” dated December 6, 2011 and last revised on October 11, 2013, signed and stamped by Joseph R. Porter, Professional Land Surveyor, and Marc Besio, Civil Engineer, and consisting of four sheets including:
    - i. Proposed Conditions
    - ii. Detail Sheet 1
    - iii. Detail Sheet 2
    - iv. Detail Sheet 3
  - b. “Landscape Plan, 429 Cherry Street, Newton, MA”, dated September 13, 2012, revised September 17, 2012 by James K. Emmanuel, Landscape Architects.
  - c. “429 Cherry Street for Young Construction”, revised November 15, 2012, prepared by Perkins Eastman, containing the following sheets:
    - i. Sheet A 101, Garage and First Floor Plans
    - ii. Sheet A 102, Second and Third Floor Plans
    - iii. Sheet A 201, Proposed Elevations
    - iv. Sheet A 301, Proposed Building Sections
    - v. Sheet A 401, Proposed 3D views
2. The petitioner will comply with all applicable recommendations of the Engineering Division of the Department of Public Works, dated November 6, 2013, as well as the restrictions and

specifications in the Construction Management Plan, dated November 16, 2012, as either may be amended and approved in accordance with Condition 11(f).

3. The petitioner reserves the right to modify the placement of windows on the north façade to minimize alignment of these windows with those on the Townhouses at West Newton Square, subject to an administrative review by the Commissioner of Inspectional Services.
4. Exterior lighting will consist only of residential-style fixtures and will not spill on to adjacent properties. There will be no electrical outlets or lighting fixtures provided on any of the balconies on the north side of the building.
5. In the event that this rental building is converted into condominiums, the petitioner shall incorporate language into the condominium documents that ensures the continued compliance with the requirements of the Inclusionary Housing Plan.
6. The petitioner shall submit, on an annual basis, an operations and management report to the City Engineer indicating that the drainage system and pumps are functioning properly and have been inspected on a regular basis. In the event that this rental building is converted into condominiums, the petitioner shall incorporate language into the condominium documents that ensures the continued compliance with the requirements of this condition.
7. The petitioner shall maintain all landscaping associated with this Special Permit/Site Plan approval in good condition. Any plant material that becomes diseased or dies shall be replaced on an annual basis with similar material.
8. The petitioner shall underground all utilities from the street to the building.
9. The trash enclosure shall be maintained in sanitary condition with proper ventilation provided in the trash enclosure area to avoid a negative impact on adjacent properties. Trash pickup will only occur between the hours of 9 a.m. and 4 p.m. on weekdays, subject to revision based on an agreement between the petitioner and abutters.
10. If the demand for parking for the petitioner's uses routinely exceeds the supply as determined by the Transportation Director and the Director of Planning and Development, the petitioner shall submit a Parking Management Plan at the request of the Commissioner of Inspectional Services, subject to review and approval by the Director of Planning and Development in consultation with the City Engineer.
11. No building permit shall be issued pursuant to this Special Permit/Site Plan approval until the petitioner has:
  - a. Recorded a certified copy of this Council Order, which includes the Operation and Maintenance plan for Stormwater Management as an attachment, for the approved special permit/Site plan with the Registry of Deeds for the Southern District of Middlesex County.

- b. Filed a copy of such recorded board order with the City Clerk, the Department of Inspectional Services, and the Department of Planning and Development.
  - c. Obtained a written statement from the Planning Department that confirms the building permit plans are consistent with plans approved in Condition #1.
  - d. Received approval from Director of Planning and Development for the Inclusionary Housing Plan and Affirmative Fair Housing and Resident Selection Plan which shall be authorized by the Mayor, and provided evidence of submission of the Local Action Unit Application to DHCD.
  - e. Conducted a pre-construction inspection of property at 437 Cherry Street and 56-66 Webster Street to document baseline conditions for structural integrity of the buildings and filed a copy of that inspection report with the Director of Planning and Development, the City Engineer, and the abutters at 437 Cherry Street and 56-66 Webster Street.
  - f. Submitted final engineered plans, an Operations and Maintenance plan for Stormwater Management, Construction Management Plan, and dewatering plans for review and approval by the City Engineer.
  - g. Complied with the recommendations in the Engineering Division's memo, as applicable, to the satisfaction of the City Engineer.
2. No temporary occupancy permit for the use covered by this special permit/Site plan approval shall be issued until the petitioners have:
- a. filed with the City Clerk, the Department of Inspectional Services, and the Department of Planning and Development a statement by a registered architect or engineer certifying compliance with Condition #1.
  - b. submitted to the Department of Inspectional Services, and the Department of Planning and Development, and the Engineering Division, a final as-built survey plan in digital format.
  - c. completed all landscaping in compliance with Condition #1
  - d. Provided evidence confirming the marketing, lottery, and resident selection for the Inclusionary Units has been completed to the Director of Planning and Development for review and approval.
  - e. Entered into a Regulatory Agreement and Declaration of Restrictive Covenants for each of the Inclusionary Units with the City of Newton and the Department of Housing and Community Development, in a form approved by the Law Department, which will establish the affordability restriction for the Inclusionary Units in perpetuity.
  - f. received a statement from the City Engineer that the storm water municipal tie in and public sidewalks have been built according to City standards.
  - g. conducted a post-construction inspection of 437 Cherry Street and 56-66 Webster Street to document changes, if any, to the structural integrity of the building, and

submitted them to the City Engineer and to the abutters with return receipt submitted to the Director of Planning and Development and the Commissioner of Inspectional Services.

- h. contributed \$3,500.00 towards the installation of a pedestrian count down signal at the intersection of Cherry Street and Washington Street.
- i. Deed Restricted Units shall be constructed and available for occupancy coincident with market rate units. Three market rate units may receive occupancy permits corresponding with one affordable unit. The petitioner shall receive occupancy for four market rate units at one time provided the petitioner has already received occupancy permit for two deed restricted units.
- j. the Commissioner of Inspectional Services may issue one or more certificates of temporary occupancy for all or portions of the building constructed subject to this special permit prior to installation of landscaping required in condition 12c, provided the petitioner shall first have filed with the Director of Planning and Development a bond, letter of credit, cash or other security in the form satisfactory to the Director of Planning and Development in an amount not less than 135% of the value of the aforementioned remaining Site improvements to ensure their completion.