



Setti D. Warren  
Mayor

**City of Newton, Massachusetts**  
Department of Planning and Development  
1000 Commonwealth Avenue Newton, Massachusetts 02459

Telephone  
(617) 796-1120  
Telefax  
(617) 796-1142  
TDD/TTY  
(617) 796-1089  
www.newtonma.gov

James Freas  
Acting Director

---

**CONTINUED PUBLIC HEARING MEMORANDUM**

DATED: November 7, 2014

TO: Land Use Committee

MEETING DATE: November 10, 2014

FROM: James Freas, Acting Director of Planning and Development  
Alexandra Ananth, Chief Planner for Current Planning

COPIED: Applicant  
Dori Zaleznik, Chief Administrative Officer  
Ward 8 Aldermen: Cheryl Lappin, Richard Lipof, and David Kalis  
Ouida Young, Law Department  
Lou Taverna, City Engineer  
William Paille, Director of Transportation  
Zoning Board of Appeals

SUBJECT: Board of Aldermen **Petition #210-14**, 135 Wells Avenue, LLC, requesting an amendment to the Wells Avenue restrictive covenant as established in Board Order #276-68(3), as amended, as it relates to parcel E-2 at 135 Wells Avenue, to allow creation of a multi-family housing building and co-working space and to accept mitigation funds in accordance with M.G.L. Chapter 44, Section 53A under the terms and conditions described in an application from Cabot, Cabot, and Forbes, dated May 27, 2014.

---

**135 Wells Avenue**

**Petition #210-14**

In response to questions raised at the Land Use Committee (LUC) public hearings on June 25, 2014, and October 28, 2014, and/or staff technical reviews, the Planning Department is providing the following information for the November 10, 2014 continued public hearing. This information is supplemental to the staff analysis previously provided at previous public hearings.

---

The Board of Aldermen is being asked by the applicant for a blanket amendment to the controls set forth in the Wells Avenue Deed Restriction, as they relate to the proposed project at 135 Wells Avenue for a multi-family residential project under M.G.L. c. 40B, comprehensive permit. These amendments include but are not limited to:

- to waive the use restrictions to allow multi-family residential use;
- to waive the square foot limitation on gross floor area that may be built in the Wells Avenue Office park;
- to waive the 40% open space requirement;
- to waive the FAR limit of .25 to allow for an FAR of 1.51 plus structured parking;
- to waive required setback;
- to waive the no build limitation on Area 1A, where it is expressly restricted as shown on the plan accompanying the Wasserman-Howard deed; and
- for signage and lighting.

The Board of Aldermen, in making a decision on the waivers requested above, must decide whether the proposed residential project, and the significant change in approach to the Wells Ave Park the project represents, is in the best interest of the park itself and the City as a whole. The Planning Department recommends that such a decision to adopt a new development strategy, one that re-imagines the business park as a mixed-use center with a major residential component, should be entered into thoughtfully with the support of a professional, impartial study of the existing conditions and constraints of the park, its market position and greater trends in the regional tech and office park markets, and with the engagement of key stakeholders and the community. The Wells Avenue Business Park is not failing, as has been contended at times, but is certainly due for a review and adjustment of strategy, and that is something that the Planning Department has begun.

#### History of the Wells Avenue Office Park and Deed Restriction

The first half of the 1900's saw increasing residential development in Newton, particularly in the 1940s and 50s when rapid population increases corresponded with much of the housing developed in the southern part of the City. By the 1960's the City realized it needed to focus on economic development in order to support the increased population. The City embarked on a thoughtful planning process that included hiring a consultant to evaluate the return of commercial land versus residential, and to help develop a strategy to attract a world class tenant headquarters to Newton. The City found Sylvania, who wanted a state of the art R&D facility, so the City rezoned 123 acres (Parcel 1) from single-family residential to Limited Manufacturing, keeping the new office park visually screened and well buffered to minimize impact on abutting residential neighborhoods and environmentally sensitive resources. The City was very strategic in the rezoning and took a two-pronged approach; in addition to the Limited Manufacturing requirements the City created a Deed Restriction that included further use and dimensional restrictions on the parcel. The restrictions and the layout of Wells Avenue with a single entrance made sense for what was planned to be a single-user on a large parcel with a single headquarters facility.

However, for whatever reason Sylvania didn't build their headquarters on this land and in 1968 the City exercised their option to purchase Parcel 2, which kicked in the Deed Restriction giving the Board of Aldermen additional control over how Wells Avenue would be developed. In 1969 the owner of Parcel 1

began to convey various parcels to third parties and the office park began to develop subject to the Deed Restriction, very much as it looks today.

For additional information on the Development of the Wells Avenue Office Park and the no build Area 1A, see the Law Department's memorandum dated November 7, 2014 (**ATTACHMENT A**).

#### A New Strategy for Wells Avenue

The applicant is arguing that creating a mixed-use environment is the best future for the Wells Avenue Office Park, and that the City should therefore waive the Deed Restriction to allow a large residential use within the Park. That conclusion has not been reached through any kind of impartial analysis but instead represents the opinion of a property owner that would like to build a large residential building in the Office Park.

The Planning Department believes that the changing office and tech sector landscape demands a re-examination of the Wells Avenue strategy and has begun working towards that goal. In partnership with the Town of Needham and the Newton Needham Chamber of Commerce, the City has created the N<sup>2</sup> Corridor Initiative as an effort to rebrand Needham Street, Needham Crossing in Needham, and the Wells Avenue Park as an innovation and technology business center, building on the successful companies and strong workforce already found in this area. The Planning Department is also working with the Metropolitan Area Planning Council (MAPC) on a market study as a first step towards the development of a strategy to guide future development of Wells Avenue specifically as a part of the N<sup>2</sup> Innovation Corridor initiative. This initial study is expected to be completed by the end of February 2015. These actions constitute the beginning of a process of understanding the existing Park, exploring ideas for its future with the community, and finalizing a new strategy.

In addition to developing a new strategy, the City has already begun to tackle some of the recognized infrastructure improvement needs in the area. New, LED lights were installed throughout the park as part of the City-wide LED lighting program and installation of traffic signals at Winchester and Nahanton Streets is one of the first projects identified in the new signalization program included in the most recent CIP. This work is consistent with the Planning Department's approach to Master Planning generally, which is to develop and implement solutions during the process, rather than always waiting until a plan is complete as may have been done in the past.

#### The Challenges of a Mixed-Use Wells Avenue

Many business parks, rightly or wrongly, have begun to reposition themselves as mixed-use centers as a response to the changing market dynamics for office space. There is no question that across the country there has been a recommitment to urban locations with many large corporations abandoning suburban office parks and campuses in favor of downtown, mixed-use locations. For some companies, and some industry sectors though, traditional office parks remain viable and even desired locations based on factors ranging from cost and access to a continuing desire for marquee corporate campuses. The office market landscape is far more complex than simply saying mixed-use is good and single-use is bad. Even within the concept of mixed-use business centers, market success for a business park as a whole comes from creating a mixed-use urbanized environment, not from simply adding a residential building.

The idea of pursuing a mixed-use business center strategy for the Wells Avenue Park has some inherent challenges that must be adequately assessed. Most significantly, there is the relative isolation and inaccessibility of the Park. While viable in its current configuration, even with the addition of a shuttle, a

true mixed-use center would potentially struggle in such a location. These types of questions would be considered in the development of a strategy, but the analysis should drive the solution, rather than the desire for a given solution becoming the basis of the analysis.

In addition to the inherent challenges at Wells Avenue for a mixed-use center strategy, for the City as a whole, a question arises around encouraging a mixed-use center there when there are existing mixed-use urban environments in the City that could use revitalization and to which companies seeking that kind of environment should be directed. In close proximity, Needham Street has some of the greatest potential for this type of development and greater opportunities to improve access. Newton Corner as well, with its proximity to Boston, Cambridge, and new development in Watertown, offers great opportunities. Offering a diverse array of choices, in this case mixed-use areas and traditional office parks, often represents good strategy and public policy.

#### Other Issues

The applicant submitted a letter dated November 2, 2014 that includes a number of inaccuracies. They note that granting the requested waivers for 135 Wells Avenue would not lead to the development of additional multi-family projects within the Wells Avenue Office Park. The Planning Department notes that granting the requested waivers including allowing for a residential use would be precedent setting, and although the Board would have to waive the Deed Restriction on a parcel by parcel basis, the Board would be hard pressed to not give another applicant the same considerations.

The applicant wrongly notes that the window of 40B development in Newton is closing due to the possibility that the City may soon meet its 1.5% "land-area threshold" under 40B. The applicant is over simplifying the calculation and the City is working to put together a more precise number that correctly accounts for the many nuances in the formula that must be backed out of the total land area counted.

#### Recommendation

Newton has always been deeply committed to the creation of affordable housing opportunities in the City and welcomes well-planned comprehensive permits at appropriate locations that are fittingly designed for the existing neighborhood context and offer sustainable development and smart growth opportunities. Although the project may offer a traffic flow that is counter to existing traffic patterns it doesn't decrease car dependence or decrease vehicle trips overall, and it is hard to envision a more robust mix of uses given the constraint of the Office Park's access and location. Given these constraints it may be more appropriate to target the types of uses that were originally envisioned for this Park. The Planning Department notes that as we don't yet have a redevelopment strategy in place for the Park, a project of this scale doesn't make sense at this time. A more preferable course of action is to complete the market position study, and develop a thoughtful, community-supported strategy for the future of the park.

#### Attachments

**Attachment A:** Memorandum from the Law Department dated November 7, 2014

**Attachment B:** Draft Board Order submitted by the applicant

CITY OF NEWTON  
LAW DEPARTMENT  
INTEROFFICE MEMORANDUM

TO: Land Use Committee of the Board of Aldermen

FROM: Ouida C.M. Young, Associate City Solicitor  
Dennis A. Murphy, Assistant City Solicitor

DATE: November 7, 2014

RE: Wells Avenue Deed Restriction – Area 1A



---

In 1960, Sylvania Electric Products, Inc. purchased the 183 acre Shaw estate off Nahanton Street in Newton with the hopes of building a \$15 million science park. At the time, Sylvania rented space nearby in Needham, so that site was convenient to its existing workforce. It was zoned for residential use and would need to be rezoned to allow Sylvania's contemplated use.

This memo briefly addresses the complex arrangement between Sylvania, its neighbors and the City in connection with rezoning the property and imposing certain deed restrictions, particularly the no-build restriction on Area 1A, a three acre triangle in the southeast corner. After reviewing records of the Law Department, Aldermen Documents and the Registry of Deeds, the memo concludes that Sylvania may have imposed the Area 1A restriction to appease one or more of its neighbors, to ameliorate environmental concerns regarding watershed protection, or simply due to topography because Area 1A contained a prominent knoll that was designated to be retained on the plans.

Background

In general, the Sylvania deal involved granting the City an option to purchase (for \$300) a 30.5 acre tract of its land along the Charles River in exchange for agreeing to rezone most of the remainder to limited manufacturing for the science park. In order to vet the proposal, the City retained a planning consultant, Charles E. Downe, who analyzed revenue to cost ratio for various possible uses on the site, conducted a traffic study, calculated the acreage and drew a plan. From Mr. Downe's reports, it seems clear that the additional tax revenues from the industrial use were a key factor in the zoning change.

Of the 183 acres Sylvania owned, only 123 acres were to be rezoned. Some 30 acres were to remain Single Residence A, and the other 30.5 acres were optioned to the City. Based on the proposed restrictions, the 123 acre Limited Manufacturing zone would have at least 74 acres of open space and only 18 acres of buildable area.

After the rezoning, some abutters sued to annul the change on the grounds that the City could not enact a zoning amendment and also impose deed restrictions on the same land. They took the case to the state's highest court and lost. In its decision, the SJC differentiated zoning

regulations from deed restrictions: “It does not infringe zoning principles that, in connection with a zoning amendment, land use is regulated otherwise than by the amendment. Zoning regulations, as Sylvania points out, exist unaffected by, and do not affect, deed restrictions.”<sup>1</sup> The Court specifically held that the restrictions at issue are not zoning restrictions.<sup>2</sup>

Despite its court victory, Sylvania never built its science park. Instead, it sold to a private developer (Wasserman), who in 1968 amended the Option Agreement to develop an industrial park. Among the material changes, the Amended Option Agreement expanded the allowable area to be developed, reduced the required open space (from 60% to 40%), and increased the term of the restrictions from 30 to 99 years. The City exercised its option in 1969, and the resulting deed dated May 22, 1969 conveys the 30.5 acres (Parcel 2) to the City. Appurtenant to Parcel 2 that same deed incorporates restrictions on the remaining 123 acres (Parcel 1), including the no-build restriction on Area 1A (condition 7).

The deed restrictions have been amended several times over the years. In a 1972 amendment to the deed restriction (#734-72), the Board of Aldermen adopted the Flood Plain and Watershed Zoning Ordinance, which among other things requires a 2/3 vote of the Board for approval of any permission thereunder. In 1981, the City deeded an easement over its 30.5 acre Parcel 2 to the United States for flood management, which further restricted the use of that land, including a prohibition against any building or excavation. No changes have ever been made to the restriction on Area 1A.

#### Genesis of Area 1A

When Sylvania applied in 1960 to change the zoning from Single Residence A to Limited Manufacturing, the plan did not include the 3.1 acre triangular site in the southeast corner of the property. From the inception of its plan, Sylvania never intended to use that land as part of its science park. The attorney for Sylvania referenced that parcel in his remarks to the Claims and Rules Committee of the Board of Aldermen (5/9/1960) as designated for recreational use. True to its word, in 1962 Sylvania split that triangular parcel from its property under an ANR plan and in 1966 deeded it to the neighboring Oak Hill Park Association (“OHPA”) for nominal consideration, with a restriction that it be used only for recreational purposes.<sup>3</sup>

In addition to the gift to OHPA, Sylvania made a deal with its other neighbor, Mt. Ida College, in the form of a land swap whereby the 3000 foot eastern property boundary was straightened out in a direct line to Nahanton Street. The land to the east went to the college and the land to the west, to Sylvania.

Area 1A is a triangular parcel that lies immediately adjacent to the similarly sized land given by Sylvania to OHPA and borders the boundary with Mt. Ida College. The restriction against any building or structure in Area 1A was in the original draft Option Agreement proposed by Sylvania to the City in 1960, and remained unchanged throughout various iterations. And the land swap with Mt. Ida College was proposed before Sylvania even petitioned for a

---

<sup>1</sup> Sylvania Elec. Prods. Inc. v. City of Newton, 344 Mass. 428, 434 (1962)

<sup>2</sup> Id. at 436.

<sup>3</sup> Oak Hill Park was a planned development of some 315 homes built in 1948 for GIs returning from the war.

zoning change. From this sequence of events, Area 1A may have been restricted to appease the concerns of abutters and to provide a buffer to those adjoining properties.

Another possibility is that Area 1A was restricted to protect sensitive environmental resources. Area 1A lies upgradient from and adjacent to the land then-owned by the City's Water Works Reservation (now owned by the Metropolitan District Commission). At one time, the City drew its public drinking water from the Charles.

In addition, the 1969 deed that adopted the restrictions from the 1960 Option Agreement also has an additional restriction, which makes the entire Sylvania/Wasserman parcel subject to the Order of Conditions of the Department of Natural Resources (#P-628) dated December 13, 1968. The Order of Conditions incorporates a stipulation dated November 22, 1968 between the Department and the owner, which states:

- The land that is the subject matter of this application . . . is essential to public or private water supply or to proper flood control [and]
- That certain portions of the above referenced land may be utilized provided that adequate perpetual protection of other areas is guaranteed [and]
- That the applicants, their successors, heirs or assigns acknowledge and agree that the rights of all parties, with respect to the land covered by the application, have been adjudicated in this proceeding, and that this stipulation shall be binding and considered "res-judicata" in any future proceeding.

The upshot of this stipulation is that DNR approved the work for the entire site based on the plans that showed various protections for sensitive resource areas bordering riverfronts, which are protected by G.L. c. 131, § 40.

A third possible reason for restricting Area 1A was due to its unique topography. From the earliest plans, the prominent knoll in that location was designated to be retained. One of the major concerns with the original project was how grading the site would affect the watershed. In a June 19, 1968 letter commenting on the proposed amendment to the Option Agreement, the Newton Conservators recommended that the Aldermen tighten the restrictions, not loosen them as proposed, in order to protect the integrity of the Charles River floodplain. The Conservation Commission letter of November 12, 1968 voiced similar concerns about the need to protect the wetland, marsh and waterways tributary to the Charles. Based on the concerns raised at the time, retaining the knoll to maintain the grade and protect the natural watershed may have been the impetus for imposing the no-build restriction on Area 1A.

### Conclusion

From the review of available records, it is reasonable to conclude that the Area 1A restriction may have been to buffer abutters, to protect the floodplain and watershed, to retain the knoll shown on the plans, or for a combination of these reasons.

**ATTACHMENT B**

**CITY OF NEWTON**  
**IN BOARD OF ALDERMEN**

November 17, 2014

**ORDERED:**

That the Board, finding that the proposed amendment can be made without substantially derogating from the purpose for which the City of Newton was granted certain restrictions in a deed from the Trustees of the “Newton at 128 Realty Trust” to the City of Newton dated May 22, 1969 and recorded with the Middlesex South Registry of Deeds in Book 11669, Page 535, the Board hereby agrees to amend the aforesaid restrictions as follows:

**PETITION NUMBER:** #210-14

**PETITIONER:** 135 Wells Avenue LLC

**LOCATION:** 135 Wells Avenue, Ward 8, Section 84,  
Block 34, Lot E-2, containing approximately 276,492  
square feet of land, more specifically designated as Lot E-2  
on a Plan of Land entitled “Existing Conditions Plan, dated  
June 14, 2013”

**OWNER:** 135 Wells Avenue LLC

**ADDRESS OF OWNER:** c/o Cabot, Cabot & Forbes  
125 Summer Street  
Boston, MA 02111

**TO BE USED FOR:** A multi-family dwelling building with café, co-working  
and accessory space.

1. That the restrictions adopted by Board Order #276-68(3) as conveyed to the City of Newton by a Deed recorded with the Middlesex South District Registry of Deeds in Book 11669, Page 535 as amended, be further amended to allow the use as described above.

2. That the restrictions adopted in unrecorded Board Order #734-72 (#884-71) be further amended to allow the use as described above.

3. That this Order is conditioned upon the Petitioner funding or causing to be performed the off site public improvements listed on Exhibit A of this Board Order.



4. That the limitations and requirements described on attached Exhibit B of this Board Order be waived and determined not to be applicable to the building and site improvements set forth in Petitioner's application to the Zoning Board of Appeals in Docket Item # 6-14.
5. That this Order is further conditioned upon the Petitioner complying with the terms and conditions of the comprehensive permit granted to Petitioner in connection with Zoning Board of Appeals Docket Item #6-14.
6. His Honor the Mayor is hereby authorized to execute on behalf of the City such recordable documents as may be usual, customary or necessary to give effect to the Order of the Board herein.

Under Suspension of Rules  
Readings Waived and Adopted

[    ] Yeas                      [    ] Nays

Executive Department  
Approved [Date]

---

City Clerk

---

Mayor

## **EXHIBIT A**

### **To Board Order #210-14**

1. Fund and cause to be designed and reconstructed the Wells Avenue/Nahanton Street intersection as per the plan entitled “Rebuild Nahanton St Intersections at Wells Ave & Winchester St” (the “VHB Plan.”)
2. If needed, supplement the City’s FY 2016-2020 Capital Improvement Plan funding for the signalization of the Winchester Street/Nahanton Street intersection.
3. Prepare for the City of Newton with the required plans and engineering services (not to exceed \$75,000) an application for the City’s approval and submission of a MassWorks State grant application (or other similar funding), which would provide funding for additional improvements in the Wells Avenue area.
4. Design and construct in the Wells Avenue Right of Way a new drop off area serving the Solomon Schechter Day School (“SSDS”) consistent with the concept shown on the plan title “Build New Solomon Schechter Pick Up/Drop off Lane” and subject to the not to exceed cost of \$35,000.00 to be provided for in the ZBA Comprehensive Permit.
5. Fund, and or design and construct improvements to the Wells Avenue Park entrance and signage consistent with the concept plan provided to the Board.
6. If not performed by the City, cause to be upgraded all Wells Avenue lighting fixtures to LED along with new arms and banners.
7. Within the public right of way, complete a onetime clean up of heavily overgrown, untended trees and perform landscaping to improve unsightly areas and create a more pedestrian friendly, safe environment (e.g. removal of poison ivy alongside sidewalks).
8. In collaboration with SSDS and Mt. Ida, develop a new, pedestrian friendly entry into the DCR Cutler Reservation across the 135 Wells Avenue property, including new entry features and improved pedestrian trails.
9. Cause to be striped Wells Avenue to include new crosswalks, lane dividers and a bike lane.  
  
[The overall cost to the Petitioner of items 1,2,5,6,7,8 and 9 shall not exceed [\$\_\_\_\_] and shall be discussed with the Land Use Committee.]
10. Work with interested property owners to promote the new Wells Avenue Smart Shuttle.

## **EXHIBIT B**

### **REQUESTED AMENDMENTS TO WELLS AVENUE RESTRICTIONS**

Blanket amendment of the restrictions set forth in a deed from Isadore Wasserman and Edwin M. Howard, as Trustees of the Newton at 128 Realty Trust, u/ d/t dated June 10, 1967, and recorded with the Middlesex (South) Registry of Deeds in Book 11419, Page 019, which deed is recorded with the Registry in Book 11699, Page 535 (the "Wasserman-Howard deed"), as those restrictions may have been amended or waived from time to time by the Newton Board of Aldermen, releasing those restrictions as they relate to 135 Wells Avenue site for so long as the project and the site are developed and used for a multi-family residential project allowed under a G.L. c. 40B comprehensive permit.

If specific amendments are to be granted, rather than a blanket amendment, amendments are requested to the following paragraphs of the Wells Avenue restrictions:

- Paragraph 1 -amendment of 800,000 square foot limitation on gross floor area, as may have been amended, to allow 417,500 square feet of gross floor area, plus structured parking at 135 Wells Avenue, and amendment of the requirement that at least 40% of each parcel be maintained as open space not occupied by buildings, parking or loading areas or roadways to require that at least 35% of 135 Wells Avenue be so maintained.
- Paragraph 2-amendment of the parcel FAR limit of 0.25, to allow an FAR of 1.54 (plus structured parking).
- Paragraph 3-amendment to remove the requirement the Aldermen's approval of finished grading, topography, drainage, parking, and landscaping plans.
- Paragraph 4- amendment of the use restrictions to allow multi-family residential use, the retail sale of tangible personal property to consumers, up to 6,000 square feet of mixed-use office/flex/cafe/automat space, and up to 5,000 square feet of rental/management/automat space at 135 Wells Avenue.
- Paragraph 5 -amendment to allow buildings and parking areas within 80 feet of northeasterly boundary of Parcel 1.
- Paragraph 6 - no amendment requested.
- Paragraph 7 - amendment to allow building on Lot 1A as shown on the plan accompanying the Wasserman-Howard deed.
- Paragraph 8- amendment of sign restrictions to allow any signs permitted under the Newton Zoning Ordinance, by right or by special permit, or as permitted by a comprehensive permit under c. 40B.
- Paragraph 9-amendment to allow lighting to direct light onto Wells Avenue and adjoining properties as may be approved by a comprehensive permit under c. 40B.

Blanket amendments to the Wasserman-Howard deed set forth in unrecorded Board of Aldermen Order 734-72, dated August 9, 1972, as those amendments may have been amended or waived from time to time by the Board of Aldermen, releasing the site from all applicable provisions for so long as the Project and site are developed and used for a multi-family residential project allowed under a G.L. 40B comprehensive permit. If specific amendments are to be granted, rather than a blanket amendment, amendments are requested to the following paragraphs of Board Order 734-72

- Paragraph 1 -amendment to not require that future site work such as removal of fill or disturbance of vegetation undertaken at 135 Wells Avenue be performed only in accordance with Paragraph 2.
- Paragraph 2- amendment to no longer require that (a) preliminary site plan, grading plan, and landscaping plans be submitted to the Planning Department for prior review, and (b) such plans be approved by the Board of Aldermen, prior to site preparation for any development undertaken at 135 Wells Avenue pursuant to a comprehensive permit under c. 40B.
- Paragraph 2A- amendment to make the parcel subject to the provisions of the Flood Plain and Watershed Zoning Ordinance only to the extent that the language of the ordinance makes it applicable to the parcel and, if the ordinance is applicable, to remove the requirement for a 2/3 vote of the Aldermen approving development undertaken pursuant to a comprehensive permit under c. 40B.
- Paragraph 3 - no amendment requested.
- Paragraph 4- no amendment requested.
- Paragraph 5 -no amendment requested.
- Paragraph 6 - no amendment requested.