

October 18, 2021

Re: 29 Greenwood Street, Newton

Newton Historical Commission
1000 Commonwealth Avenue
Newton, MA 02459

Dear Commissioners,

Ty Gupta, the developer of a landmarked but now demolished house at 29 Greenwood, has submitted plans in support of his request to correct the violations and be allowed to rebuild the house he demolished. On September 17, 2021 the Mayor and the Director of Planning and Development wrote a letter outlining what they asserted were the legal standards governing your decision. The undersigned Newton lawyers write to correct several points of incorrect legal statements in that letter.

I. THE BASIC FLAW OF THE LETTER IS THAT IT IS BASED UPON THE WRONG NEWTON ORDINANCE- THE DEMOLITION DELAY ORDINANCE, NOT THE LANDMARKS ORDINANCE.

These are two entirely different Ordinances which apply to separate categories of Newton properties and give completely different sets of procedures and remedies. As one can even tell from its title, the Demolition Delay Ordinance¹ merely creates a timetable for when demolition can occur (12 months or 18 months) with houses over 50 years old having some historical significance.

The Newton Landmarks Ordinance, on the other hand, is a significantly stronger ordinance with a stated goal of ... “the preservation or protection of the landmark”. This ordinance prevents the demolition of the 26 Landmarked houses in Newton, except in very limited cases which it can approve only prior to demolition according to the detailed review process specified in the Ordinance. See Sec 22-65. Simply stated, one cannot demolish a landmarked structure, and then seek retroactive permission to demolish and rebuild.

¹ Both Ordinances can be found in Chapter 22 “Planning and Development” of the Newton City Ordinances (updated 7/27/20). Demolition Delay is Article III, Div. sec. 22-50 – 22-59. Landmarks Ordinance is sec 22-60- 22-75.

The only way to get approval to demolish a Landmarked structure is to file an Application for a Certificate of Appropriateness with the NHC and receive a Certificate of Appropriateness to demolish prior to demolition. Sections 22-65 through 22-67 set forth the procedure for the Application, materials to be submitted by the developer, timing for the scheduling of a public hearing and decision, and the legal standards for the NHC’s review and decision. The NHC has power to grant the Application, deny it or grant it with conditions. (See “Determination” sec. 22-67).

If the NHC denies the application to demolish, the landmark stays as is. Any “aggrieved person” (as defined by the Ordinance)² wanting to appeal the NHC decision may do so to the Massachusetts Superior Court sitting in Equity. The applicant’s only recourse under the Landmarks Ordinance therefore is to appeal to Superior Court. He cannot go ahead and demolish and then come back to the Commission and try to get approval for his plans after the fact to remediate the violation.

II. THE RELEVANT ORDINANCE, THE LANDMARKS ORDINANCE, PROVIDES NO RIGHT FOR SOMEONE WHO HAS ILLEGALLY DEMOLISHED A LANDMARK TO “REMEDiate THE VIOLATION”—THE MAYOR’S LETTER PROCEEDS UNDER THE DEMOLITION DELAY ORDINANCE, WHICH DOES NOT APPLY HERE

The Mayor’s letter states:

“The owner must come ... with a proposal to reverse the violation on the property and reconstruct the Hyde house; in legal language, this is called “remediating the violation.” The NHC has the power to accept or reject proposed reconstruction plans based upon whether, in their expert opinion, the proposal remediates the violation (emphasis added).

The “remediation of violation” language is taken from the Demolition Delay Ordinance, not the Landmarks Ordinance. Demolition Delay Ordinance Sec. 22-50(e) states:

“Non-Compliance...

In addition, unless a demolition permit issued in accordance with this section was obtained ... the commissioner may elect to (1) issue a stop work order halting all work ... until the commission notifies the commissioner in writing that ... the commission has accepted the applicant’s plans to remediate such noncompliance; (2) refuse to issue any certificates of occupancy, temporary or final, until any noncompliance has been remediated.”

² *Person aggrieved*: the applicant, an owner of adjoining property, an owner of property within the same historic district or of property within one hundred feet of the property lines of the property subject to the application, and any charitable corporation having as one of its purposes the preservation of historic buildings or places. “Definitions” Sec. 22-61.

There is no language or procedure in the Landmarks Ordinance which refer to “remedying” or “remediation” of a violation. The only language in this Ordinance regarding violations refers to their enforcement in the Superior Court and a \$300/day fine:

“Sec. 22-71. Enforcement.

Middlesex Superior Court sitting in equity shall have jurisdiction to enforce the provisions of this division and any regulations enacted hereunder and the determinations, rulings, and regulations issued pursuant thereto and may, upon the petition of the mayor or of the city council or of the commission, restrain by injunction violations thereof; and, without limitation, such court may order the removal of any building, structure, or exterior architectural feature constructed in violation thereof, or the substantial restoration of any building, structure, exterior architectural feature or landscape of a landmark altered or demolished in violation thereof, and may issue such other orders for relief as may be equitable.

Whoever violates any of the provisions of this division shall be punished by a fine of three hundred dollars (\$300.00). Each day during any portion of which a violation continues to exist shall constitute a separate offense.”

III. THE LETTER INCORRECTLY STATES “NOTABLY, THEIR REVIEW AUTHORITY IS LIMITED TO DETERMINING WHETHER THE PROPOSED PLANS RESTORE THE HISTORIC VALUE OF THE PROPERTY TO THE EXTENT REASONABLY POSSIBLE (EMPHASIS ADDED)

The Mayor’s letter does not cite any source for this limit on the Commission’s authority. No analogous wording appears in the Landmarks Ordinance, no such principle is inferable from the language of the Landmarks Ordinance, and no such limit is contained in any case interpreting the Ordinance

IV. THE LETTER INCORRECTLY STATES: “THE NHC DOES NOT HAVE LEGAL AUTHORITY TO DETERMINE THAT THE OWNER MAY NEVER CONSTRUCT A BUILDING ON THE PROPERTY.”

Again there is no such language by its terms or implication in this Landmarks Ordinance. The statement shows a complete misreading or basic lack of comprehension as to how the Ordinance works. The NHC has stated power to grant the Application, deny it or grant it with conditions. (See “Determination” sec. 22-67). But there is nothing in the law which states that the NHC must allow the owner to construct a house on the property after it has demolished a Landmarked

house. If the NHC denies an applicant’s application for a Certificate of Appropriateness to demolish a Landmarked house, the Landmarked house cannot be demolished and must remain on the property, unless the developer files a successful lawsuit in Superior Court.

The Ordinance provides only one mechanism to obtain approval to demolish a landmarked structure: a developer must file an application for a certificate of appropriateness with the commission and receive a certificate of appropriateness to demolish. If the commission denies an applicant’s application for a certificate of appropriateness, “no building, structure, exterior architectural feature or landscape of a landmark shall be altered or demolished nor any building or demolition permit issued therefor by the city or any department thereof (Sec 22-65(a)).” Far from there being such limit on the commission’s authority, the Commission has clear authority under the Ordinance to prevent demolition and rebuilding.

V. THE ASSERTION THAT “THE PURPOSE OF A COURT ACTION IS TO PRESERVE OR RESTORE A LANDMARKED PROPERTY” IS LEGALLY INCORRECT

Again there is no such language by its terms or implication in this Ordinance as to what the Court should do. The “sitting in equity” language means that the Superior Court has the full range of remedies open to it: from no action, to fine, to injunction, to permit reconstruction, to allow a new house, or whatever other the Court deems just and equitable on the facts of the case. The Middlesex Superior Court sitting in Equity will do what it deems just and equitable with clearly no legal requirement to “preserve or restore” the demolished house as claimed. On the compelling facts of this case, we would think it appropriate that the Court would impose the most serious penalties against the developer-a denial of Mr. Gupta’s attempt to rebuild and profit therefrom.

VI. THE LETTER MISCHARACTERIZES THE OPTIONS AVAILABLE TO THE COMMISSION

The letter’s attempt to limit the NHC’s options to“... restoration, recreation or remediation...” is without any legal basis in the language of the Landmarks Ordinance and misrepresenting what the NHC’s legal options are as described above. The Commission has the legal right to deny the developer’s request to rebuild and we encourage them to do so.

CONCLUSION

Mr. Gupta must not be granted authority to rebuild that which he has illegally destroyed. To allow otherwise, would be to gut the language and intent of the Newton Landmarks Ordinance. His conduct in demolishing the 1744 Gershom Hyde house was clearly illegal and this Commission should not allow him to rebuild a replica and profit from his misconduct. Allowing this developer to flagrantly violate the Landmarks Ordinance and then be allowed to build a new “replica” house would create a dangerous precedent to other unscrupulous developers to demolish other Newton Landmarks.

RESPECTFULLY SUBMITTED,

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cc. w/ Exhibits: Honorable Ruthanne Fuller
Barney Heath, Director of Planning and Development
Stephen C. Farrell

- Ex. 1. Annotated copy of September 17, 2021 from the Mayor and the Director of Planning and Development
- Ex. 2. Newton Landmarks Ordinance
- Ex. 3. Newton Demolition Delay Ordinance

SIGNATURES ON THE FOLLOWING PAGES

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September 17, 2021

Dear Mr. Farrell and our many concerned residents,

A critical mission for the City of Newton via our Historical Commission is caring for our historic resources, designating City landmarks, and protecting these historic properties.

My job as Mayor and the job of our Planning Department staff is to support fully these preservation efforts and the Historical Commission.

I as Mayor and Barney Heath as Director of Planning and Development share our Commissioners and our residents' outrage that the owner/developer at 29 Greenwood demolished one of our treasured landmarked properties. It was completely wrong. Its demolition went completely against our City's goal of ensuring our landmarked historic properties remain part of Newton's fabric in perpetuity.

The City vests in our Newton Historical Commission (NHC) the regulatory authority over the landmark ordinance. They have my full support and the full weight of my office in this important work.

I know our Commissioners take their role as stewards of Newton's historic properties seriously, act with great care, and willingly work many long hours.

What has happened at 29 Greenwood to date?

Enforcement: The City of Newton Inspectional Services Department (ISD) immediately issued a stop work order upon notification that the owner demolished 29 Greenwood. Thereafter, the Newton Historical Commission took the most swift and decisive action available to them under the City of Newton ordinances. They quickly met and formally determined that the owner's actions constituted a violation of the landmark ordinance. They directed ISD to maintain the stop work order. They imposed the maximum daily penalty, which continues to accrue.

What happens next at 29 Greenwood?

Reconstruction: The owner cannot restart any construction activities on the property prior to receiving approval from the NHC. The fines assessed by the Commission will continue to accrue until the owner receives such approval.

The owner must come before the Newton Historical Commission with a proposal to reverse the violation on the property and reconstruct the Hyde house; in legal language, this is called "remediating the violation." The NHC has the power to accept or reject proposed reconstruction plans based upon whether, in their expert opinion, the proposal remediates the violation.

Notably, their review authority by law is limited to determining whether the proposed plans restore the historic value of the property to the extent reasonably possible. The NHC's decision must be based on an objective review and does not and cannot have a punitive component. The NHC does not have the legal authority to determine that the owner may never construct a building on the property.

Court Action: Under the City of Newton landmark ordinance, the City may seek court action to enforce the provisions of the ordinance. Specifically, the City can request that the Court order the removal of structures constructed in violation of the ordinance. The City can also request that the Court order reconstruction of a building demolished in violation of the ordinance. The purpose of a Court action is to preserve or restore a landmarked property. The option of seeking court action is one the City will continue to consider and use if necessary.

The actions the owner of 29 Greenwood will be required to take with regards to removal of any built structures and/or reconstruction of any built structures is under the purview and the authority of the Newton Historical Commission. I know the NHC will take great care when they render a decision as to what they think would be most historically appropriate and I support the Newton Historical Commission taking the strongest legally possible measures.

How can we prevent this from happening to a landmarked property ever again?

The Planning Department and the Chair of the Historical Commission are working with the Law Department on ways the landmark ordinance and the landmark review process could be strengthened to lessen the chance of this type of egregious action ever occurring again. We welcome ideas. For example, one idea that resonates strongly is having the NHC require a third party, independent architect to monitor regularly construction activity on key properties that have been approved by the NHC. This possible requirement may need an ordinance change to make it possible.

The owner's next available opportunity to be heard is at the October 28 NHC meeting. We understand that the owner intends to present an official submission on how they will restore the building. The Commission will decide if they agree and will officially respond in due course.

In the meantime, the City will continue to enforce the stop work order at the site and to assess daily fines. This will continue until the Newton Historical Commission approves an acceptable resolution.

Let us reiterate that the demolition of the Hyde house was wrong. While no restoration, recreation or remediation will ever be satisfying, we are confident that the Newton Historical Commission will do the most they can do in this onerous, terrible situation.

We welcome your continued communication with us and with the members of the Newton Historical Commission.

Sincerely,

Ruthanne Fuller, Mayor

Barney Heath, Director of Planning and Development