

MEMORANDUM

To: MarketStreet Advisory Committee (“MSAC”) of the Town of Lynnfield

From: Berm Subcommittee of MSAC (Brian Charville, Paula Parziale, Taidgh McClory)

Date: October 25, 2017

Re: Subcommittee Findings & Recommendations

The Berm Subcommittee (“Subcommittee”) was asked by MSAC in June 2017 to look into the MarketStreet berm, its origin and purpose, and stakeholders’ present concerns regarding it. By “berm” we are referring to the artificial, raised bank of earth that begins along the north side of the drive as one enters and exits MarketStreet from Walnut Street, and continues north along King Rail Drive to a point near the King Rail Reserve Golf Course and Colonial Village. This Memorandum summarizes the Subcommittee’s approach, findings and recommendations.

Review of Zoning Bylaws and Design Standards

The Subcommittee began its work by reviewing the Zoning Bylaws that relate to MarketStreet as well as the “Lynnfield 40R Planned Village Development District Design Standards and Procedures” (the “Design Standards”) to learn what they say about the berm. Section 9.5 (“Planned Village Development District”) of the Town of Lynnfield’s Zoning Bylaws speaks to MarketStreet (it being the Planned Village Development). While that Section speaks to matters like affordable housing, allowed and prohibited uses, and how the site will be buffered from neighboring parcels, it does not speak to the berm.

The Design Standards, however, speak to the berm and present-day berm-related concerns in some detail. The fact that the Design Standards, and not the Zoning Bylaws, speak to the berm is consistent with the recollection of Angus Jennings, the project’s design consultant (discussed more below). The Design Standards note that “Landscaping shall be selected to minimize necessary water usage, and to satisfy [] functional objectives such as screening” and “Landscape elements should be used as buffering features in the form[] of [a] planted earth berm”. Section 5.D.4.f(iii) says “... on top of the *landscaped berm* along the westerly edge of the Walnut Street Buffer [] *at least 50% of evergreen trees shall be 10 feet high, balled and burlapped or equivalent at the time of planting.*” (emphasis added) In subsection 5.D.4.g the Design Standards make recommendations about landscape planting practices generally.

Section 5.I. of the Design Standards speaks specifically to the berm:

Guiding Principles. Overall site design should minimize impacts to adjacent properties on Walnut Street by providing a raised buffer with year-round, vegetated screening and other site planning features. Screening should be designed to minimize both visual and audible impacts from the District. ...

Overall site design should retain a *substantial vegetated buffer* of existing vegetation adjacent to Walnut Street, and *said buffer*

should be enhanced with a raised, vegetated berm to minimize the visual and noise impacts of the District on adjacent properties...
(emphasis added)

That same Section of the Design Standards included this guiding image and caption:



Illustrative view of berm, post construction, from Walnut Street.

The Design Standards speak most specifically to the berm in Sections 5.I.1 and 5.I.2, and in Table X (Walnut Street Buffer column):

5.I.1 A raised, landscaped berm or berms of a minimum combined 1,100 linear feet shall be constructed, at a minimum height of ten feet above the adjacent parking area, but in any event of sufficient height to block the view of cars in the parking lot from as far north along Walnut Street as the end of the berm from a vantage point five feet above Walnut Street grade. The berm or berms shall be roughly parallel to Walnut Street and be located along the westerly edge of the Walnut Street Buffer required by the District Bylaw. The berm is *intended to serve as a visual and noise buffer between the District and Walnut Street.*

5.I.2 The berm shall be landscaped with a combination of evergreen and deciduous plantings of varying canopy heights to help provide a natural screening to the development.

Table X Raised, landscaped berm or berms of a minimum combined 1,100 linear feet, with a minimum height of ten feet above the adjacent parking area, *landscaped with mix of Deciduous Trees, Evergreens and shrub material.*

Evergreen trees 6 feet minimum. 50% of evergreens must be at least 10 feet. (emphasis added)

From the Subcommittee's perspective, the berm's length, height and landscaping are prescribed clearly in the Design Standards. If anything was not clear, it is vegetation upkeep standards.

Review of Plans

The Subcommittee, at the same time it was reviewing the Zoning Bylaws and Design Standards, reached out to Town staff to access and review the site plan and other plans for MarketStreet that might have shown or otherwise related to the berm or berms. Kathy Randeale, the Planning Board's Planning and Land Use Assistant, provided the Subcommittee with access to the original and revised Site Plan documents which had been submitted by National Development, MarketStreet's owner, to the Planning Board over the years. Subcommittee member Brian Charville reviewed the plans with Mrs. Randeale and did not see any plan pages that showed the berm specifically, whether as designed or as built. Mrs. Randeale spoke with Charlie Richter, the Town Engineer, and she reported back that the Town's Department of Public Works was not aware of as-built plans that might show the berm in its constructed form.

From the Subcommittee's perspective, the berm meets the length and height requirements of the Design Standards. As noted below, no one expressed concerns to the Subcommittee that the berm is not as long or as high as required. Measurement of its length using the distance tool on Google Maps indicates that it is approximately 1,200 feet long. A naked-eye observation of its height, from the perspectives of the parking lots opposite the berm along King Rail Drive, indicates that it is approximately 10 feet above the parking lots' elevation. The Subcommittee's principal concern after this portion of its work was whether the berm complied with the letter and spirit of the landscaping requirements.

Public Forum

On September 14, 2017, MSAC held a public forum for stakeholders to speak to the Committee regarding berm- and noise-related concerns at MarketStreet. Stakeholders (primarily abutters and Town residents who live on or near Walnut Street) expressed clear concerns about the lack of vegetation on the berm, with one person telling MSAC that in terms of vegetation "Nothing has happened." Speakers said that a lack of enforcement of the Design Standards relating to vegetation on the berm was enabling the inadequate vegetation to persist. Despite National Development's past representations that it wanted to act as a "partner" with the Town, speakers said that it had not done so. David Moynihan, of 285 Walnut Street, said that the concept of the berm began with him. He said that the vegetation installed on the berm after it was built was to be watered and maintained, and become a thicket, but none of that had occurred. He said that in his legal experience, plantings come with warranties that enable replacement if they die. He mentioned that the original design consultant for MarketStreet was Angus Jennings, and that the original intent of the berm is not being met by National Development. From Mr. Moynihan's perspective, the berm does meet the length and height requirements. But there is a need for enforcement mechanisms and authority, or, if there is authority already on the books, action by the Town, to actually enforce vegetation standards with respect to the berm.

Joe DeMaina, of Alexandra Road, addressed MSAC at the forum and provided the Committee with a printed PowerPoint presentation and a CD with MarketStreet-related documents. His comments related to both noise and the berm. The CD contained copies of the original Development Agreement for MarketStreet, the Amended and Restated Development Agreement from January 2011, the Design Standards, Mr. DeMaina's PowerPoint presentation (including excerpts of past National Development presentations to the Town, as well as the photo of the vegetated berm shown earlier in this Memorandum) and a 2007 PowerPoint presentation by National Development itself. Mr. DeMaina's materials made it clear that the berm's current vegetation (including a photo taken in April 2017) is not meeting the letter or spirit of the Design Standards, and that certainty is needed regarding enforcement of the Design Standards.

Meetings with Individuals & National Development

As a result of the public forum, the Subcommittee thought it would be appropriate to conduct one-on-one follow-up with specific individuals and with National Development. The Subcommittee contacted David Moynihan (an abutter to MarketStreet and someone involved in early berm discussions), Angus Jennings (the original design consultant as MarketStreet was first approved by the Town) and Doug Straus of National Development to schedule meetings.

On October 11, Brian Charville and Taidgh McClory met with Mr. Moynihan and his wife, who reside at 285 Walnut Street. Mr. Moynihan had the idea for the berm, based on his past work on developments, and he shared it with Ted Tye of National Development early in the design process for the shopping center. Mr. Moynihan grew up on Fernway, just above and slightly east of Walnut Street. He gave the Subcommittee perspective on the hilly, thickly forested land behind his Walnut Street residence before MarketStreet work began. It was apparent that the hilly terrain would be lowered and he thought the berm would be a visual barrier for his home and others in sight of MarketStreet. He also encouraged the idea of the 200-foot no-build zone / residential buffer. Mr. Moynihan worked closely with Mr. Jennings on the berm's design. Mr. Moynihan specifically recalls emphasizing the need for "staggered, native vegetation" on the berm, in order to create a solid evergreen visual barrier atop the berm. The Subcommittee specifically inquired if maintenance of berm vegetation was discussed, and Mr. Moynihan did not recall that it was – his recollection is that getting National Development to agree to build the berm and plant any vegetation on it were viewed as significant successes. When asked what is now needed with respect to berm vegetation, Mr. Moynihan said that National Development should take out dead vegetation, replace it, implement a watering plan, and remember that what is to be planted is staggered, native vegetation that grows and thickens.

On October 13, Brian Charville and Taidgh McClory spoke by phone with Angus Jennings, the design consultant when MarketStreet was approved and initially laid out. He is now the Town Manager of Hampden, Maine. When he worked on MarketStreet Mr. Jennings was employed by Concord Square Planning & Development. The Town hired Concord Square and paid for their services using money posted by National Development. The overarching message from Mr. Jennings to the Subcommittee was that MarketStreet is a so-called "40R" project (under the Smart Growth Zoning Overlay District Act), and therefore was subject to very strict state oversight with respect aspects like affordable housing, but rather limited local control over details like plantings. With a 40R project the goal is to spur housing and/or mixed-use

development. There was close oversight of the project by Don Schmidt at the Commonwealth's Department of Housing and Community Development. Anything that the Town and National Development agreed to had to be approved by DHCD. On the other hand, in his 40R experience Mr. Jennings found that landscaping features commonly were included in the initial site-plan approval, would be incorporated into a planning board's or board of selectmen's decision on a project, and would be a *continuing condition of compliance* throughout the project's life. Concord Square originally was hired to draft the Zoning Bylaws and Design Standards (a seven-month engagement), and later was hired in a separate process to staff the Planning Board as it oversaw the actual design of the shopping center and design compliance.

Mr. Jennings recalled that the berm's purposes were to address visual impact and noise. The Subcommittee specifically asked Jennings about berm landscaping, and he believes that the plan was a mix of keeping some of what was there, and some new plantings. A mix of deciduous and evergreen; minimum height & caliper, with the berm's height being above adjacent parking. The goal was a mix of vegetation in order to have a year-round visual buffer. He definitely recalled that the berm was one of the *material items* in terms of getting approval at Town Meeting. He recalled that the Design Standards and plans were very heavily negotiated, and he defers to the actual words that are in the final documents, in terms of what governs the project. For ongoing enforcement, Jennings said the Town's approach was to have a paragraph in the Zoning Bylaws to empower the Design Standards, and leave the details to the Design Standards themselves. From the Subcommittee's perspective that is what occurred. The Subcommittee asked Jennings about past discussions of watering or other vegetation-upkeep on the berm, and he did not recall that that had been discussed. He said there was an expectation that plantings, which were conditions of approval, by plan reference, are continuing, enforceable conditions at the project. From his perspective it was reasonable to think National Development would maintain plantings in initial years, so that irrigation would not be needed down the line.

On October 16, Brian Charville, Paula Parziale and MSAC Chair Jen Bayer spoke by phone with Doug Straus, Senior Vice President at National Development, regarding the berm. Mr. Straus stated that the berm's main purpose was to block headlights from cars at MarketStreet, with vegetation a secondary concern. With a height of 10' above adjacent parking, the berm is already unusually high and provides a significant visual barrier regardless of the vegetation on it. From National Development's perspective, vegetation (specifically trees) was never meant to block lights but rather to blend and shield views of taller buildings at the project.

In terms of the berm's current vegetation, Mr. Straus was frank about the conditions National Development has encountered in trying to get vegetation to take hold on the berm. He reminded the Subcommittee of the extreme drought conditions in 2016, Lynn Water & Sewer's emptying of water from the meadow (which prevented National Development from drawing water from the meadow as permitted), and supply problems sourcing drought-tolerant species. Drought tolerance led National Development to plant the grasses now on the berm. National Development is continuously experimenting with different species and sizes, in conjunction with Leahy Landscaping, their landscapers. Leahy has told National Development that the berm is very windy and has poor soil, which causes evergreens and other vegetation to dry out. Notably Mr. Straus said that there is now, and has been since planting, a top-spray, above-ground

irrigation system, but even it does not overcome the dry conditions. Leahy Landscaping has recommended that National Development use smaller, 6-8' trees, to give them a better chance of surviving. Mr. Straus reported that *12 trees are scheduled to be delivered and planted by Leahy the week of October 30th*. They will be served by the above-ground water system. Assuming the replacement species does well over the winter, National Development will plant "a significant number of replacement trees" in spring 2018. He will continue to update the Subcommittee on that work.

Mr. Straus expressly said to the Subcommittee and Mrs. Bayer that National Development acknowledges its responsibility with respect to the berm and it will adhere to that responsibility with its upcoming plantings. National Development specifically plans to plant additional trees in areas of concern noted by neighbors and other stakeholders. Mr. Straus said that National Development recently revised projected budgets for MarketStreet to provide for a line item relating to removal and replacement of vegetation on the berm, a reflection of National Development's commitment to addressing stakeholders' berm concerns. National Development expects better results from the arborist's recommended drought-tolerant species. Mr. Straus repeatedly emphasized to the Subcommittee National Development's commitment to do the right thing and honor its commitments and obligations with respect to the berm. He expressly acknowledged that berm vegetation is an ongoing condition of the development. From the Subcommittee's perspective that will be the case regardless of who owns the project. Mr. Straus said that National Development stands by the vegetation required by original designs. He said National Development is not avoiding paying money, but does not want to burn money either.

Recommendations

Having completed our fact-finding, the Subcommittee makes the following recommendations to MSAC:

- In light of National Development's commitment to make significant plantings this autumn and in spring 2018, and National Development's acknowledgement of the continuing enforceability of berm vegetation requirements, National Development should be allowed until spring 2018 to remove dead vegetation and plant additional trees as promised.
- If National Development has not made the additional plantings by MSAC's meeting in late April 2018, then the Subcommittee will advise MSAC of same and ensure that berm vegetation is a topic on that MSAC meeting agenda, for advisement to the Board of Selectmen and referral to the Planning Board and Building Commissioner Jack Roberto for investigation and enforcement action.