



Zoning & Planning Committee Report

City of Newton In City Council

Monday, July 17, 2017

Present: Councilors Hess-Mahan (Chair), Kalis, Leary, Sangiolo, Yates and Baker

Absent: Councilors Albright and Danberg

Also Present: Councilor Crossley

City Staff Present: James Freas (Deputy Director, Planning Dept.), Rachel Blatt (Long Range Planner), Maura O'Keefe (Assistant City Solicitor), Karyn Dean (Committee Clerk)

#203-17 **Mayor's appointment of Kathryn Cade to the Conservation Commission**
KATHRYN CADE, 195 Islington Road, Auburndale, appointed as an alternate member of the CONSERVATION COMMISSION for a term to expire July 31, 2020 (60 days 09/08/17) [06/21/17 @ 12:16 AM]

Action: **Approved 5-0 (Councilor Baker not voting)**

Note: Councilor Hess-Mahan noted that Ms. Cade's letter of interest to the Mayor's office was dated 2015. Ordinarily, the Committee likes to meet with candidates but Ms. Cade was unable to attend the meeting as she was traveling. Councilor Sangiolo mentioned that she did not know Ms. Cade but spoke to some of her neighbors. They said that she has been before the Conservation Commission in the past relative to a project she was involved with and therefore knows the process. She has been waiting two years and is still very interested in serving. Jennifer Steele, Senior Environmental Planner, also supported her appointment.

Councilor Sangiolo moved approval and the Committee voted in favor 5-0.

#204-17 **Zoning ordinance technical amendment**
DIRECTOR OF PLANNING & DEVELOPMENT requesting a technical amendment to the Newton Zoning Ordinance, Chapter 30, Section 5.11.15 Incentives, to restore the reference to Sections 4.1 and Section 4.2 for density bonus incentives related to an increase in inclusionary units for residential use in Business and Mixed Use districts which was inadvertently omitted from the ordinance. [06/19/17 @ 5:19 PM]

Action: **Public Hearing Closed; Approved 5-0 (Councilor Baker not voting)**

Note: Councilor Hess-Mahan opened the Public Hearing on this zoning ordinance amendment. James Freas, Deputy Director of Planning, explained this amendment is recommended because there is a missing reference within the inclusionary zoning ordinance. A petitioner before the Land Use Committee, Terrence P. Morris, Esq., identified this missing reference from the transition to

the reformatted Zoning Ordinance that changes the application of Section 5.11.15 of the ordinance, pertaining to incentives in the Inclusionary Zoning provision.

Section 5.11.15.A lays out the density bonus granted to projects that provide more than the required 15% inclusionary units. It carries forward Section 30-24(f)(16)(a) of the *Revised Ordinances 2012, Chapter 30: Zoning Ordinances (Ed. April 30, 2015 – Ordinance A-57)* with one small difference. In both ordinances, the density bonus allows for one additional market rate unit for every one additional inclusionary unit with a limit of no more than a 25% change to the density controls specified for each zone. The section in the 2012 Ordinance pointed to a single table where the density controls for all zones, residential and commercial, were listed; whereas the current ordinance points to the density controls for just the residential districts.

The intent of the reference in the 2012 Ordinance was for the inclusionary incentives to apply in all zones, but due to incorrect referencing, the current ordinance only applies it to the residential zones and not residential projects in business and mixed use zones. The proposed amendment would correct the current ordinance to reflect the intent of the 2012 Ordinance by adding the correct references.

There is normally a yearly technical edit amendment, however, it was felt this amendment should be taken up in a more timely manner as there is a development project underway which is seeking to make use of this incentive within the Business district and this reference is necessary. The project is a 7-unit building in Nonantum.

A redlined version of the amendment was attached to the Planning Memo.

The Planning & Development Board was unable to attend this meeting. They will be holding their Public Hearing on this item on August 7th. If they are able to vote on this amendment at that time, the City Council will be able to vote it out at their August 14th meeting. **Clerk's Note:** The Planning & Development Board did meet on August 7th. Their recommendation to approve is attached.

The Chair asked for any comments from the public. Hearing none, the Committee voted to close the Public Hearing.

Committee Questions/Comments

A Councilor felt this was merely a scrivener's error and did not need to go through the Public Hearing process. Mr. Freas noted that because this has a substantive aspect to it, it needed to go through as an amendment and not a scrivener's error. He explained that the older ordinance had one table, which referred to residential projects in all districts. When the table was re-formatted into the revised edition, it was split into two tables. The reference only carried to the table for residential projects in residential districts but not into the second table for residential projects in Business and Mixed Use districts. This amendment would rectify that omission.

Councilor Kalis moved approval and the Committee voted in favor 5-0 with Councilor Baker not voting.

#238-16 Zoning amendment for exempt lots definition

COUNCILOR HESS-MAHAN proposing to amend Chapter 30: Zoning Ordinance, Section 7.8.4.C by amending the definition of “exempt lots” to include lots changed in size or shape as a result of an adverse possession claim. [06/30/16 @ 4:12 PM]

Action: Held 6-0

Note: Mr. Freas explained that this amendment relates to the issue of non-conforming and non-compliant uses and how they are treated in the zoning ordinance. There are new lot standards and old lot standards in the zoning ordinance: old lots are those established prior to 1953 and have certain dimensional requirements; new lots are those established starting in 1953, when the dimensional requirements were changed. Any changes to the lot lines of an old lot are interpreted as turning it into a new lot. In certain circumstances, the change to a lot line can occur through an adverse possession claim. This could be the result of something simple such as a fence being placed over a property line for a number of years. The neighbor could claim that bit of property and thereby change the lots for both parties making them both non-compliant under new lot standards. This could lead to the possible loss of use of the homes.

The proposed amendment adds changes in lot size or shape due to adverse possession to the list of exemptions to the rule found in Section 7.8.4 that a building shall not be used when a change in lot size or shape leaves the lot no longer consistent with the requirements of the ordinance.

Councilor Hess-Mahan noted that these types of situations can come up quite often in neighborhoods with lots under 10,000 square feet where they may be shared driveways, for instance. He has heard from members of the Land Use Bar who have to deal with these cases that they support these changes. These members included three former members of the City’s Law Department: Michael Peirce, Jason Rosenberg and Howard Levine. Mr. Levine was the former City Solicitor.

It was noted that Land Use attorney, Jason Rosenberg had mentioned that this was part of the original proposal for exemptions and for reasons he could not recall, got dropped, in 2001. This is something that could be researched.

Committee Questions/Comments

A Committee member commented that if there is a pending piece of litigation that someone on the Land Use Bar is concerned about, this should not be amended at this point. It may look as though the Council is acting to favor one party over another. Councilor Hess-Mahan pointed out that the current ordinance, however, hurts both parties if the claim succeeds and the current case is just an example of other cases going on in the City.

A Councilor noted that there are many other items on the agenda that have been put off because they were to be dealt with through zoning reform and perhaps this item should be as well.

There was a request for more information on the number of adverse possession claims in the City. Turtle Lane has an adverse possession issue and it would be good to know how this amendment would affect that and any other case that might be ongoing.

Councilor Hess-Mahan noted that both parties in this case are present and invited them to comment.

Hugh Starky, 50 Congress Street, Boston, addressed the Committee. He is representing the Plaintiff, Simon French, in the second of two cases. He has read the Planning Memo and he does not agree with it based on his understanding of the ordinance. A lot change does not automatically require that an old lot meet new lot standards, it simply means it still has to meet whatever is applicable, whether it is an old or new lot. Adverse possession is relatively rare, complicated, difficult to prove and is usually only a foot or so. Good contractors usually put a fence one foot within a lot line. A one-foot encroachment on a 100-foot deep lot could result in only 100 square feet of area reducing the size of the lot. Many lots would still conform to old lot standards with that small loss. Even if a 7000 square foot lot lost 100 square feet, there is a provision in Section 7.8.4. for reduction in space requirement of 5% by special permit. If it brings a lot under the frontage there is also the same provision.

There is some flexibility already built into the ordinance as written. He thinks the proposed amendment is unclear on what kind of a claim would trigger adverse possession. What would happen if there was an agreement for judgement filed by the parties and that would be a judgment of the court and that could be a collusive end-run around the intent of the ordinance. Echoing what was said about pending litigation, there was an original case when his client was sued over a subdivision. He counter-claimed for adverse possession and in May got a judgement by Judge Piper in Land Court that they had established adverse possession. This is not a theoretical question. They went to the Zoning Board of Appeals to challenge the building permits that the developer went ahead and applied for during the pendency of the first litigation and the ZBA ruled 3-2 in favor of the developer, which was not overwhelming, so they appealed to the Land Court and that is now pending. This issue needs more review and analysis to avoid unintended consequences in other areas of the ordinance. There have been other instances where this has happened, amendments had to be made and some people were disadvantaged. He suggested using a start date. He believes if his client has more land added to his lot, it remains conforming and does not become non-conforming or non-compliant.

Mr. Freas said that the ordinance makes no differentiation between old and new lots beyond the date of December 7, 1953. In terms of what constitutes the creation of a lot before or after that date, Inspectional Services' interpretation is if lot lines are changed, a new lot is created. This has been their interpretation for a very long time. Councilor Hess-Mahan noted that Chief Zoning Code Official, Jane Santosuosso, confirmed that as well. A neighbor of his had a problem getting a

mortgage because of a misplaced fence and the neighbor would not move it. They settled it but it was problematic. It was noted that Registered Land, however, cannot be changed by adverse possession.

Mr. Starky said that the Section 7.8.4.d.3.b says that if a lot in question is created before 1953 the requirements that apply are those that apply to those created before 1953. There is a subsection 2. that says lots created after 1953 are subject to after-1953 requirements. If new lots were created with lot line changes then the ordinance would not have sub 1 and sub 2, lots would always be subject to post-1953 and that is not what the ordinance says.

Laurence Lee, said this issue goes back to 2001. His access to all the Land Use Bar attorney's institutional knowledge leads him to believe that this is a problem. They have all had cases going back and they have all independently said this change needs to be made. The issue does not just affect old lots, but new lots as well. The ordinance speaks to taking of land by eminent domain and by the City. This was through no fault of the owner of that property so the City decided to exempt them. However, if a private party is doing the same thing, the same protections should apply. It does not matter if it is "just a foot". Many lots in the City are very small, non-conforming lots and he has seen many instances of fences, bushes, or driveway encroaching on the neighboring lot. All of that adds up. Lawsuits and lawyers are expensive so people decide to settle for losing a foot of their property rather than spend the money. This is not about developers, this is about residents and it comes up very often.

This affects new lots as well with minimum compliance, for example in cases where a home must be torn down because of catastrophic damage in a fire or storm, and that lot has lost a few feet through adverse possession, then the lot still has to meet new lot standards and there is not enough frontage to re-build. Every member of the Land Use Bar that he has spoken to agrees with this amendment. John Lojek also had mentioned at a ZBA hearing that this has been a problem for a long while. Mr. Lee said he has a suspicion that his fence may be on his neighbor's property in West Newton. He is not going to adversely possess their property but it is an example that this is happening all over the City. The current interpretation is dangerous and it could encourage people not to settle in certain cases. Whether there is ongoing litigation or not, this needs to be corrected. Mr. Freas added that the City was 70% built out by 1949, which would have been before new lot standards. Subsequently, the City is 87% non-conforming. If public lands are excluded the City is 95% non-conforming.

Law Department

A Committee member thought that there is a distinction between third party actions like eminent domain by the City, and two party actions, which is what this issue is addressing. There needs to be a responsible way to address this. If this is passed, an outcome is automatically changed in a specific matter in litigation.

There should be some review by the Law Department of the interpretation of the ordinance generally and the idea that a lot boundary shift changes an old lot to new lot standards. It needs to

be determined, also, whether this change would allow people to build on an old lot what they were not previously able to because it has become a new lot. It will require a tailored response and this language may be broader than appropriate for that purpose. There is also the question as to whether a home could become unusable if a lot becomes non-compliant as was stated in the Planning Memo.

The Committee agreed and asked Maura O'Keefe, Assistant City Solicitor to look into all these concerns and provide guidance.

Councilor Yates moved to hold this item and the Committee voted in favor. This will be back for further discussion with the information from the Law Department and a public hearing will be scheduled.

#95-15 Discussion to consider mix of uses at Wells Avenue Office Park

ALD. CROSSLEY, JOHNSON, LEARY, HESS-MAHAN, DANBERG, ALBRIGHT AND BLAZAR requesting a discussion with the Planning Department to consider the mix of uses in the Wells Avenue Office Park, with and without a second egress to the site, pursuant to the recent MAPC study recommending a strategic introduction of retail and restaurant uses to attract and sustain healthy commercial uses, and some number of residential units sufficient to support an economically viable and vibrant mixed use environment. [04/13/15 @ 2:46 PM]

Action: Held 6-0

Note: James Freas, Deputy Director of the Planning Department joined the Committee. A Memo was provided in the Council's Friday packet on this item. The Planning Department has been working on this initiative for some time now and has interviewed property owners within the Wells Avenue Office Park to understand their views of the future of the park. The Planning Department has studied the MAPC study as well as the Comoyne Study of the larger N2 district.

The studies recognize that the Wells Avenue Office Park is one of the City's most important commercial areas providing great opportunity for expansion. There are three essential ideas for improving the park: expanding transportation access which includes providing a second access into the park; creating a more pleasant environment for employees which includes the appearance of the park as well as amenities like restaurants and food trucks; and integrating the park into the larger N2 Innovation district by bringing events into the park and expanding the building envelope by reducing setbacks, open space requirements and allowing more stories on buildings. All of this could expand the tax base and the office space available while recognizing that the transportations issues need to be solved in order to accommodate the expansion.

The Chair felt that rezoning the park would be necessary because Manufacturing is not appropriate and the park has reached its limit under the current deed restriction. The park offers a campus-like environment that is close to woods and the river, which is very attractive. The shortest route is only about 2 miles from the center of Needham Street to the park, which is a very easy and nice bike ride utilizing the bike path.

Committee Comments/Questions

A Councilor recalled that there was a discussion in Programs & Services Committee relative to food trucks in Newton. The brick and mortar restaurant owners expressed a concern that the food trucks would take business away from them. He would not want to start allowing things in one location that could ultimately spread and shape other parts of the City. The Chair explained that the Health Department is on board with allowing food trucks for the park and the brick and mortar owners are more unified in feeling this will not have a negative impact on their businesses. It may be site specific and perhaps a pilot program for the park. It can bring some excitement to the site as well as providing needed food options. It could help promote a more collaborative environment. The Planning Department is working on a proposed ordinance.

There was a question about the second access to and from the park. Mr. Freas said the Planning Department is proposing to do a feasibility and cost benefit analysis to understand a variety of different options. The proposed study will look at several different routes, including Dedham and Nahanton Streets, and the existing intersection for improvements. Mt. Ida has agreed to participate in the study as well.

A Councilor was concerned that the overall project was not planned out well enough at this point. He would like to see a strategic plan that leads the comprehensive vision of the project. Mr. Freas said they are actively working on food trucks and the feasibility of the second access. Those are the two issues that can meet the need in the near term.

There was interest in the impact on Oak Hill Park and the Memorial Spalding School. An overall transportation plan is paramount and should require alternatives, such as congestion pricing or limiting the amount of parking that can exist there. There is another development proposal on Needham Street. She did not want to encourage single occupant vehicles which could devastate the neighborhood in Oak Hill. Mr. Freas noted that many of those issues are identified in the Transportation Strategy that guides all transportation work in the City. Conversations took place with property owners in the park which involved the discussion of shuttles, bike access and bike sharing. The overall feasibility and cost benefit analysis study will have to demonstrate that the cost of adding an additional access is in fact worth the benefit considering there are other modes that could be brought into play.

Chuck Tanowitz, Executive Director of the N2 Innovation District, added that the transportation issues are a much broader N2 problem. They are looking at how to get from the T and commuter rails in Newton, Needham and West Roxbury. There is also a longer-term plan to encourage the different uses of the entire area. Even simple bike access through the area has seen some pushback, so there are some attitudes that are more challenging than the actual execution of plans.

It was asked if DCR will be upgrading their facilities and what will happen with the pathways and access to the River. Mr. Freas said that many of the trails around Parker Street belong to the City and the Conservation Commission oversees them. The Commission has long expressed an interest

in doing some boardwalks and bridges in the park because the trail comes in from Nahanton and then goes around in a circuitous manner. There could be some improvement to that experience. Cutler Park is in Needham and belongs to DCR.

Property owners are finally agreeing that some changes need to be made and have hired a consultant to do some rebranding of the park. A designer will be looking at design, streetscape and signage, which is a very positive step. The N2 brand will be part of this as well to help promote the entire area.

It was asked if a bid would be an option. Mr. Freas said the challenge with a bid is that there may not be enough property owners to invest. There is a new option called a Community Benefit District, but the Governor just sent it back to the Legislature with comments. The District has a number of benefits over a bid. It is a 501c(3) which means it could accept a number of funding sources. It can include non-profit organizations, which is important to the park because there are two major ones there. Assuming this is passed, it would be a much more viable option for the park than a bid. He encouraged the Councilors to contact their representatives and ask for a positive vote on the Community Benefit District.

A Councilor asked if any residential development would be included in the park. Mr. Freas said residential is not being considered. It does not seem like an appropriate location as it is a bit isolated. A full mixed-use area would be more appropriate for a residential component. Some Committee members felt it should not be ruled out.

The Planning Department will continue to bring updates back to Committee.

Councilor Kalis moved hold and the Committee voted in favor unanimously.

Referred to Zoning & Planning, Land Use and Finance Committees

#273-12 Request to restructure and increase of fees for various permits

ALD. CROSSLEY & HESS-MAHAN requesting a restructuring and increase in fees for permits charged by the Inspectional Services Department and fees charged by the Planning Department and City Clerk to assure that fees are both sufficient to fund related services provided and simple to administer. [09/10/12 @ 1:17 PM]
Finance and Land Use voted NAN

Action: No Action Necessary 4-2-0 (Councilors Baker and Kalis opposed)

Note: Councilor Hess-Mahan explained that he is recommending a vote of No Action Necessary. He has spoken to the Mayor's office and there is no intention to make any changes to the fees at this time. This item was docketed five years ago. It could be re-docketed when the new administration takes office in a few months if there is interest. Inspectional Services made \$9M in fees revenue last year and the Commissioner is currently content with the fee structure. Perhaps they could have made more with higher fees, but a better question to ask is why their departmental budget was cut by \$50K by the administration.

Councilor Baker noted that the Recodification Committee is looking at this issue and felt this should stay on the docket.

Councilor Crossley said there are some scofflaws in the City that end up costing the departments much more than what the fees cover in additional time. Allowing the Commissioner of Inspectional Services to charge additional fees for that work needs to be considered. She said she could re-docket the item in January.

Councilor Yates moved No Action Necessary. The Committee voted in favor with Councilors Baker and Kalis opposed.

Councilor Hess-Mahan said his goal is to vote No Action Necessary on all items on the agenda at the end of the term. If issues are important and Councilors would like to actively work on them, they can be re-docketed in the new year.

Meeting adjourned.

Respectfully Submitted,

Ted Hess-Mahan, Chair

PLANNING & DEVELOPMENT BOARD



Date: August 8, 2017

The Honorable City Council President, Scott Lennon

City of Newton
1000 Commonwealth Avenue
Newton, MA 02459

Dear Honorable Council President Lennon:

On August 7, 2017, the Planning & Development Board (P&D Board) discussed petition #204-17 concerning technical amendments to the Newton Zoning Ordinance, Chapter 30, Section 5.11.15 Incentives, to restore the reference to Sections 4.1 and Section 4.2 for density bonus incentives related to an increase in inclusionary units for residential use in Business and Mixed Used districts which was inadvertently omitted from the ordinance. The Planning Board voted 5-0-1 to recommend that these technical amendments be granted.

Submitted on behalf of the Planning & Development Board.

Sincerely,

Scott I. Wolf
Chair

Cc: City Council

Setti D. Warren
Mayor

Barney Heath
Director
Planning & Development

Rachel Powers
CD Programs Manager
Planning & Development

Members

Scott Wolf, Chair
Peter Doeringer, Vice Chair
Barney Heath, *ex officio*
Jonathan Yeo
Megan Meirav
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DRAFT

CITY OF NEWTON

IN CITY COUNCIL

ORDINANCE NO.

August 14 , 2017

RECEIVED
Newton City Clerk
2017 JUN 29 PM 3:30
David A. Olson, City Clerk
Newton, MA 02459

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NEWTON AS FOLLOWS:

That the Revised Ordinances of Newton, Massachusetts, 2012, as amended, be and are hereby further amended with respect to **Chapter 30 ZONING** as follows:

1. **Delete** the language "Sec. 3.1 or Sec. 3.2" where it appears in the second clause of the first sentence of Sec. 5.11.15.A, and **insert** in place thereof the following language:

"Sec. 3.1, Sec. 3.2, Sec. 4.1 or Sec. 4.2"

2. **Delete** the language "Sec. 3.1 or Sec. 3.2" where it appears in the last sentence of Sec. 5.11.15.A, and **insert** in place thereof the following language:

"Sec. 3.1, Sec. 3.2, Sec. 4.1 or Sec. 4.2"

Approved as to legal form and character:

DONNALYN LYNCH KAHN
City Solicitor

Under Suspension of Rules
Readings Waived and Adopted

EXECUTIVE DEPARTMENT
Approved:

(SGD) DAVID A. OLSON

(SGD) SETTI D. WARREN