CITY OF NEWTON

IN BOARD OF ALDERMEN

ZONING & PLANNING COMMITTEE REPORT

MONDAY, APRIL 22, 2013

Present: Ald. Johnson, Yates, Sangiolo, Danberg, Kalis, Lennon, Swiston and Baker
Also Present: Ald. Gentile, Harney and Hess-Mahan
Others Present: James Freas (Chief Long Range Planner), Marie Lawlor (Assistant City Solicitor), Maura O'Keefe (Assistant City Solicitor), Karyn Dean (Committee Clerk)

#127-13 ALD. GENTILE, HARNEY, SANGIOLO proposing to amend **Chapter 30, Section 15(c)(1)b)** of the City of Newton Zoning Ordinances by increasing the lot size from "at least five thousand (5,000) square feet of area" to "at least seven thousand (7,000) square feet of area". [03/25/13 @10:14 AM]

ACTION: HELD 5-0-1 (Ald. Lennon abstaining; Ald. Yates and Swiston not voting)

NOTE: Ald. Gentile addressed the Committee. He explained that this item was docketed on behalf of a constituent in Auburndale who was concerned about the over-development of smaller lots. There was a suggestion by the constituent that the lot size be increased to 7,000 square feet from 5,000 square feet. The Planning Department memo indicated that it was not in the Board's power to increase the lot size requirement because it was more restrictive than the requirement in MGL Chapter 40A, Section 6. While the City may increase the level of protection offered to its citizens through local ordinances as compared to what is required by state law, it cannot decrease the level of protection.

Ald. Baker said state law speaks to lots that were created before 1940. He wondered if the City had any 5,000 square foot lots that were legally created after that date, which is the start date of the protection under state law. He thought the lot size could be legitimately raised on those post-1940 lots.

Follow Up
Marie Lawlor, Assistant City Solicitor, said they would have to do some research to determine if any lots were created after 1940 and to determine if Ald. Baker's interpretation was correct.

Ald. Lennon explained that he abstained from voting on this item because he has a lot in question in his family. The Committee voted in favor to hold this item

#77-13 ALD. GENTILE & HARNEY requesting that the Board of Aldermen amend the **City of Newton Zoning Ordinances** so that any properties that have been built and purchased that may now be considered non-compliant due to the recent court decision in the Mauri/Chansky case be considered valid non-conforming properties. [02/27/13 @3:06 PM]

ACTION: HELD 8-0

NOTE: Ald. Gentile addressed the Committee. He explained that this docket item is an attempt to protect a specific, limited number of properties that were affected by the Mauri/Chansky case. That case overturned the Inspectional Services Department interpretation of the zoning ordinance which led to issuance of building permits on a small number of properties. There are about 10 homeowners who followed the rules and were issued building permits and through no fault of their own, are now at risk and are "noncompliant". These homeowners cannot be granted building permits to do any additions to their homes; would be unable to rebuild if something catastrophic, such as a fire were to happen to their homes; and by some accounts are not able to acquire legal and valid insurance on these homes. He felt it was their obligation to do everything they can to assist these homeowners in making their properties legal.

Variance Option

Ald. Gentile spoke to the Law Department and they felt the homeowners would be better off going to the Zoning Board of Appeals (ZBA) to petition for a variance. Their thought was that it would potentially be less subject to challenge. He did not want to change an ordinance to give relief, and have that challenged and make the situation even worse. The Law Department is willing to provide education on the variance process to these homeowners. The ZBA is aware of the situation. There was also a suggestion that the fee for filing for a variance be waived.

Ald. Yates said that he did not think the variance process was a sound across-the-board solution to this problem and it could open the door for other property owners not in this group to be granted variances as well if the precedent were set. He stated that the granting of a variance requires three findings (MGL Chapter 40A, Section 10). The first one is *"owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located*". He said that speaks to a physical problem with the lot and unless there is a physical problem a variance cannot be granted. Ms. Lawlor stated that they cannot speak for the ZBA but the ZBA has in past practice, granted variances for "non-physical" problems. It has not been challenged in the past in other contexts but there is no way to know if it would be challenged in this context. There is some case law that suggests that a non-physical attribute has been used where there is government action and is not under the control of the homeowner, such as an eminent domain taking. Mr. Freas noted that there was a case in which lack of sufficient frontage was considered a hardship, which is not physical factor of the lot. If the "shape of the land" can be interchanged with the "shape of the lot", then that can be interpreted as a hardship. Ald. Baker found another case where insufficient frontage was not grounds for a hardship.

Ms. Lawlor explained that whether or not the homeowner applies for a variance is completely up to them and neither the Board nor any other agency has control over that. If they do apply, then

it is under the jurisdiction of the ZBA to make a decision. And if the ZBA does grant a variance, that could be subject to challenge, but only by persons with standing to challenge which would be abutters. Most of these homes have been in place for a number of years and there have never been complaints about many of these houses by abutters, as far as she knew.

Ordinance Option

And ordinance amendment was presented in the April 19, 2013 Planning Department memo (which was attached to the agenda) as follows:

c) if the lot was:

- *i) Not the site of a single or two family dwelling as of July 7, 2001; and*
- *ii) Was held in common ownership at any time after January 1, 1995 with an adjoining lot that had continuous frontage on the same street and the adjoining lot was the site of a single or two family dwelling; and*
- *iii) The lot has on it a single or two family dwelling that was constructed in compliance with a building permit issued between July 7, 2001 and October 6, 2009.*

There is one property which is a duplex that received its building permit in 2011 and Mr. Freas is investigating this. This would fall outside of the dates that are used in the proposed amendment to the ordinance.

Ms. Lawlor noted that a change could be subject to challenge on the grounds of uniformity, and equal protection or "spot zoning". If lots are similarly situated and some are allowed to be zoned one way, and the same kinds of lots to be zoned in a different way (notwithstanding differences allowed between districts) that could be susceptible to challenge on the grounds of uniformity. There is no way to know what the outcome would be of a challenge.

Ald. Baker noted that the Board tried to solve noncompliant lot problems when the Section 30-15(c) amendment was created in 2001. There were noncompliant structures there and nobody challenged that and except for this peculiar situation, it solved a lot of problems. His preference would be to try to solve this legislatively through an ordinance amendment. He was uneasy with the variance process, which could fail.

Ald. Sangiolo noted that distinctions are made in the zoning ordinance, for example, pre-1953 lots and pre-1940 lots. She wondered why they couldn't do something similar for this situation and why this would be considered a problem with uniformity. Ald. Baker noted that yes, there are these distinctions and felt the Planning Department could work with the Law Department to put together some language that could limit the risk of challenge.

Ald. Gentile said he would welcome a legislative remedy to this problem. He felt that there was an obligation to take care of the people that are now at risk through no fault of their own. If the property owners do go before the ZBA and their variance is denied, he would like to have another option for them to turn to.

Ald. Danberg said that when the amendment was voted on in 2001, the word "each" was left out before the word "lot". Former alderman, George Mansfield, told her this was a scrivener's error because it was approved in Zoning & Planning Committee with the word "each" in the language. Ald. Mansfield also told her that the Committee only wanted to deal with the smaller matter of noncompliance, and not the larger matter of buildability of the lots that were vacant. Therefore, she felt the intent was not to allow these lots to become buildable.

Ald. Sangiolo asked about the meaning of *"dwelling that was constructed in compliance with a building permit issued between July 7, 2001 and October 6, 2009.* Does this mean if a Certificate of Occupancy (CO) was issued, or the structure is in the process of being constructed, or the construction is complete? Mr. Freas suggested a change to reflect that a CO was issued within the dates. Ald. Gentile was concerned about using specific dates because they may find a case or two that may fall outside the specific dates. Ald. Hess-Mahan wondered if this would be a good instance to use a purpose statement with the ordinance to make it absolutely clear was the intent is. Committee members agreed.

Identifying Properties

James Freas noted that it is difficult to identify the properties because the building permits aren't issued to a jointly owned property, they are issued to whoever the owner is at the time they are getting the building permit. It has been a process of researching files and people's memories and that has led them to nine properties. They are continuing the process to see if they can find more.

Accessory Apartment Example

Ald. Hess-Mahan noted that there was a situation in which people found out the accessory units they were living in were not legal. They were trying to install new windows for energy efficiency and were not able to obtain a building permit. This development would ultimately make the condos very difficult to sell. There was not a zoning complaint about the apartments. The person who created them converting them to condos and was off the scene for many years before anybody realized the problem. The owners of the condos were left in a bad position. The Commissioner of Inspectional Services felt that it was not the fault of the condo owners. There was an ordinance amendment created that made clear, as it wasn't clear before, that you cannot have separate ownership on a single family lot where you have a structure and an accessory unit. This gave the Commissioner the discretion to then call these units created before the clarification non-conforming, but not non-compliant. This ordinance was clarified before it made it to court. The difference in the lot situation is there is now a court decision, but Ald. Danberg felt a similar solution could be applied. Ald. Baker said that was a question that needed to be answered.

Interim Action

Committee members wondered if there was any way to protect these property owners until the proper permanent solution was agreed upon. Ald. Yates suggested asking the Inspectional Services Department not to take any action against these properties until the statute of limitations of six years runs out. If the structure has been in existence for more than six years then the City cannot take punitive action. However, the structure would still be considered noncompliant and no building permits could be issued going forward. The Committee's concern was whether

people could occupy the home and if they could secure legal insurance. Ms. Lawlor said the City can do nothing about instructing insurance companies one way or another.

Follow Up
There was great concern in the Committee about these property owners being left at risk and it wanted to act as quickly as possible to find and implement a solution. The Committee asked for more information from the Planning and Law Departments specifically about uniformity, spot zoning and situations related to problems that stem from a City misinterpretation, as happened in this case. James Freas is also going to provide a list of the nine identified properties. Mr. Freas is going to report back on the particulars of the duplex property that received its building permit in 2011.

The Planning and Law Departments were asked to work on the ordinance language to be sure it was comprehensive and protected only this limited number of affected property owners. This would include revising the language to include the Certificate of Occupancy requirement. The zone of protection should be very narrowly drawn so as to protect the intended homeowners only. They would also look to see if there were any parallels to be drawn from the above mentioned Accessory Apartment situation. In the meantime, property owners could go forward with the variance process if they chose to do so.

The goal is to have a public hearing on a proposed ordinance change on May 29th.

The Committee voted to hold this item.

#146-13 THE ZONING & PLANNING COMMITTEE requesting information from the Planning Department concerning the nature and character of vacant lots that were confirmed as unbuildable by the Mauri Appeals Court decision. [04/01/13 @ 9:44 AM]

ACTION: HELD 8-0

NOTE: Mr. Freas distributed a map with the 124 identified vacant properties that have been impacted and are now considered unbuildable according to the Mauri Appeals Court decision. It is attached to this report. Ald. Hess-Mahan learned that two different property owners have already applied for demolition permits so they can construct large houses on the merged lots.

Follow Up
Mr. Freas will provide a list of the property addresses.

The Committee voted to hold this item.

#406-12 ALD. JOHNSON requesting a discussion to review City of Newton Zoning Ordinances Chapter 30-20(h)(6) regarding campaign signs, and the failure of candidates to comply with current removal requirements. [11/19/12 @ 9:24AM]

ACTION: HELD 8-0

NOTE: Ald. Johnson said she was concerned about the remaining campaign signs left around the City after an election. Her concern was not so much with the local elections as those candidates seem to do a good job of removing their signs. The statewide and federal campaign signs, however, tend to linger. She would like to have a conversation with the interim director of Elections, David Olson, as well as the heads of the Democratic and Republican City Committees, to determine the best way to educate campaigns about the City's ordinance for sign removal. The ordinance currently calls for the signs to be removed within 48 hours of an election. Ald. Johnson believes this is an unreasonably short amount of time and should probably be amended, but she still wanted to be sure that whatever timeframe was decided, campaigns were made aware.

There was sentiment that property owners should not be held responsible for the sign removal and that it should be the responsibility of the local campaign offices or the City party Committees. The Election Commissioners can also reach out to their respective Committees to have them remove signs in a timely manner. Some members felt that the homeowners should be aware of the regulations as well. The idea of placing a door hanger notice was suggested to remind homeowners to remove the signs. It is unclear whether the $50 fine is against the homeowner or the campaign, however. There was also sentiment that it is the right of any homeowner to keep any kind of sign on their property for as long as they want.

Follow Up
The Committee asked the Planning Department to find out the timeframe in which other communities require election signs to be removed. Ald. Johnson would like the Election Commissioners and David Olson to be present at the next discussion.

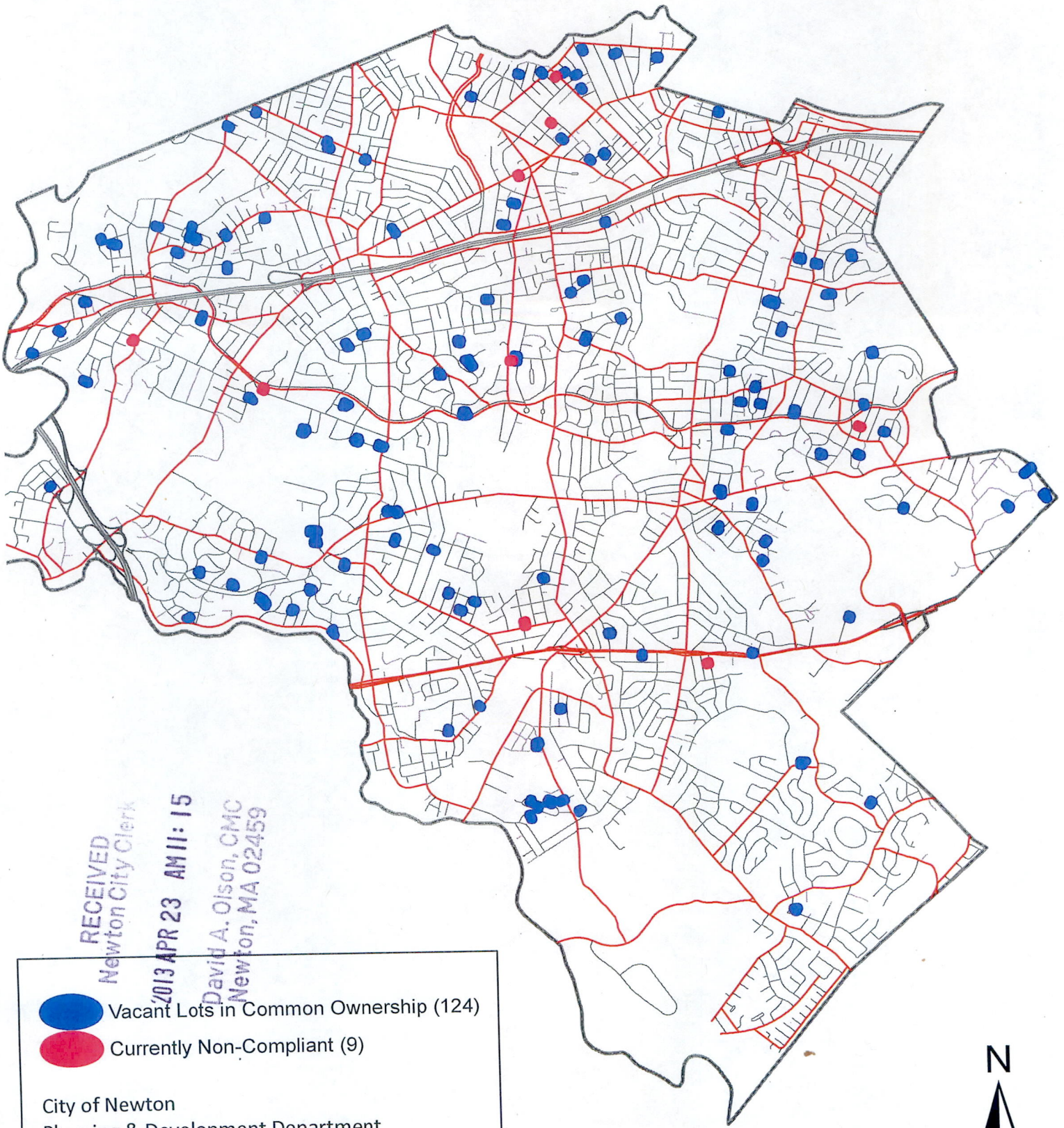
The Committee voted to hold this item.

Respectfully Submitted,

Marcia T. Johnson, Chairman

#146-13

Lots Affected by the February 2012 Appeals Court Decision



Vacant Lots in Common Ownership (124)

Currently Non-Compliant (9)

City of Newton
Planning & Development Department
April 19, 2013

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