

CITY OF NEWTON

IN BOARD OF ALDERMEN

ZONING & PLANNING COMMITTEE REPORT

MONDAY, MAY 13, 2013

Present: Ald. Johnson (Chairman), Sangiolo, Baker, Lennon, Yates, Kalis and Swiston

Absent: Ald. Danberg

Also Present: Ald. Harney

Others Present: James Freas (Chief Long Range Planner), Marie Lawlor (Assistant City Solicitor), Maura O'Keefe (Assistant City Solicitor), John Lojek (Commissioner, Inspectional Services) Chris Steele (Economic Development Commission), Linda Finucane (Committee Clerk)

#108-13      ECONOMIC DEVELOPMENT COMMISSION submitting its 2012 annual report as required by City of Newton Ordinances, **Chapter 22, Section 92.**  
[03/07/13 @ 1:17 PM]

**ACTION:**      **NO ACTION NECESSARY 7-0**

**NOTE:** Christopher Steele, Vice Chair of the Economic Development Commission (EDC) addressed the Committee. The Annual Report was attached to the agenda and the Committee had a chance to review it. Mr. Steele noted that the EDC has been working with the Board of Aldermen on agenda items relevant to economic development issues. There is now a semi-annual meeting schedule for the Board and the Commission and that has been fruitful.

The EDC has worked with Suffolk University on the feasibility and desirability of a small business incubator within the City. They are now starting to get some interest and they will work on that more actively. Mr. Steele went on to say that there has been some work around village vitality as well. He noted they are also working on a tourism map of the City of Newton which they would like to distribute to the hotels in the City. There have also been some discussions regarding directories in the villages but Mr. Steele thought the tourism map would be a good solution.

One of the focuses of the EDC has been to work on capturing more biotech businesses in the City. The City have been certified up through the bronze level through the Mass Biotech Council and they could work on getting to silver or gold. This will help Newton as the Mass Biotech Council goes out to market municipalities for that type of business. They are looking at the Newton Inclusionary Zoning ordinance to remove some language that could be detrimental to some kinds of investment, such as boutique hotels, and because it also doesn't seem to be furthering the mission of providing for community housing. They are working with the Newton Housing Partnership on this initiative.

The EDC held their first ever Business Excellence Awards last fall and it was very well received and has allowed them to have a dialogue with small businesses. Some Committee members noted that they received an email about the Subway chain coming into Newtonville. There was concern that the smaller independent businesses might be very negatively impacted by that and the EDC should work with the community.

There was an economic development self-assessment (ED SAT) undertaken by the City. The results of that have helped the EDC really focus their efforts on marketing, village centers and corridors (including Needham Street) and look for input from the Board on these issues as well. There was concern about the Route 128 and Route 9 intersection and its impact on certain neighborhoods. There was concern that Route 9 was not being looked at much by the Department of Transportation. It is a viable economic corridor for Newton.

Mr. Steele noted that the ED SAT comparisons are among those communities that have also done the assessment. The “peer group” is not necessarily Newton’s actual peer group. Mr. Steele said the City should conduct their own due diligence to find out what their advantages and disadvantages are in relation to other communities.

Ald. Lennon thanked the EDC for their work and for coordinating efforts with the issues that have come before the Board. The Committee voted No Action Necessary on this item.

#127-13      ALD. GENTILE, HARNEY, SANGIOLO proposing to amend **Chapter 30, Section 15(c)(1b)** 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:**      **NO ACTION NECESSARY 7-0**

**NOTE:** The Planning Memo that was attached to the meeting agenda noted 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. Marie Lawlor, Assistant City Solicitor agreed with this opinion.

Ald. Baker had stated at the last discussion of this item that he thought the 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. James Freas reported, however, that the state law does not have the 1940 reference and that it is only stated in the City of Newton Ordinances.

The docketers were satisfied with this analysis and recommended voting No Action Necessary. The Committee voted in favor of No Action Necessary.

#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 7-0**

**NOTE:** Draft ordinance language was attached to the Planning Memo and is attached to this report as well. Part 1 of the draft is a Purpose Statement which will not be part of the language in the zoning ordinance. Instead, it is meant to accompany the amendment text through the legislative process as a clear statement of the intent for the proposed amendment and will stay in the record of this item.

In (2) of the purpose statement, the Planning and Law Departments have proposed two options, either A or B and their recommendation is for option B. These options determine the end date of the term of protection:

*“A – the time the City was put on notice of a legal challenge to its erroneous interpretation that such adjoining lots were entitled to a building permit.”*

**OR**

*“B – the enactment of this ordinance amendment (or other date to be determined), understanding that no additional building permits or certificates of occupancy have or will be issued on currently un-built or unoccupied lots of structures.”*

There was concern from the Committee about capturing all the affected properties without inadvertently capturing some that were not. The Planning Department has identified seven affected properties. There is a question of the right date, and what that date is measured against; building permit and/or certificate of occupancy (CO). Commissioner Lojek noted that there are times when a temporary CO can be issued and that has to be renewed and can run for years. There can often be a small matter that needs to be addressed, but the building is occupiable. Ald. Sangiolo wondered if a building permit could also include foundation or framing permits and that could cause problems. Commissioner Lojek said there are various forms of building permits and they are all considered “building permits”. Ald. Baker suggested that some form of building permit would be necessary along with a permanent CO by a date certain. Mr. Freas said he did not specifically look at the cases in question to see if their CO was temporary or permanent.

Ald. Yates wondered if the term “the time the City was put on notice of a legal challenge” needed to be clarified in option B above. He felt the date of the publication of the legal challenge before the Zoning Board of Appeals should be the date used (October 6, 2009). This puts the onus not only on the City but also on property owners who applied for a permit for a particular purpose, to be aware of what has been publicly noticed on that particular purpose. The problem is there is one property on Lowell Ave. that received its CO in 2011 but otherwise falls in the category they are trying to capture. It received its zoning determination in 2007 and then

came back in 2011 and got its building permit. There were some properties that got their zoning determination but did not ever come back for building permits.

Ron Mauri, 35 Bradford Rd., said the Land Court decision came down on December 22, 2011. The Committee thought this could be the appropriate end date in the ordinance. The Law Department will rewrite option B of the Purpose Statement to reflect the reason for the December 22, 2011 date, and “December 22, 2011” will replace “June 1, 2013” in the draft ordinance.

The Committee voted to hold this item and a public hearing has been set for May 29, 2013.

#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 6-0 (Ald. Lennon recused)**

**NOTE:** The Committee asked for a list of the addresses of the affected vacant lots. Mr. Freas said he would provide that prior to the next discussion.

The Committee voted to hold this item.

Respectfully Submitted,

Marcia T. Johnson, Chairman



Setti D. Warren  
Mayor

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Candace Havens  
Director

## WORKING SESSION MEMORANDUM

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**DATE:** May 10, 2013

**TO:** Alderman Marcia T. Johnson, Chairman  
Members of the Zoning and Planning Committee

**FROM:** Candace Havens, Director of Planning and Development  
James Freas, Chief Planner, Long-Range Planning 

**RE:** #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.

**MEETING DATE:** May 13, 2013

**CC:** Board of Aldermen  
Planning and Development Board  
Donnalyn Kahn, City Solicitor

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### INTRODUCTION

As a result of the court decision invalidating the City's interpretation of section 30-15(c)(3)(b) any home built on a non-conforming lot formerly in common ownership would now be considered non-compliant according the Newton Zoning Ordinance raising potentially severe issues for these homeowners. The current estimate is that there are seven such lots, the details of which can be found in the accompanying memo for petition #146-13.

### Zoning Amendment

The proposed Zoning Ordinance amendment (attached) would allow these homes to become nonconforming under the provisions of section 30-15(c). In this context, "nonconforming" simply means that the house exists legally and may be modified or expanded consistent with the regulations

of the zoning ordinance, but the dimensions of the lot are not consistent with the current requirement of the zoning ordinance for the zoning district in which that lot sits.

The most critical issue to resolve for this proposed zoning ordinance amendment is the closing date for qualifying non-compliant homes to receive the benefit of this amendment. There are two primary options, the first being the date on which the City received notice of the legal challenge to the ordinance, which has been identified as October 6, 2009, and the second being a date related to the development of this proposed amendment to the Zoning Ordinance such as the docket filing date, February 27, 2013, or its adoption date. The importance of selecting this date relates to the issue date for building permits and certificates of occupancy for the seven non-compliant homes.

Petition #77-13 seeks to make all homes that have been built and purchased and that were later made non-compliant by the court decision, legally non-conforming. A two-family condominium building on Lowell Avenue was built and received its certificate of occupancy in 2011 and the two units were subsequently purchased. The earlier closing date identified above would leave the two homes on this lot non-compliant and subject to enforcement unless they were able to get a variance.

At the ZAP working session on April 22, 2013 the question was raised as to whether the phrase “was constructed in compliance with a building permit” was sufficiently precise given the intent of the original docket language. The concern raised appeared to be centered on the meaning of “constructed.” Could the meaning be construed to enable a partially or mostly constructed house to qualify under the proposed amendment? The proposed language adds receipt of a certificate of occupancy along with a building permit, as was suggested during that meeting. The certificate of occupancy formally recognizes that a building is complete and compliant with all City requirements.

Based on a comment made at the April 22 working session meeting, the attached zoning amendment language is preceded by a formal purpose statement. The purpose statement, in this context, is not meant to be included in the Zoning Ordinance, but is instead meant to clearly state the legislative intent of the proposed amendment and to accompany the zoning amendment language as it makes its way through the City legislative process.

#### **NEXT STEPS**

A Public Hearing for this item has been scheduled for the May 29<sup>th</sup> ZAP meeting.

## Attachment

This attachment contains the proposed language for the zoning ordinance amendment to section 30-15(c)(3)(b) of the Newton Zoning Ordinance. The first part below contains a statement of purpose, which is not intended to be included as language in the zoning ordinance but is instead meant to accompany the zoning amendment text through the legislative process as a clear statement of legislative intent for the proposed amendment. The second part below contains the actual proposed zoning amendment text. New text is underlined; text to be removed is ~~struck through~~.

### Part 1

#### *Purpose Statement*

The purpose of the following amendment is:

(1) to memorialize the interpretation of an existing provision of the Newton zoning ordinances by the courts of the Commonwealth, specifically Section 30-15(c)(3)(b). Subsection b was intended to protect certain existing single-family and two-family dwellings on lots that did not conform to applicable zoning density and dimensional requirements, and were in common ownership with an adjoining lot at some time after January 1, 1995. Subsection b, however, was not intended to authorize the construction of a new dwelling on the adjoining lot held in common ownership where the adjoining lot was nonconforming to applicable zoning density and dimensional requirement; and

(2) to avoid a hardship of being found to be legally noncompliant with Newton zoning ordinances for a small number of properties within the City that were constructed on such common ownership adjoining lots incident to building permits issued by the City pursuant to an erroneous interpretation of 30-15(c)(3)(b) during a period of time after the effective date of Section 30-15(c)(3)(b) until

Either

A - the time the City was put on notice of a legal challenge to its erroneous interpretation that such adjoining lots were entitled to a building permit.

OR

B – the enactment of this ordinance amendment (or other date to be determined), understanding that no additional building permits or certificates of occupancy have or will be issued on currently un-built or unoccupied lots or structures.

### Part 2

#### *Proposed text for 30-15(c)*

(c) Exceptions Applicable in Residential Districts.

Any increase in area, frontage, or setback requirements prescribed in Table 1 of this section shall apply to any lot in a residential zoning district except to the extent that either the provisions of Massachusetts General Laws, Chapter 40A, Section 6, as in effect on January 1, 2001, or the following provisions, provide otherwise.

Any increase in area, frontage, or setback requirements prescribed in Table 1 of this section shall not apply to any lot in a residential district if all of the following requirements are met:

(1) At the time of recording or endorsement, whichever occurred sooner, or on October 11, 1940 if the recording or endorsement occurred before October 11, 1940, the lot

a) conformed to the requirements in effect at the time of recording or endorsement, whichever occurred sooner, but did not conform to the increased requirements, and

b) had at least five thousand (5,000) square feet of area, and

c) had at least fifty (50) feet of frontage.

(2) The size or shape of the lot has not changed since the lot was created unless such change complied with the provisions of section 30-26.

(3) Either

a) The lot was not held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the lot in question,

or

b) If the lot was held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the lot in question, such lot had on it a single-family or two-family dwelling,

or

c) If the lot:

i) did not have on it a single-family 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-family or two family dwelling; and

iii) has on it a single-family or two-family dwelling that was constructed in compliance with a building permit and received a certificate of occupancy on or before June 1, 2013.