CITY OF NEWTON

IN BOARD OF ALDERMEN

ZONING & PLANNING COMMITTEE REPORT

MONDAY FEBRUARY 27, 2012

Present: Ald. Johnson, Baker, Lennon, Sangiolo, Swiston, Yates, Kalis
Absent: Ald. Danberg
Also present: Ald. Gentile, Crossley, Albright
City Staff: Candace Havens (Director of Planning and Development), Eve Tapper (Chief Planner for Current Planning), Seth Zeren (Chief Zoning Code Official), John Lojek (Commissioner, ISD), Ouida Young (Associate City Solicitor), Marie Lawlor (Assistant City Solicitor), Maura O'Keefe (Assistant City Solicitor)
Planning and Development Board: Douglas Sweet, David Banash

#400-11 ALD. GENTILE, HARNEY, SANGIOLO requesting establishment of a Business 5/Riverside Zone: a mixed-use transit-oriented district at the site of the current Riverside MBTA rail station. The proposed new zone shall allow by special permit a single commercial office building not to exceed 225,000 square feet with a maximum height of 9 stories, two residential buildings not to exceed 290 housing units in total, retail space not to exceed 20,000 square feet, along with a multi-use community center. [11/17/11 @3:36 PM]

ACTION: HELD 7-0

NOTE: Candace Havens, Director of Planning and Development, presented the amended language to the committee as set forth in the Planning Department's memo (attached). Ms. Havens walked the committee through the different tiers proposed by the department. Tier 1 is the initial action and is most consistent with the original plan as set forth by the docketers. Tier 2 is an additional piece which incorporates the Planning Department's interest by offering the developer more density if they provide direct access from both the northbound and southbound sections of the highway. An amendment to the verbiage was settled on for tier 2 as well, those being to include the phrase "up to" after the word "by" and before the number "250,000". The way this proposal is framed, tier 1 must be accepted in order to amend it with tier 2. The size of the additional density proposed in tier 2 was questioned. Ms. Havens explained that half of the additional 250,000 square feet would most likely be parking. Furthermore, though there is a maximum FAR of 3.0 in business 4 districts, there is no structure in the city right now that has reached that limit; buildings in this district generally have an FAR of around 2.0 Tier 3 of the proposal was not accepted by the committee. This tier would push the square footage to a threshold of 1.5 million square feet and create a dwelling unit limit of 300. There square footage amount would also include above-grade parking

Tier 3 would push the square footage to a threshold of 1.5 million and a dwelling unit limit of 300. The amount also includes above-grade parking and would also change the height limit. As with tier 2, tier 3 would also require the adoption of tier 1. Though the FAR in tier 3 would be a max of 3.7, the development would only be allowed to grow as large as the impacts could be managed. The committee took issue with the fact that there is no incentive associated with tier 3, other than that the city would collect more taxes, to justify such an increase in development.

Ald. Gentile shared his thoughts about this with the committee, distributing to them a chart from the newly submitted traffic study for the development which shows that between the office, residential, and retail space, an additional 5,088 trips would be made to and from the site. Without additional mitigation he is not comfortable with considering the type of density increase that tier 3 would provide.

Ald. Baker shared that if there was some other public benefit with a site specific character to justify this would be more acceptable, but to add density without a purpose is concerning. Ald. Johnson suggested considering some kind of affordable housing incentive that would make it a more viable option for the community.

It was decided that the tier 3 option is not fleshed out enough and will therefore not be moved forward with or advertised for public hearing.

Getting back to the language of tier 1, the changes are outlined below:

1) The memo now specifies that the size of the development parcel shall be no less than 9.33 acres, which is the size of the most recent plan. A minimum 10 acre lot was discussed in committee, and during the upcoming meeting with the MBTA this will be discussed and depending on the outcome of those conversations this minimum acreage could change.
2) A site walk is going to take place with the MBTA to address the possibility of river access. The MBTA expressed some willingness in this. Ms. Havens must also contact DCR to discuss this as DCR is the rightful owners of the shoreline.
3) The community space is now an allowed as a by-right use.
4) The beneficial open space requirement has been raised to 15% since the incentives have been eliminated. At least half of the open space is required to be publicly accessible. Clauses were also added to encourage the connections between natural and built open spaces in the area.
5) Regarding special permit filing requirements, developers are now required to provide digital 3D models as well as a shared parking analysis. Conceptual review has also been added to the list of pre-filing requirements for so that community input is collected. The land use committee will be the reviewing body during this process; however no votes shall be cast. These reviews will be beneficial especially for the Planning Department which will

have the ability to do some investigation early on. Some engineering standards have also been added to the special permit requirements.

6) Many incentives have been eliminated. After discussing them with the committee it was determined that they may not be as advantageous as originally thought.

There were some comments made by the committee on the amended language of tier 1 set forth in the by the Planning Department. Ald. Yates provided the suggestion that on the second line of the seventh page of the memo, the words "any if" be inserted after "for" and before "the purposes" for clarity.

Ald. Kalis inquired about obtaining estimates ahead of time and conducting post construction assessments relating to school impact. It was the overwhelming opinion by the Law Department and the committee chair that to specifically make reference to the schools may not be a wise choice for practical reasons and also for the possibility of appearing discriminatory towards families.

Regarding beneficial open space, Ald. Kalis noted that if 15% is the minimum, and at least half of that is required to be publicly accessible, then that means 7.5% could be on a top of a building. Ald. Kalis would prefer for more open space to be required on the ground level. Ald. Gentile took a moment to share that though 15% is the minimum, the Board will be pushing for a higher percentage, likely 20% or higher. The developer is aware of this and is prepared to accommodate.

Ald. Hess-Mahan requested that the language for the fiscal analysis on page 7 (11th page of the memo) also be used on page 9 (15th page of the memo) for consistency.

Ald. Baker suggested that on page 8 (12th of the memo), section 1 (b), the phrase "and any access proposed to public lands nearby" should be inserted. The Planning Department will make that edit. Ald. Baker also made the suggestion that perhaps a certain level of a car repair/maintenance use should be allowed on the site to accommodate potential rental car companies that do minor repairs. Ald. Gentile suggested that perhaps this could be allowed on another portion of the 22 acre MBTA site, but not necessarily on the site for this development.

The committee moved for tier 2 to be docketed as a separate item, a parens 2 to this 400-11, and took a straw poll vote unanimously in favor of hearing tier 1 and tier 2. Advertising language will be drafted for tier 1 and tier 2 and both these items will be heard at a public hearing on March 22, 2012. A motion to hold the item was made, which carried 7-0.

#25-12 TERRENCE P. MORRIS, G. MICHAEL PEIRCE, JASON ROSENBERG, JOHN LOJEK proposing a zoning ordinance amendment to amend section 30-15(c)(3)(b) by inserting the word "*subject*" before the word "*lot*", the word "*and"* before the word "*such*" and the word "*adjoining*" after the word "*such*" so that the paragraph reads as follows:

(b) if the subject 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 subject lot and such adjoining lot had on it a single-family or two-family dwelling. [01/30/2012 @ 3:14PM]

ACTION: HELD 7-0

NOTE: This discussion served as an introduction to the proposal by Terrence Morris et al. The committee will in the future hold working sessions and a public hearing on the subject. Terrence Morris was first to address the committee. He explained that this docket item arose from a controversy over the interpretation of a code in 30-15 (c). In 2001 the ordinance was amended to add the language that is in the ordinance now. Since then various commissioners have been asked to interpret that language. They have consistently interpreted it as to provide an exemption for undersized lots; "undersized" meaning lots that don't meet the post 1953 standard for frontage/lot area. For the case of Bradford Road, the interpretation was made. The permit was appealed to the ZBA at which point the ZBA sustained the commissioner's determination on a vote of 2-3. The issue then went to the land court where an adverse decision came down on the issue and on interpreting the ordinance. The decision takes place on the antecedent rule and the judge decided on that basis even though it had been interpreted consistently throughout the years in the city. All docketers believe that this case was wrongly decided and that the few words proposed here will attempt to clarify that and make it consistent with the historical interpretation over the last 10 years.

Commissioner Lojek the joined the committee and again stated that the intent of this docket item is to bring more clarity to a very convoluted ordinance. The Commissioner explained that the interpretation of this ordinance has been done in the same manner since 2001. This is the first time this has been challenged in 11 years. Prior to the Commissioner's employment here, Juris Alksinitis was interpreting this ordinance. Commissioner Lojek worked with Mr. Alksinitis to understand this paragraph. Mr. Alksinitis understood the ordinance because he worked on the committee that wrote it and made the decision consistently with the intent of the paragraph from the time it was created until now. The interpretation continues to be made in the same fashion as from when it was first written, and no other interpretation of the ordinance makes any sense. Commissioner Lojek explained to the committee that there have been a number of people in touch with the Board and the Mayor's office whom are suggesting that this would allow for countless lots to be built on. He stressed to the committee that these accusations are false and that there just aren't that many available and/or buildable lots.

Atty. Michael Peirce spoke to the committee. He requested that when the committee discusses this matter they remember that this section of the ordinance was designed to be an exemption to avoid the concept of a required merger between an undersized lot and its abutter if the lots came into common ownership. This was designed to allow for things to occur that otherwise wouldn't. Mr. Peirce went on to share that typically in these situations an available lot is next to a lot that has a single or two family house on it which was built without a building permit but consistent with the

zoning at the time of construction and, because of this, there is nothing in the law that calls them in violation. Newton, unlike most communities, states that a lot that is too small or doesn't have enough frontage isn't necessarily non-conforming for those reasons whereas in other communities they would be considered non-conforming. Newton allows people to take down or add to those houses because they aren't considered non-conforming. His final question for the committee was what they consider the planning negative to be for allowing a house to be built on a fully compliant lot with zoning that already matches all the other lots.

Ald. Swiston questioned the difference in tax revenue between developable and undevelopable lots and the time at which lots have been assessed as developable or undevelopable. Ouida Young, Associate City Solicitor, responded to the assessing inquiry, stating that it would be extremely difficult for the assessors or the Board of Aldermen to go back and reassess the status of the lots before 2001 having not assessed them at that point in time. Many people were not aware of the change in 2001 that materially altered their land. With the change in 2001, isolated lots not in common ownership, under 5000 sq. ft., and under 50 ft of frontage were rendered unbuildable.

With the conversation drifting to the topic of assessing, Ald. Baker clarified the issue at hand. He explained that there is a situation is that there's a house with a lot next to it. The question is whether that lot can be built on as the adjacent lot was built on. The committee is being asked to amend the ordinance so that the vacant lot can be built on as a separate lot. The committee must determine whether they want to clarify that a free standing lot next to an existing house can be built upon or whether it should be merged with the main lot. Ald. Baker doesn't disagree with the good faith of the commissioner or of the intent of the docketers but also recognizes that the impact of this would be that currently undevelopable lots will become buildable.

Ald. Yates expressed his disapproval with the proposal, aligning his interpretation with that of the land court. He requested that the committee discuss this with the 2001 documents from the Zoning and Planning committee and the ZBA.

Ald. Baker commented that when this process went forward in 2001 there was concern that the city had more development opportunity then the Board believed it should. What is proposed is a clarification, yes, but a clarification that produces a specific outcome. During the impending working sessions the committee will have to decide what they prefer from a policy standpoint. Following this discuss a motion to hold was made which carried unanimously.

Respectfully Submitted,

Marcia Johnson, Chairman

Setti D. Warren
Mayor

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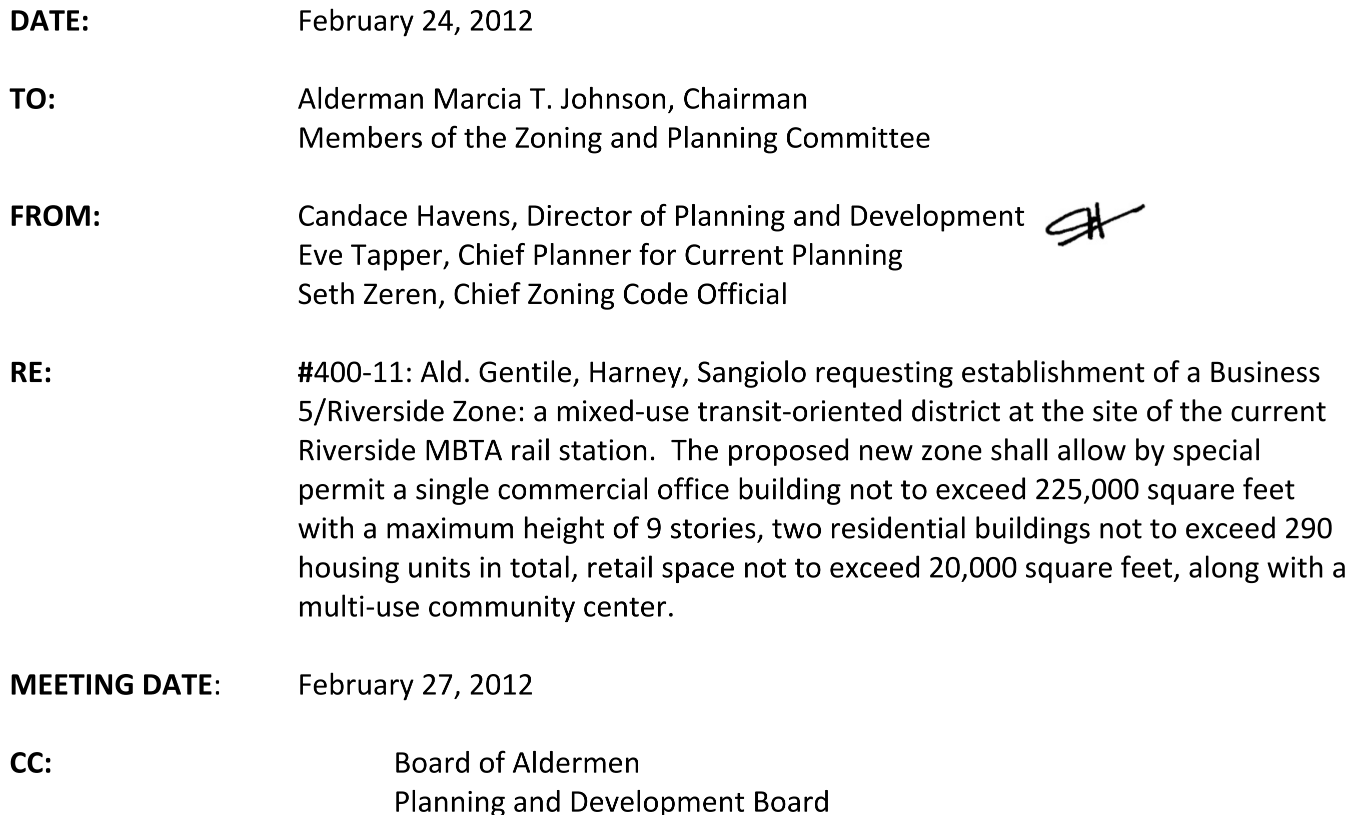
Candace Havens
Director

WORKING SESSION MEMORANDUM



DATE: February 24, 2012

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

FROM: Candace Havens, Director of Planning and Development
Eve Tapper, Chief Planner for Current Planning
Seth Zeren, Chief Zoning Code Official

RE: #400-11: Ald. Gentile, Harney, Sangiolo requesting establishment of a Business 5/Riverside Zone: a mixed-use transit-oriented district at the site of the current Riverside MBTA rail station. The proposed new zone shall allow by special permit a single commercial office building not to exceed 225,000 square feet with a maximum height of 9 stories, two residential buildings not to exceed 290 housing units in total, retail space not to exceed 20,000 square feet, along with a multi-use community center.

MEETING DATE: February 27, 2012

CC: Board of Aldermen
Planning and Development Board

SUMMARY

On January 9th, Planning staff presented some concepts and sample text for a new zone for Riverside. At its meetings on January 23rd and February 9th, the Zoning and Planning Committee reviewed a "menu" of zoning tools and their policy implications. While consensus around many policies and approaches was reached during these sessions, there were some differences in approach among the Committee members. In order to reconcile these differences, the Planning Department introduced a two-tiered process: the first part intended to reflect the current docket language and the second part included additional special permit criteria and performance measures, as well as some incentives. Additional questions and concerns were raised around a variety of topics, which are addressed in this report and in revised text, which now includes three "tiers" or possible actions for Committee consideration. Should the Committee be satisfied that the draft text is reasonably close to one upon which they may be willing to take action, and supports the current tiered approach, staff recommends docketing this item for a public hearing so the public's voice can inform the final text.

ZONING TEXT
The attached zoning text (Attachment A) differs from the draft presented on February 15th in the following ways:

<u>Actions</u>. There are now three tiers proposed, upon which actions can be taken and that are crafted to provide options for a range of development possibilities on the site. Actions on these items are intended to be taken individually in the order shown; both the second and third actions can modify the first action and do not depend on each other.

- The **initial action (Tier I)** includes all the provisions of the original docket language, as well as impact studies, performance measures, and additional special permit criteria. It no longer includes a million square foot cap on development; however, the dimensional standards in this text will hold the intensity of development to below this threshold. The text does not include incentives, as there did not seem to be appreciable support for these (with some exceptions noted below); nor is the contextual height referenced any longer, since it appeared to create confusion and was not a relevant reference point in addition to absolute heights.
- The **second action (Tier II)** offers an incentive to allow an increase in the development potential in exchange for direct access to the subject property from the highway. Following a vote in favor of Tier I, a vote for this second action would allow an additional 250,000 square feet of gross floor area, not to exceed 1.2 million square feet total gross floor area, and an FAR of 3 to be added to the site development, provided direct highway access is secured. The impact studies, performance measures and additional special permit criteria would apply.
- A possible **third action (Tier III)** offers flexibility within a 1.5 million square foot cap with a maximum of 300 dwelling units, additional building height, and at least one use from categories A, B, and C. A vote for this option would revise the caps set in Tier I and allow for flexibility in terms of the proportions of uses within this cap. This option, like the previous two, would be subject to impact studies and post-construction monitors prescribed in the initial action (Tier I).

Summary of changes proposed in zoning text in the initial (TIER I)

- <u>Size of Development Parcel.</u> The previous report required a ten-acre minimum parcel; however, after revising the shape of the development parcel, it is now proposed to be 9.33 acres without any changes to the project design. City staff discussed the size of the development parcel with representatives of the MBTA's Transit Realty, who expressed a willingness to consider an increase in the size of the development parcel to accommodate ten acres, if desired, and another meeting is being planned with the MBTA and BH Normandy in the near future. In the meantime, the minimum parcel size has been eliminated from the text, which instead notes that the development parcel will not be less than 9.33 acres. *NOTE: For the purposes of discussion, the Mixed-Use Task Force generally referred to ten acres to describe the City's largest; however, the Element does not define the City's largest sites by a specific acreage.*

- Access to the river. Staff also asked the MBTA representatives about whether the development parcel could be extended towards the river. Again, they expressed a willingness to consider such changes within the MBTA's authority, and provided that such changes don't interfere with their maintenance operations. This would likely require the MBTA to clear some property from the rear of the site and coordinate with DCR. Planning staff will coordinate between the jurisdictions prior to the special permit application, since the jurisdictional boundaries will need to be considered in planning for improvements on the river side of the site.
- Intensity of the Development Parcel. As noted, the initial action (Tier I) does not include a million square foot cap on development. The text provides for a maximum of 290 dwellings, 225,000 square feet of gross floor area within one structure, and no more than 20,000 square feet of retail space. Community space is allowed by right in this text.
- Setbacks. The previous text references setbacks appropriate to uses on particular frontages with no setback required on the highway and ½ building height required on Grove Street. The stepped building approach can be employed to further diminish the visual impact of tall buildings, particularly from Grove Street. Applicants are encouraged to employ this approach, of setting upper floors farther back from property lines, especially along this scenic road.
- Beneficial Open Space. The definition of beneficial open space (as listed in the PMBD) does not specifically require all beneficial open space to be publicly accessible. The intent of the definition is aimed at making sure open spaces are not leftover vegetated spaces, such as those between buildings that aren't very useful or enjoyable outdoor places; however, there may be beneficial spaces that are appropriately private, such as common recreation areas for residents, private swimming pools or shared patios. The minimum required beneficial open space has been increased from 10 to 15% and staff recommends requiring at least half of the beneficial open space to be publicly accessible. Interest also was expressed in further developing connections not only between the beneficial open spaces, but also among natural and created open spaces and trails in and around the site to maximize the recreational potential of this scenic location. As such, the special permit criteria regarding open space has been expanded to encourage enhancement of such opportunities for public enjoyment.
- Special Permit Filing Requirements. As staff noted in previous meetings, these are generally the types of requirements City staff would ask the developer of a large project to provide; including them in the zoning text makes them "official" and provides the developer with a greater degree of certainty as to what to expect when bringing forward a proposal. These are now all included in Tier I, as no concerns were noted about their inclusion at the previous meetings. The proposed text no longer requires a massing model, but rather a 3-D computer model, which can be posted on the City website where it can be publicly viewed and easily stored. A shared-parking analysis has been added to the list of required submittals for review at special permit.
- Conceptual Review. The Committee discussed the possibility of requiring conceptual review prior to applying for a special permit, so this also has been added to list of pre-filing requirements. Conceptual review would give the developer an "early read" on a master plan for the site before investing in costly engineered drawings, and offer a chance for the public to

comment on it earlier in the process. The proposed conceptual plan would include building footprints, proposed uses, and enough information about the proposed project to do preliminary zoning review and impact analyses. The Land Use Committee would host a public meeting at which the project design and rationale would be presented and where public comment would be taken so as to inform design features prior to submittal for a special permit.

- Incentives. Many of the incentives presented in the previous draft have been eliminated, as it was duly noted that lowering the minimum requirements to accommodate incentives may not have been a very useful zoning tool here. As such, most incentives have been replaced by higher minimum requirements for environmentally-sensitive design, beneficial open space, and building height. Bonuses are no longer offered for creating additional affordable housing or community space; however, one incentive remains under Tier II for direct access to the highway, as this feature was identified by Committee members as particularly desirable, since the direct access would offset the traffic generated by additional density. The previous incentive for direct access to the river has been incorporated into a more robust special permit criterion, as noted previously under Beneficial Open Space.

NEXT STEPS

If the Committee finds that the text (with or without further changes) represents language that is relatively close to that upon which it can foresee taking action and agrees with the three-tiered approach, the next step would be to schedule a public hearing on the rezoning. Additional changes to the text can be made in response to public comments following the hearing, so long as they fall within the parameters of proposed docket language.

ATTACHMENT A: Draft Zoning Text

ATTACHMENT A

Petition #__-12
February 27, 2012 – Hearing Draft

WHEREAS, the 22-acre area owned by the Massachusetts Bay Transportation Authority ("MBTA") and including the MBTA Station and lands adjacent to existing highways in the Riverside area of the City of Newton represents an unique opportunity to encourage mixed-use development based upon smart growth principles; and

WHEREAS, the purpose of a mixed-use development within the Riverside area is to allow development appropriate to the area and its surroundings, provide enhancements to infrastructure, integrate with and protect nearby neighborhoods, provide a mix of compatible and complementary commercial and residential uses appropriate for transit-oriented sites, and advance the City's long-term goal of strengthening alternatives to single-occupancy automobile use while remaining consistent with the City's *Comprehensive Plan*; and

WHEREAS, the Zoning Ordinances of the City of Newton do not presently provide the appropriate development controls and incentives to encourage and control the transit-oriented development of the Riverside area; and

WHEREAS, such controls and incentives are in the public interest and further the objectives of the City's *Comprehensive Plan*; and

WHEREAS, this proposal does not rezone any land, but provides a new zoning district for Mixed-Use Development and no land will be placed in this zone until the Board of Aldermen approves a map change;

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF NEWTON AS FOLLOWS:

TIER I – INITIAL ACTION

1. *By re-designating the current Section 30-13(f) as Section 30-13(h); re-designating the current Section 30-13(g) as Section 30-13(i); and inserting a new Section 30-13(f) and a new Section 30-13(g) as follows:*

(f) Establishment and purpose of the Mixed-Use 3/Transit-Oriented District.
(1) Purpose. The purpose of the Mixed-Use 3/Transit-Oriented District is to allow the development of a mixed-use center on a 9.33-acreparcel near the terminus of a mass-transit rail line, an interstate highway, a scenic road, and the Charles River, commonly referred to as the Riverside MBTA station, pursuant to the City's *Comprehensive Plan,* particularly the Mixed-Use Centers and Economic Development Elements. This district shall encourage comprehensive design within the site and with its surroundings, integrate complementary uses, provide enhancements to public infrastructure, provide beneficial open spaces, protect neighborhoods from impacts of development, allow sufficient density to make development economically feasible, foster use of alternative modes of transportation, and create a vibrant destination where people can live, work and play.

(2) Allowed uses. In the Mixed-Use 3/Transit-Oriented District, land, buildings, and structures may be used or may be designed, arranged, or constructed for one or more of the purposes listed in Section

30-13 Table A, subject to the density and dimensional controls of Section 30-15 and the parking requirements of Section 30-19.

TABLE A: PRINCIPAL USES*	
Uses similar to or accessory to the following	**BR**
Mixed-Use Development	
• **Mixed-Use Development per section 30-13(g)**	**SP**
Category A	
• **General office**: including but not limited to research and development, professional offices, medical offices, and similar uses	**BR**
• On the ground floor	**SP**
Category B	
• **Retail sales** including but not limited to retail bakery, and similar uses, excluding sales of motor vehicles or gasoline	**BR**
• **Retail banking** and financial services	**SP**
• **Automated Teller Machines**	**BR**
• **Personal services**: including but not limited to barbershop, salon, tailor, cobbler, personal trainer or fitness studio, and similar uses, excluding repair of motor vehicles	**BR**
• **Retail laundry or dry cleaning**	**BR**
• **Eating and drinking establishments**, excluding fast-food establishments as defined in section 30-1	**BR**
• **Health club**	**BR**
• On the ground floor	**SP**
• **Place of entertainment and assembly**, theater	**SP**
• **Lodging**, hotel, motel	**SP**
• **Parking**, non-accessory commercial	**SP**
• Any retail, service, eating and drinking establishment over 5,000 square feet of gross floor area	**SP**
• **Drive-in** business	**X**
Category C	
• Multifamily dwelling (a building containing three or more dwelling units)	**BR**
• Live/work space or home business	**BR**
• Single-room occupancy dwelling, Single-person occupancy dwelling	**SP**
• Assisted living or nursing home	**SP**
Public and Community	
• **Community use space**	**BR**
• **Day care (adult or child)**	**BR**
• **Place of religious assembly**	**BR**
• **Government offices or services**	**BR**
• **Park or garden**	**BR**
• **Nonprofit or public school**	**BR**
• **Rail or bus terminal**	**BR**
• **Public parking**	**BR**
• **Library or museum**	**BR**

A use listed in Table A is permitted as-of-right in the Mixed-Use 3/Transit-Oriented District where denoted by the letter "BR." Uses designated in the Table by the letters "SP" may be allowed only if a special permit is issued by the Board of Aldermen in accordance with the procedures Section 30-24. Uses denoted by an "X" are prohibited.

(g) ***Development by special permit in the Mixed-Use 3/Transit-Oriented District****.* Land and buildings in the Mixed-Use 3/Transit-Oriented District may be used for the purposes authorized in 30-13(f)(2). Notwithstanding section 30-13(i), any development that proposes an aggregate gross floor area of 20,000 or more square feet of gross floor area among all buildings within the Development Parcel shall require a special permit for a Mixed-Use Development, which is defined to include a Development Parcel combining a residential use with at least two other principal uses listed in Table A as allowed by right or by special permit, in accordance with the procedures provided in section 30-24. Any proposed Mixed-Use Development shall comply with the following provisions and the provisions of sections 30-15(v) and Table 3, 30-24(c)(7), 30-24(c)(8), 30-24(i), 30-24(j)), and 30-24(f).

(1) ***Establishment of a Development Parcel.*** The area developed under a special permit by this section must be organized into a Development Parcel as defined in Section 30-1. The Development Parcel may contain more than one lot and/or a portion of a lot. The provisions of this Zoning Ordinance shall apply to the Development Parcel as it exists on the date that the special permit is granted as if the Development Parcel were a single lot for zoning purposes, without reference to interior lot lines dividing separate ownerships. After the grant of a special permit per Section 30-13(g), the ownership may be further divided (subject to the establishment of an organization of owners defined in (3) below) and any interior lot lines shall be disregarded for zoning purposes. The Development Parcel may be modified from time to time to accommodate land swaps or the purchase of adjacent land, provided that the Development Parcel is not less than 9.33 acres in size and does not create or expand any nonconformities.

(2) ***Intensity of development.*** The aggregate gross floor area of all structures, including private accessory parking structures within the Development Parcel, excluding any structures or portions of structures dedicated to public use and owned by a state instrumentality, shall be subject to all of the following provisions:

a) The total area of office uses shall not exceed 225,000 square feet of gross floor area and must be contained within one structure (excluding offices incidental to residential, retail and/or community uses);
b) The number of dwelling units within the Development Parcel shall not exceed 290 and must be contained within up to two structures; and
c) The total area of uses in Category B in enumerated Table A shall not exceed 20,000 square feet; and
d) The development must have at least one use from each of the three categories (A, B, and C) enumerated in Table A.

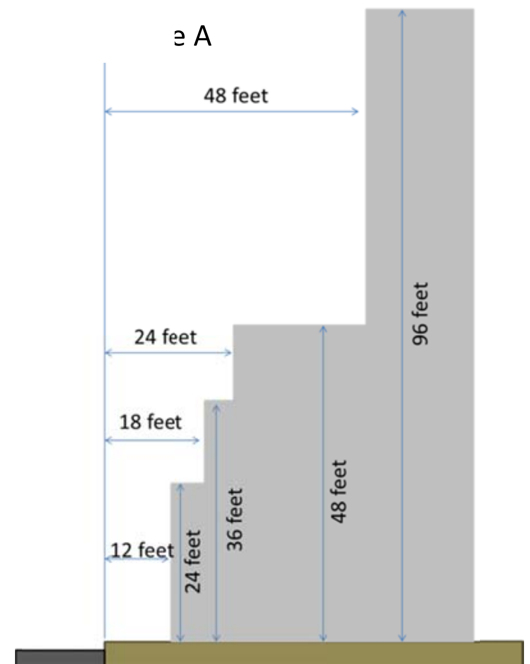
(3) ***Organization of Owners.*** Prior to exercise of a special permit granted under this section, an organization of all owners of land within the Development Parcel shall be formed. The organization of owners will be governed by special permit with the authority and obligation to act on behalf of all such owners in contact with the city or its representatives regarding compliance with the zoning ordinance. The organization shall serve as the liaison between the city and any owner, lessee, or licensee within the Development Parcel governed by a special permit granted under section 30-13(g). Such organization shall be the primary contact for the city in connection with any dispute regarding violations of the zoning ordinance and, in addition to any liability of individual owners, shall have legal responsibility for compliance of the Development Parcel with the terms of the special permit for a Mixed-Use Development, site

plan approval, and other applicable provisions of the zoning ordinance. In addition, any special permit granted under this section shall provide for the establishment of an advisory council consisting of representatives of the adjacent neighborhoods and this organization to assure continued compatibility of the uses within the Development Parcel and its neighbors during and after construction.

2. *By adding a new Section 30-15(v) as follows:*

(v) ***Mixed-Use Developments in the Mixed-Use 3/Transit-Oriented District.*** Any development permitted by special permit per section 30-13(g) must meet the following requirements and the requirements of Table 3. The Board of Aldermen may grant a special permit per section 30-24, including section 30-24(i), to allow exceptions to the by-right dimensional standards of the Mixed-Use 3/Transit-Oriented District, provided that the requirements of this section are met and no dimension exceeds those allowed in Table 3 for the Mixed-Use Development Special Permit.

(1) ***Setbacks.*** Any structure or building must be set back at least one-half the height of that structure or building from any public way, except that for perimeter lot lines adjoining a state highway right-of-way or land owned by a state instrumentality the setback may be zero feet for nonresidential uses. To encourage stepped setbacks for taller structures, each portion of a building shall be treated as if it is a separate building for purposes of calculating required building heights and setbacks (as illustrated in Figure A). In accordance with the procedures provided in Section 30-24, the board of aldermen may grant a special permit to allow a reduction in the minimum setback if it determines that the proposed setback is adequate to protect abutting uses.



(2) ***Beneficial Open Space.*** At least 50% of the beneficial open space provided as part of a Mixed-Use Development must be freely open to the public.

(3) ***Exclusion of Public Structures from Zoning Requirements****.* Any portion of the Development Parcel for the proposed development owned by a state instrumentality and devoted to a governmental function from which the general public is excluded, such as but not limited to a rail yard, maintenance facility, or railroad right of way and any portion of a building or structure dedicated for public use by a state instrumentality, such as a passenger station or associated facilities for use by customers of the Massachusetts Bay Transportation Authority, shall not be included in the calculation of:

i. The quantity of beneficial open space required;
ii. Minimum lot area; or
iii. Floor Area Ratio.

(4) ***Impacts of Takings by or Conveyances to a Public Entity:*** The provisions of section 30-26(a) shall apply to any taking by or conveyance of land within the Development Parcel to a public entity or to any land otherwise dedicated and accepted as a public way.

3. *By adding the dimensional requirements for the Mixed-Use 3/Transit-Oriented District to Table 1 and Table 3 of Section 30-15 as follows:*

Table 1

Zoning District	*Minimum Required Lot Area*	*Lot Area per unit*[1]	*Frontage*	
MU3/TOD	*40,000*	*1,200*	*80*	*SEE TABLE 3 for other dimensional controls*

Table 3

Zoning District[11] *MU3/ TOD*	*Max. # of Stories*	*Bldg. Ht*[12] *(feet)*	*Total Floor Area Ratio*	*Gross Floor Area/Site Plan Approval (SF)*	*Threshold by Special Permit (Gross Floor Area; SF)*	*Min Lot Area (SF)*	*Lot Coverage*	*Beneficial Open Space*	*Front (feet)*	*Side (ft.)*	*Rear (ft.)*
As of Right	*N/A*	*36*	*1.0*	*10,000-19,999*	*20,000*	*40,000*	*N/A*	*N/A*	*15*[9]	*10*	*15*
Mixed-Use Development Special Permit, per 30-13(g)[13]	*N/A*	*135*	*2.4*	*N/A*	*N/A*	*40,000*	*N/A*	*15%*[13]	*½ build. height*[13]	*0*	*0*

13.See section 30-15(v) for additional dimensional requirements for developments within the Mixed-Use 3/Transit-Oriented District.

4. *By adding new sections 30-24(c)(7), 30-24(c)(8), 30-24(i), 30-24(j) as follows (and renumbering all the others):*

(c)(7): ***Project Phasing****.* Any development subject to a special permit under section 30-13(g) may be built in multiple phases over a period of time, in accordance with the terms of the special permit granted, provided that all off-site improvements and enhancements to public roadways are completed prior to issuance of any occupancy permits.

(c)(8): ***Adequacy of public facilities.*** Transportation, utilities, water, sewer and storm water infrastructure, public safety, schools including capacity, and other public facilities and infrastructure shall serve the Mixed-Use Development appropriately and safely and without deterioration in service to other locations. To determine the adequacy of public facilities, impact studies of the following must be undertaken by the applicant as part of the special permit application process under 30-13(g) with the project scope determined by the director of planning and development, the city engineer, and traffic engineer. A peer review by a consultant may be required, hired by the city and paid for by the petitioner.

a) Adequacy of road and traffic infrastructure, including the traffic analysis required in section 30-24(j)(6)
b) Adequacy of water, sewer, and storm water infrastructure, including use of the water, sewer, and storm water analysis required in section 30-24(j)(8)
c) Net fiscal impacts including use of the fiscal impact analysis required in section 30-24(j)(9)

As part of any special permit granted per section 30-13(g), post-construction studies for impacts on road and traffic capacity and water, sewer, and storm water service shall also be required. These

studies must be conducted within twelve months of full occupancy, or earlier if requested by the director of planning and development, the city engineer or traffic engineer, and continue annually for two years. If the actual impacts are consistent with projections, no further study or mitigation shall be required. If the actual impacts exceed projections, further mitigation shall be required. Following completion of any further mitigation required, annual follow-up studies shall be conducted until these studies show for five consecutive years that the impacts from the development comply with the special permit.

The special permit shall also require a bond or other security satisfactory to the director of planning and development, the city engineer, and traffic engineer to secure performance. If the petitioner fails to complete any required mitigation or to manage impacts within acceptable levels identified by special permit, subject to reasonable extensions under the circumstances, the bond or other security may, at the city's election, be forfeited and proceeds used by the city for mitigation.

Post-Construction Traffic Study. A special permit issued under section 30-13(g) shall provide for monitoring to determine consistency between the projected and actual number of weekday peak hour, Saturday peak hour, and weekday daily vehicle trips to and from the site and their distribution among points of access to the Mixed-Use Development. The special permit shall require a bond or other security satisfactory to the city traffic engineer and director of planning and development to secure performance as specified below:

i. Monitoring of vehicle trips for this purpose shall begin not earlier than twelve months following the granting of the final certificate of occupancy and shall continue annually over the following twenty-four months. Measurements shall be made at all driveway accesses to the Mixed-Use Development and/or intersections studied in the pre-construction Roadway and Transportation Plan. The city engineer may require traffic monitoring earlier or more frequently if in his or her judgment, there appears to be degradation from the LOS projected by the pre-construction Roadway and Transportation Plan.
ii. The actual number of weekday peak hour, Saturday peak hour, and weekday daily vehicle trips to and from the Mixed-Use Development at all points studied in the pre-construction Roadway and Transportation Plan shall be measured by a traffic engineering firm retained by the city and paid for by the applicant or successor.
iii. Mitigations will be required if actual total number of vehicle trips to and from the Mixed-Use Development measured per subsection (ii), above, summed over the points of access exceeds the weekday evening Adjusted Volume projected per section 30-24(i)(5) by more than ten percent (10%) as a result of traffic generated by the Mixed-Use Development. Within six months of notification, the owner of the Mixed-Use Development site shall begin mitigation measures (reflecting applicable roadway design standards at the time and pending receipt of all necessary state and local approvals), as described in the Roadway and Transportation Plan submitted by the applicant and listed in the Mixed-Use Development special permit in order to reduce the trip generation to 110% or less of the Adjusted Volume. Such reduction is to be achieved within twelve months after mitigation begins. The city engineer and director of planning and development must approve any mitigation efforts prior to implementation.

(i) ***Additional special permit criteria for a Mixed-Use Development in the Mixed-Use 3/Transit-Oriented District.*** In granting a special permit for a Mixed-Use Development under section 30-13(g), the Board of

Aldermen shall not approve the special permit unless it also finds, in its judgment, that the proposal meets all of the following criteria in addition to those criteria in section 30-24(d):

(1) *Not inconsistent with the Comprehensive Plan.* The proposed Mixed-Use Development is not inconsistent with the City's Comprehensive Plan in effect at the time of filing an application for a Mixed-Use Development and applicable general laws relating to zoning and land use;

(2) *Housing, public transportation and parking improvements, and utility infrastructure enhancements*. The proposed Mixed-Use Development offers long-term public benefits to the city and nearby areas such as:

a) Improved access and enhancements to public transportation;
b) Enhancements to parking, traffic, and roadways;
c) On- and off-site improvements to pedestrian and bicycle facilities, particularly as they facilitate access to the site by foot or bicycle;
d) Public safety improvements;
e) On-site affordable housing opportunities except where otherwise allowed in subsection 30-24(f)(5), the inclusionary zoning ordinance; and
f) Water, sewer, and storm water infrastructure enhancement.

(3) *Fiscal Impacts.* The proposed Mixed-Use Development has a positive fiscal impact on the city after accounting for all new tax revenue and expenses related to, but not limited to school capacity, public safety services and public infrastructure maintenance.

(4) *Improved access nearby.* Pedestrian and vehicular access routes and driveway widths are appropriately designed between the proposed Mixed-Use Development and abutting parcels and streets, with consideration to streetscape continuity and an intent to avoid adverse impacts on nearby neighborhoods from such traffic and other activities generated by the Mixed-Use Development as well as to improve traffic and access in nearby neighborhoods

(5) *Enhanced open space*. Appropriate setbacks, buffering, and screening are provided from nearby residential properties; the quality and access of beneficial open space and on-site recreation opportunities is appropriate for the number of residents, employees and customers of the proposed Mixed-Use Development; and meaningful connections to open spaces, recreational areas and natural resources that are publicly accessible and take full advantage of the unique opportunities for their use and enjoyment by the community at large.

(6) *Excellence in place-making*. The proposed Mixed-Use Development provides a high quality architectural design so as to enhance the visual and civic quality of the site and the overall experience for residents of and visitors to both the Mixed-Use Development and its surroundings.

(7) *Comprehensive signage program*. Notwithstanding the requirements of Section 30-20, all signage for the proposed Mixed-Use Development shall be in accordance with a comprehensive signage program developed by the applicant and approved by the Board of Aldermen, which shall control for all purposes, shall supersede any other sign requirements, and shall be complementary to the architectural quality of the Mixed-Use Development and character of the streetscape.

(8) *Pedestrian scale*. The proposed Mixed-Use Development provides building footprints and articulations appropriately scaled to encourage outdoor pedestrian circulation; features buildings with appropriately spaced street-level windows and entrances; includes appropriate provisions for crossing all driveway entrances and internal roadways; and allows pedestrian access appropriately placed to encourage walking to and through the Development Parcel.

(9) *Public space*. The proposed Mixed-Use Development creates public spaces as pedestrian-oriented destinations that accommodate a variety of uses, promote a vibrant street life, make connections to the surrounding neighborhood, as well as to the commercial and residential components of the Mixed-Use Development, to other commercial activity, and to each other.

(10) *Sustainable design*. The proposed Mixed-Use Development at least meets the energy and sustainability provisions of subsections 30-24(d)(5), 30-24(g), and 30-23(c)(2)(h).

(11) *Adequacy of parking.* Parking for the site is appropriate to the intensity of development, types of uses, hours of operation, availability of alternative modes of travel and encourages the use of alternatives without over-supplying parking.

(12) *Pedestrian and Neighborhood Considerations*. If the proposed Mixed-Use Development project proposes any of the measures listed below, and if such measures, singly or in combination, create a substantial negative impact on pedestrians or surrounding neighborhoods, the applicant has proposed feasible mitigation measures to eliminate such substantial negative impact:

a) Widening or addition of roadway travel or turning lanes or conversion of on-street parking to travel lanes;
b) Removal of pedestrian crossing, bicycle lanes, or roadway shoulder;
c) Traffic signal additions, alterations, or roundabouts; and
d) Relocation or alterations to public transport access points.

(j) ***Additional Filing Requirements for Special Permit in the Mixed-Use 3/Transit-Oriented District***

In addition to the provisions of sections 30-23 and 30-24, applicants for a grant of a special permit under section 30-13(g) shall submit:

(1) Conceptual Plans. Prior to submittal of a Special Permit in the MU3/TOD, which will include items (2) to (12) below, applicants shall present conceptual plans for review by the Land Use Committee of the Board of Aldermen at a public meeting. The Committee shall provide a forum for a public presentation whereby the Committee and public may ask questions, gain an understanding of the project proposal, and provide feedback that can inform further development of the project. Submittal for conceptual review shall not require engineered plans, but shall include the following:

a) Project description, including project purpose or design rationale;
b) Project statistics, including zoning, current and proposed uses on site, total square footage for each use proposed, area to be covered by structures, FAR, number of bedrooms in all dwelling units, percentage of affordable units, percentages of open space with breakdown of beneficial and publicly-accessible open spaces;
c) Preliminary site plan, including dimensioned property lines and all building setbacks and building footprints, impervious surfaces, location of waterways, top of bank and distance from waterways, proposed demolitions, location and number of parking spaces, landscaping and open spaces, trees to be removed, north arrow and scale; and
d) Other information as may be requested by city staff to perform a zoning review and preliminary impact analyses.

(2) 3-D computer model consistent with section 30-24(b);

(3) Narrative analysis describing design features intended to integrate the proposed Mixed-Use Development into the surrounding neighborhood, including the existing landscape, abutting commercial and residential character and other site specific considerations, as well as an explanation of how the proposed Mixed-Use Development satisfies each

criterion in this section;

(4) Statement describing how the beneficial open space areas, to the extent open to the public, are intended to be used by the public;

(5) Site plans showing any by-right or zoning-exempt alternatives;

(6) A Roadway and Transportation Plan reflecting the "EOEEA Guidelines for EIR/EIS Traffic Impact Assessment" with further attention to public transportation and exceptions, subject to review by the city traffic engineer, director of planning and development, and peer review consultants. The Plan should include the following:

   a) Graphic and narrative description of existing and proposed means of access to and within the site, including motor vehicular, pedestrian, bicycle, and public or private transportation alternatives to single-occupant vehicles;

   b) Description of a proposed transportation demand management (TDM) program identifying commitments, if any, to a designated TDM manager, employer contributions to employee public transportation passes, shuttle bus capital contribution, car pool, van pool, guaranteed ride home, flex hours, promotional programs, support for off-site pedestrian and bicycle accommodations, and similar efforts;

   c) Detailed analysis and explanation for the maximum peak hour and daily motor vehicle trips projected to be generated by the Mixed-Use Development, documenting:

      i) The projected Base Volume of trips to and from the Mixed-Use Development based upon the latest edition of the Trip Generation Manual published by the Institute of Transportation Engineers or other sources, such as comparable projects in Newton or nearby communities, acceptable to the city traffic engineer and director of planning and development;

      ii) The projected Adjusted Volume of trips net of reductions resulting from internally captured trips; access by public transport, ridesharing, walking or biking; and through the TDM program cited above; but without adjustment for "pass-by" trips, and noting how those reductions compare with the Mixed-Use Development guideline of Adjusted Volume being at least ten percent (10%) below the Base Volume on weekday evening peak hours;

      iii) The means of making mitigations if it is found pursuant to the monitoring under section 30-24(c)(7) of this section that the trips counted exceed the projected Adjusted Volume by ten percent (10%) or more; and

      iv) The projected trip reduction adjustment based on "pass-by" trips for use in projecting impacts on street traffic volumes.

   d) Analysis of traffic impacts on surrounding roadways, including secondary roads on which traffic to the Mixed-Use Development may have a negative impact. Results are to be summarized in tabular form to facilitate understanding of change from pre-development no-build conditions to the build-out conditions in trip volumes, volume/capacity ratios, level of service, delays, and queues;

      i) The assumptions used with regard to the proportion of automobile use for travel related to the site, the scale of development and the proposed mix of uses, and the amount of parking provided; and

      ii) Analysis of projected transit use and description of proposed improvements in transit access, frequency and quality of service.

(7) A shared-parking analysis that demonstrates that the number of parking spaces to be

provided is appropriate to the context, taking into consideration the mix of uses; the demand for parking spaces at different times of day, week, and year; availability of alternative modes of transportation; and other site-specific influences on parking supply and demand.

(8) Water, sewer, and storm water impact analysis. The analysis shall be subject to review by the city engineer, director of planning and development, and peer review consultants and shall include the following:

a) A study of the proposed project's surface water runoff relating to the Charles River and associated deep marsh system, which explores all feasible methods of reducing impervious surfaces, including underground parking and/or more compact site layouts, as well as the possibility of roof water harvesting for irrigation reuse, including:

b) A conceptual drainage plan demonstrating the consistency of the drainage infrastructure plan with the DEP Storm Water Management Policy and the City of Newton drainage policy;

c) A drainage analysis based on the City's 100-year storm event of six inches over a 24-hour period, showing how runoff from impervious will be infiltrated on-site;

d) An on-site soil evaluation identifying seasonal high groundwater elevation and percolation rate and locations of these tests shown on the site plan;

e) If a connection to the city's drainage system is proposed, prior to approval of this permit a closed circuit television (CCTV) inspection shall be performed and witnessed by the engineering division, the applicant shall provide the city inspector with a video or CD prepared by a CCTV specialist hired by the applicant. A post-construction video inspection shall also take place and witnessed as described above;

f) An evaluation of hydraulic capacity of the downstream drainage system submitted to the engineering division to determine any impact to the municipal drainage system;

g) A master plan and schedule of the sanitary sewer system improvements, Including:

   i) A plan showing a reduction in infiltration and inflow into the sanitary sewer system of at least eight gallons for every one gallon of sanitary sewage contribute by this development;

   ii) A calculation of the life-cycle cost of the proposed sanitary system;

   iii) A quantitative analysis of the capacity to dispose, verified by the MWRA; and

   iv) A study showing how the developer will comply with the city's cross connection control program sanitary to storm).

h) A 21E Environmental Site Investigation Report that evaluates the site for any contaminants related to underground fuel or oil tanks, creosote, leachate from existing trolley tracks, cleaning and/or washing facilities, or local dry wells.

i) A solid waste master plan including a detailed explanation of how the uses will control solid waste through reduction, reuse, recycling, compaction and removal that demonstrates compliance with the city's solid waste master plan. The plan shall provide estimates of the expected solid waste generation by weight and volume for each of the uses proposed for the site with consideration to peak volumes.

j) A quantitative analysis that demonstrates that the water demands of the proposed

development will not overburden the water supply of existing infrastructure provided by the city, including fire flow testing for the proposed fire suppression system, as well as domestic demands from the entire development. The applicant must coordinate this test with both the fire department and utilities division; representatives of each department shall witness the testing and test results shall be submitted in a written report. Hydraulic calculations shall be submitted to the fire department for approval. Hydraulic analysis for both domestic and fire suppression will be required via hydraulic modeling in a format acceptable to the utilities director.

(9) Fiscal impact analysis that includes school impacts analysis prepared by a professional analyst, subject to peer review;

(10) Proposed phasing schedule, including infrastructure improvements;

(11) Shadow study showing shadow impacts on the surrounding properties for four seasons at early morning, noon, and late afternoon; and

(12) Applicants must submit in electronic form all documents required by sections 30-23 and 30-24 (including this section 30-24(i)) and any supplemental reports, memoranda, presentations, or other communications submitted by the applicant or its representatives to the Board of Aldermen and pertaining to the special permit application unless the applicant demonstrates to the satisfaction of the director of planning and development that electronic submission or compliance with that standard is not feasible. Documents created using Computer Aided Design and Drafting software shall comply with the Mass GIS "Standard for Digital Plan Submittal to Municipalities," or successor standard. Electronic submission must be contemporaneous with submission by any other means. The director of planning and development will arrange to have electronically submitted documents posted on the city website within a reasonable time after receipt.

5. *By adding a new Section 30-19(d)(22) as follows:*

(22) Notwithstanding the other requirements of 30-19(d), by special permit from the Board of Aldermen in accordance with the procedures provided in section 30-24, the parking requirement for a mixed-use development approved under Section 30-13(g) shall be set through a shared-parking analysis, which demonstrates that the number of stalls provided is sufficient for the combination of uses proposed taking into account the proximity to public transportation and other factors. This analysis shall be subject to review by the city's planning director and peer review at the applicant's expense if requested by the planning director. Following the grant of a special permit under this section, no material change in the combination of uses shall be authorized until the petitioner submits a revised analysis demonstrating to the satisfaction of the planning director that sufficient parking exists to accommodate the new combination of uses or requests and receives a modification of the special permit to authorize a change in the number of stalls provided.

6. *By deleting the definition of "Development Parcel" as it appears in Section 30-1, Definitions, and substituting the following definition:*

    Development Parcel: The real property on which a Planned Multi-Use Business Development or a Mixed-Use Development is located in connection with a special permit under Section 30-15(s) or 30-13(g).

    By deleting the definition of "Open Space, beneficial as it appears in Section 30-1, Definitions, and substituting the following definition:

    Open Space, Beneficial: Areas not covered by buildings or structures that are available for active or passive recreation, which shall include, but are not limited to: landscaped areas, <u>including space located on top of a structure, gardens</u>, playgrounds, walkways, plazas, patios, terraces and other hardscaped areas, and recreational areas, and shall not include: (i) portions of walkways intended primarily for circulation, i.e., that do not incorporate landscape features, sculpture or artwork, public benches, bicycle racks, kiosks or other public amenities, (ii) surface parking facilities<u> or associated pedestrian circulation</u>, (iii) areas that are accessory to a single housing unit, or (iv) areas that are accessory to a single commercial unit, and controlled by the tenant thereof, and not made available to the general public.

    And by adding the following Definition in Section 30-1 as follows:

    "Community Use Space: Space that is open to the public and used for, but not limited to, ball courts, gymnasia, play areas, community meeting rooms, social services, outdoor play areas, playgrounds, related seating areas, and similar uses."

7. *By inserting a new Section 30-5(a)(4) as follows:*

    (4) Public uses described in Section 30-6(a) through (k); provided that such uses shall be subject only to site plan review as required under Section 30-6 and shall not be subject to dimensional, parking or any otherwise applicable zoning requirement.

TIER II – SECOND ACTION

If the **INITIAL ACTION** is adopted, consider amending it by inserting the following as Section 30-15(v)(5) and modifying Table 3 of Section 30-15, provided that all other dimensional standards are met:

(5) ***Incentives.*** For providing direct access to and from an interstate highway, the maximum allowed gross floor area may be increased by 250,000 square feet not to exceed 1,200,000 square feet total gross floor area and an FAR of 3.0, including above-ground parking

TIER III – THIRD ACTION

Following adoption of the **INITIAL ACTION**, consider amending Section 30-15(g)(2) to read as follows (whether or not it has been altered by the second action, above):.

(1) ***Intensity of development.*** The aggregate gross floor area of all structures visible above grade within the Development Parcel shall not exceed 1.5 million square feet of gross floor area, including private accessory parking structures and excluding any structure or portions of structure dedicated to public use and owned by a state instrumentality, and shall also be subject to all of the following provisions:

a) The number of dwelling units within the Development Parcel shall not exceed 300;
b) The total gross floor area of all uses in Table A shall not exceed 1.5 million square feet, including above-grade parking; and
c) The development must have a least one use from each of the three categories (A, B, and C) enumerated in Table A.

Amend the figure in Section 30-15, Table 3 in the Building Height (feet) column for Mixed-Use Development Special Permit, per 30-13(g) changing it from 135 to 168 and the Floor Area Ratio column changing it from 2.4 to 3.7.

Table 6 Project Trip Generation

Time Period	Direction	Office Trips [a] (A)	Shared Office Trips [b] (B)	5% Transit Credit [c] (C)	New Office Trips (D=A-B-C)	Retail Trips [d] (E)	Shared Retail Trips [b] (F)	25% Pass-By Trips [e] (G)	New Retail Trips (H=E-F-G)	Residential Trips [f] (I)	Shared Residential Trips [b] (J)	25% Transit Credit [g] (K)	New Residential Trips (L=I-J-K)	Total New Trips (M=D+H+L)
Weekday Daily	Enter	2,592	108	124	2,360	2,332	314	504	1,514	1,880	260	406	1,214	5,088
Weekday Morning	Enter	329	1	16	312	36	5	6	25	29	3	7	19	356
Peak Hour	Exit	45	2	2	41	23	3	6	14	117	3	29	85	140
	Total	374	3	18	353	59	8	12	39	148	6	36	104	496
Weekday Evening	Enter	59	3	3	53	104	11	23	70	115	15	25	75	198
Peak Hour	Exit	286	4	14	268	108	16	23	69	62	9	13	40	377
	Total	345	7	17	321	212	27	46	139	177	24	38	115	575

a Based on ITE LUC 710 (Office) for 237,000 sf, which is comprised of the 225,000 sf office building and the 12,000 sf of community space.
b Based on Mixed Use Shared Trip rates of 10.0 percent for the weekday daily; 3.0 percent for the weekday morning peak hour, and 8.2 percent for the weekday evening peak hour.
c A 5 percent transit credit was applied to the trips associated with the office component of the site.
b Based on ITE LUC 820 (Shopping Center) for 19,300 sf.
e A 25 percent pass-by reduction was applied to the trips associated with the retail component of the site.
f Based on ITE LUC 220 (Apartment) for 290 units.
g A 25 percent transit credit was applied to the trips associated with the residential component of the site.

#25-12

BOARD OF ALDERMEN

CITY OF NEWTON

DOCKET REQUEST FORM

DEADLINE NOTICE: Aldermanic Rules require items to be docketed with the Clerk of the Board NO LATER THAN 7:45 P.M. TUESDAY, PRIOR TO THE MONDAY FULL BOARD MEETING in order to be voted to be assigned to Committee(s) that evening.

To: Clerk of the Board of Aldermen Date: January 30, 2012

From (Docketer): Terrence P. Morris, Esq.

Address/phone/email: 57 Elm Road Newton, MA ▪ 617 202-9132 ▪ tpmorris.landuse.law@comcast.net

Additional sponsors: G. Michael Peirce, Esq.; Jason Rosenberg, Esq.; John Lojek

RECEIVED
Newton City Clerk
2012 JAN 30 PM 3: 14
David A. Olson, CMC
Newton, MA 02459

1. **Please docket the following item (edit if necessary):** Proposed zoning ordinance amendment to amend section 30-15(c)(3)(b) by inserting the word, "*subject*" before the word, "*lot*", the word, "*and*" before the word, "*such*" and the word, "*adjoining*" after the word, "*such*" so that the paragraph reads as follows:

   "(b) If the subject 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 subject lot and such adjoining lot had on it a single-family or two-family dwelling."

2. **The purpose and intended outcome of this item is:** Zoning Ordinance amendment

3. **I recommend that this item be assigned to the following committees:** Zoning & Planning

4. **This item should be taken up in committee:** As soon as possible, preferably within a month; see explanation in item #8 below re potential emergency.

5. **I estimate that consideration of this item will require approximately:** not more than one hour

6. **The following people should be notified and asked to attend deliberations on this item. (Please check those with whom you have already discussed the issue, especially relevant Department Heads):**

City Personnel	Citizens (include telephone numbers/email please)
Eve Tapper, Chief Planner ________	Michael Peirce, Esq. mpeirce@gmpeircelaw.com
Seth Zeren, Chief Zoning Code Official	________
________	________

____

7. **The following background materials and/or drafts should be obtained or prepared by the Clerk's office prior to scheduling the item for discussion:** copy of the Land Court decision in the Case of *Mauri v. Zoning Board of the City of Newton* et al recently issued (copy attached).

8. **I have provided additional materials and/or undertaken the following research independently prior to scheduling the item for discussion:** Consulted with other land use practitioners that perform much of the work within the City of Newton to ascertain their experience with the long-standing interpretation of existing ordinance and the need for the proposed amendment to correct the negative effect of a wrongful decision of the Land Court recently handed down that overturns the intended effect of the ordinance when previously amended in 2001.

9. **I would like to discuss this item with the Chairman before any decision is made on how and when to proceed.**

10. **I would like the Clerk's office to confirm that this item has been docketed. My daytime phone number is:** 617 202-9132.

11. **I would like the Clerk's office to notify me when the Chairman has scheduled the item for discussion.**

Thank you.

Terrence P. Morris

Terrence P. Morris, Esq.

RECEIVED
Newton City Clerk
2012 JAN 30 PM 3: 14
David A. Olson, CMC
Newton, MA 02459

DRAFT
-12

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROPOSED ORDINANCE NO. ____

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF NEWTON AS FOLLOWS:

That the Revised Ordinances of Newton, Massachusetts, 2007, as amended, be and are hereby further amended with respect to Chapter 30, Zoning, as follows:

amend Section **30-15(c)(3)(b)** by inserting the word "subject" before the word "lot", the word, "and" before the word, "such" and the word, "adjoining" after the word, "such" so that the paragraph reads as follows:

> b) If the subject 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 subject lot and such adjoining lot had on it a single-family or two-family dwelling.

Approved as to legal form and character:

____

City Solicitor

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Newton City Clerk
2012 JAN 30 PM 3:14
David A. Olson, CMC
Newton, MA 02459

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss. CASE 10 MISC 419859 (HMG)

MAUREEN MAURI and
RONALD A. MAURI

Plaintiffs

v.

ZONING BOARD OF THE CITY OF
NEWTON, ET AL.

Defendants

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Newton City Clerk
2012 JAN 30 PM 3:14
David A. Olson, CMC
Newton, MA 02459

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ORDER DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Introduction

This case concerns the construction of a single-family dwelling on a preexisting, nonconforming lot at 31 Bradford Road, Newton, Massachusetts (Locus / Garage Lot).[1] The plaintiffs, Maureen M. Mauri and Ronald A. Mauri (Mauris / plaintiffs) initiated the instant appeal pursuant to G.L. c. 40A § 17 in which they challenge a Decision of the City of Newton Zoning Board of Appeals (Board). That Decision sustained the issuance of a building permit by

[1] *See* Stipulation of Facts ¶ 1 (Plan recorded with the Middlesex County Registry of Deeds in 1890 as 'Lot 39'). Locus has always contained approximately 8,400 square feet of area and 60 feet of frontage. Locus became nonconforming in 1940, when the Newton Ordinance was amended to require a minimum lot size of 10,000 square feet and frontage of no less than 80 feet.

the City of Newton Inspectional Services Department (ISD)[2] to defendants James D. Chansky and Bonnie E. Chansky (Chanskys / defendants). [3]

The plaintiffs have filed a Motion for Summary Judgment claiming, *inter alia*, that the Board's Decision was erroneous in that it stemmed from an incorrect interpretation and application of § 30-15(c)(3)(b) of the Newton Zoning Ordinances (Ordinance).

For their part, the defendants contend that the Board's Decision is consistent with both the plain meaning of § 30-15(c)(3)(b) of the Ordinances, as well as with its historical understanding and application. As such, defendants argue that the Board's Decision should be affirmed. To this end, they have filed a Cross-Motion for Summary Judgment in which they further argue that the plaintiffs lack the standing required to maintain the instant appeal.[4] The Mauris respond that they are "aggrieved" by the Decision of the Board,[5] inasmuch as the Chanskys' proposed construction (dwelling) at Locus will intrude upon their privacy.

In the instant matter, two distinct questions present themselves. The first asks whether the plaintiffs possess the standing necessary to vest this court with subject-matter jurisdiction. [6]

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[2] The Permit (No. 09080027) was granted on August 3, 2009; *See* Confirmation of lot determination, dated April 29, 2005, issued by Chief Zoning Official, Juris Alksnitis (Plaintiff's Appendix Exhibit 5 and Defendant's Appendix Exhibit H); *See also* Reaffirmation of lot determination, dated March 8, 2007, issued by Commissioner of Inspectional Services, John D. Lojek (Plaintiff's Appendix Exhibit 5 and Defendant's Appendix Exhibit H).

[3] Ernest D. Rogers, also a named defendant, is described as having "submitted the application for the Building Permit in question as agent for property owners, the Chanskys:..." Complaint ¶ 17. Together with the Chanskys, he submitted the opposition to the plaintiffs' Motion for Summary Judgment as well as a Cross-Motion for Summary Judgment.

See Ordinance § 30-27 (b)(2)(c) (The Board's vote to sustain the plaintiffs' appeal was two (2) in favor and three (3) opposed; a four-fifth supermajority vote was required to reverse the ISD's issuance of the Permit).

[4] *See* M.G.L. c. 40A § 17 (only "a 'person aggrieved' by the decision of a board of appeals..." has the requisite standing to bring the present action); *See generally* Defendant's Cross Motion for Summary Judgment.

[5] *See* Plaintiffs' Opposition to the Defendant's Cross-Motion for Summary Judgment, p. 5 (Plaintiffs argue that the proposed construction of a single-family on Locus, approximately twelve (12) feet from Plaintiff's home, will cause a deprivation of their privacy as a result of increased density in an already overly dense lot and neighborhood).

[6] *See Barvenik* at 33 Mass. App. Ct. 129, 131 (1992) ("Aggrieved person status is a jurisdictional prerequisite for § 17 review") [internal quotations omitted]; *See also Sweenie v. A.L Prime Energy Consultants*, 451 Mass. 539, 542 n.9 (2008) ("aggrievement for purposes of pursuing an appeal under . . . § 17 is a jurisdictional requirement" [internal quotations omitted]).

Based upon the Summary Judgment record, the court is satisfied that the Mauris do possess the necessary standing, and are thus "persons aggrieved" within the meaning of G.L. c. 40A § 17.

The second question concerns the decision of the Board sustaining the issuance of the Mauris' Building Permit, and whether that Decision is legally tenable. [7] The court is satisfied that the Board's determination is not legally tenable.

Background

The building permit issued by the ISD would allow the defendants to raze an existing garage and build a single-family dwelling on the Garage Lot at 31 Bradford Road.[8] The Chanskys also own and reside at 25 Bradford Road (House Lot) "immediately adjacent to the northeast" of the Locus.[9] The plaintiffs own the premises and reside at 35 Bradford Road (Mauri Lot), which is "adjacent to the southwest" of the Locus. [10]

The aforementioned lots [11] were created by a plan recorded in 1890. Each lot has an area of 8,400 square feet, while possessing sixty (60) linear feet of frontage. "Since 1916, the House Lot and Garage Lot have been held in common ownership.[12] Since at least 1917, a dwelling has

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7 *See* Plaintiffs' Brief in Support of Motion for Summary Judgment (p. 20-21). (A zoning board's interpretation will be set aside where it is "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary") *quoting Roberts v. Southwestern Bell Mobile Systems, Inc.*, 429 Mass. 478, 485-86, 709 (1999).

8 *See* Stipulation of Facts ¶ 11; *See* Plaintiff's Appendix Exhibit 2 (Board's Decision cites the language of the ISD Commissioner); *See also* Defendant's Appendix Exhibit H (ISD Determinations).

9 *See* Stipulation of Facts ¶ 1 (1890 Plan refers to this lot as 'Lot 40').

10 *See* FN 11, *Supra.* (1890 Plan refers to this lot as 'Lot 38'). In sum, the Mauris reside at 35 Bradford Road, which is adjacent to 31 Bradford (Locus). The Mauris' residence at 35 Bradford Road is separated from 25 Bradford Road, the Chanskys' residence, by Locus.

11 I.e. 25 Bradford Road , 31 Bradford Road, 35 Bradford Road.

12 Stipulation of Facts (Stipulation), ¶ 4.

been located upon the House Lot. [13] Since at least 1917, a garage has been located upon the Garage Lot and used by the owners of the House Lot. [14]

The Ordinance was first adopted by the City of Newton in 1922. The House Lot and Garage Lot were then located in the Private Residence Zoning District which imposed no minimum frontage or lot size requirements.[15] In 1940 [16] the Ordinance was amended and imposed its first frontage and lot size requirements of eighty (80) linear feet and 10,000 square feet, respectively in what was renamed the Single Residence B District.[17] As a consequence of this amendment, each of the three lots became, and presently remains, nonconforming as to lot size and frontage. Under the current iteration of the Ordinance, the House Lot and Garage Lot are located in a Single Residence 2 District. For lots created prior to December 7, 1953, the frontage requirement remains at 80 feet, while the lot area requirement remains at 10,000 square feet. [18] The Chanskys acquired both the House Lot and the Garage Lot in by deed dated July 15, 1987. [19]

On August 3, 2009 the ISD issued a building permit to the defendants for the construction of a single family dwelling at 31 Bradford Road, the Garage Lot. The Chanskys' proposal calls for construction to be sited from approximately 7.5 feet to 10 feet from the property line they share in common with the plaintiffs. The plaintiffs' residence, in turn, is located approximately 4.5 feet from that common property line. [20]

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[13] Id., at ¶ 5.
[14] Id., at ¶ 6.

[15] Id., at ¶ 7.
[16] Presumably on October 11, 1940. See in this connection, Sec. 30-15 (c)(1) of the Ordinance.
[17] Stipulation, at ¶ 8.
[18] Id., ¶ 10.
[19] Id., ¶ 9.
[20] Id., ¶ 14.

Plaintiffs assert that the building permit will allow their neighbors, the Chanskys, to build a far larger structure upon the Garage Lot, than the currently existing garage.[21] Predicated upon exterior elevations, plans, photographs and assessors' records included with the exhibits, this court concludes that the Chanskys' garage consists of a modest, single story, one-car structure closely abutting the common property line between the Chanskys' Garage Lot and their House Lot.[22] By contrast, the proposed dwelling at two and half stories, would be in excess of thirty–two feet in height. It would be set back 7.5 feet to 10 feet from the common property line shared with the Mauris. [23] As the Mauris' dwelling is set back approximately 4.5 feet from that common boundary line, the two structures would be approximately 12 feet apart at their closest point.

Critically, the proposed dwelling will contain thirteen windows, including two windows in a roof dormer, on the side directly facing the Mauris' residence. According to the plaintiffs, the proposed dwelling will extend further east than their own home. The topographical plan [24] provided the court suggests a structure of approximately 55 feet in length, running alongside the plaintiffs' dwelling.

The plaintiffs challenge the propriety of the Board's Decision in sustaining the issuance of the building permit. They argue, *inter alia*, that § 30-15 (c)(3)(b) of the Ordinance was

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[21] *See* Affidavit of Architect AIA, Dennis C. Rieske as attached to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment, App. 20.
[22] Exhibits C and D.
[23] With a sideyard setback of 7.5 feet, the proposed dwelling would be in compliance with the setback requirements in the Single Residence 2 District.
[24] Topographic Site Plan of the permit plans. See Affidavit of Dennis C. Rieske, AIA, ¶ 5.

erroneously interpreted by the Board. Rather, they contend that the Chanskys' two lots have merged rendering the Locus unbuildable as a matter of law.[25]

Summary Judgment

Summary judgment must be granted when "pleadings, depositions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ.P. 56(c). The non-moving party "may not rest upon the mere allegations or denials of [their] pleadings, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial [and] [i]f [they] do[] not so respond, summary judgment, if appropriate, shall be entered against [them]."[26] Having found no genuine issue of material fact, summary judgment is appropriate "where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." [27] In adjudging whether a factual issue is *genuine*, "the [c]ourt must determine whether the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Steffen v. Viking*, 441 F. Supp.2d 245, 250 (2006), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where resolution of the case depends solely upon judicial determination of a question of law, Mass. R. Civ.P. 56(c) permits the court to grant a summary decision.[28]

[25] According to the common law doctrine of merger, "A basic purpose of the zoning laws is 'to foster the creation of conforming lots." *Preston v. Board of Appeals of Hull*, 51 Mass. App. Ct. 236, 238 (2001); In *Seltzer*, that court enunciated the general rule, "[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize the nonconformities with the dimensional requirements of the zoning by-law or ordinance." *See Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 (1987); *See* Plaintiffs' Brief in Support of Motion For Summary Judgment, p. 8-9 ("the two lots merged into a single lot when they became nonconforming upon adoption by the City of Newton in 1940 of a 10,000 square foot area requirements and an 80 foot frontage requirement").

[26] "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *See Kourouvacilis*, 410 Mass. at 713, *citing Celotex Corp.* v. Catrett, 477 U.S. 317, 323-4 (1986).

[27] *See Opara v. Massachusetts Mut. Life Ins. Co.*, 441 Mass. 539, 544 (2004).

[28] *See* Mass. R. Civ. P. 56 (c).

The moving party bears the burden of proving the absence of any genuine issue of material fact, and that he is deserving of judgment as a matter of law. *See Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 232 (1997). The moving party has discharged said burden once "[they] demonstrate [], by reference to material described in Mass. R. Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving a legally cognizable interest" (internal quotations omitted) *Standerwick v. Zoning Board of Appeals of Andover,* 447 Mass. 20, 35 (2006). Said a different way, "the material supporting a motion for summary judgment…must demonstrate that proof of [an essential] element at trial is unlikely to be forthcoming" *Id.*

Although "the party facing summary decision [has the right] to have the facts viewed in a favorable light, . . . [it] does not entitle that party to a favorable decision." *Caitlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992). For example, where the non-moving party merely relies on "bald conclusions" they are not thereby entitled to resist a motion for summary judgment. *Id.*

The present appeal yields no genuine issue of material fact. Rather, the only relevant issues which this court must resolve, are issues of law. Under these circumstances, the present action is ripe for summary judgment.

Discussion and Analysis

Standing Pursuant to G.L. c. 40A, § 17.

Under G.L. c. 40A § 17, this court lacks subject-matter jurisdiction to reach the merits of a case absent a showing of "aggrievement"[29] *See Marotta v. Board of Appeals of Revere*, 336

[29] *See Marashlian v. Zoning Board of Appeals of Newsburyport*, 421 Mass. 719, 721 (1996) (Only those persons aggrieved by a Decision of a Zoning Board of Appeals may seek judicial review of that administrative determination).

Mass. 199, 202-03 (1957). *See* also *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 334 (1994) (standing as an aggrieved party is jurisdictional and cannot be conferred by stipulation or waiver) (Abrams, J., Dissenting). The Appeals Court has described standing as "a gateway through which one must pass en route to an inquiry on the merits..." *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005).

As owners of property directly abutting the Garage Lot, the Mauris are clearly "parties in interest," pursuant to G.L. c. 40A § 11.[30] Those entitled to notice of the proceedings are presumed to have the requisite interest. *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 33 (2006). The Mauris therefore enjoy a rebuttable presumption that they are "persons aggrieved" by the Decision of the Board. *See Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). *See also Marashlian*, 421 Mass. 719, 721 (1996).

In *Standerwick*, the Supreme Judicial Court offered the following instructive commentary regarding the presumption of standing and the manner in which it may be rebutted:

> We have explained that to rebut the presumption, the defendant must offer evidence "warranting a finding contrary to the presumed fact...." [T]he presumption recedes when a defendant challenges a plaintiff's status as an aggrieved person *and offers evidence supporting his or her challenge...."* {R]ebuttable presumption "continues only until evidence has been introduced *which would warrant a finding contrary to the presumed fact."*
>
> A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by "throwing upon his adversary the burden of going forward with evidence."
>
> Thus, an abutter is presumed to have standing until the defendant comes forward with evidence to contradict the presumption. Our conclusion that this evidence must "warrant a finding contrary to the presumed fact" does not shift the burden of proof on the issue of standing to the defendant.... [I]f presumed fact is "met and encountered" by defendant's contrary evidence, burden of proof remains with plaintiff and is "not for the defendant to show that [the presumed fact] does not exist"

[30] G.L. c. 40A § 11 defines a "party in interest" as "petitioners, abutters, owners of land directly opposite on any public street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner." In the present appeal, defendants to not dispute plaintiffs' presumed standing and the facts of record indicate that the Mauris are due this statutorily imparted presumption.

> In a summary judgment context, a defendant is not required to present affirmative evidence that refutes plaintiff's basis for standing.... [M]aterial supporting motion for summary judgment "need not negate, that is, disprove, an essential element of the claim" of the party upon whom the burden of proof at trial will rest" but "*must demonstrate that proof of that element at trial is unlikely to be forthcoming*." It is enough that the moving party "demonstrate..., *unmet by countervailing materials*, *that the party opposing the motion has no reasonable expectation of proving" a legally cognizable injury.*
> See *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999) (defendants rebutted plaintiff's presumption of standing where plaintiff's deposition testimony "failed to show that the proposed project will impair any interests of the [plaintiff] that are protected by the zoning law."; *Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 622 (1993) (deponents' inability to "articulate whether or how the plaintiffs would be injured" were not conclusive but caused the presumption of standing "to recede." Through discovery of the plaintiffs , the [defendant] demonstrated that the plaintiffs had no factual basis for their claims....
> But the [defendant] may rebut a presumption of standing by seeking to discover from such plaintiffs the actual basis of their claims of aggrievement. If a person claiming to be aggrieved can point to no such evidence, a party seeking summary judgment is entitled to rely on that fact. Once the developer in this case rebutted the plaintiffs' presumption of standing, the plaintiffs were required to... meet their burden to establish standing. (internal citations omitted) (emphasis added)

To rebut the plaintiffs' presumptive standing, the court may deem sufficient, evidence adduced in the course of discovery, including depositions and answers to interrogatories.

Legal arguments and mere allegations are not sufficient to rebut the plaintiffs' presumed standing. *See Watros*, 421 Mass. at 111 (reversing Appeals Court judge's conclusion that presumption of standing may be rebutted by denials in defendant's Answer); *Marinelli v. Bd. of Appeals of Stoughton*, 440 Mass. 255, 258 (2003) ("speculation [as to whether named grantor possessed proper] authority [to convey a parcel] on behalf of a trust is insufficient to rebut [the] presumption [of standing]"); *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 128 (1999) ([i]t is not enough simply to raise the issue of standing in a proceeding under § 17 [; t]he challenge must be supported with evidence").

That said, evidence adduced through discovery may rebut the plaintiffs' presumed standing, such as depositions, answers to interrogatories, and expert affidavits, if they shed doubt

on plaintiffs' bases for asserting aggrievement. In *Cohen*, the court "treat[ed] [the] submissions [of plaintiffs' depositions] as effectively challenging the plaintiffs' standing."[31] Essentially, plaintiffs' presumptive standing will have receded once the defendants have either proffered affirmative evidence showing that a basis for standing is not well-founded, or alternatively, the defendants can rely on plaintiffs' lack of factual foundation for asserting a claim of "aggrievement". *See Standerwick*, 447 Mass. at 35-36. *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999) ("trustee's deposition testimony failed to show that the proposed project will impair any interests of the trustee that are protected by the zoning laws," rebutting plaintiffs' presumption of standing).

In this way, the defendant may rebut the plaintiffs' presumption of aggrievement either by providing affirmative evidence—that a basis for aggrievement is not well founded—or by showing, in the negative, that the plaintiffs lack any factual foundation for asserting a claim of aggrievement.

Consequently, if this court is to conclude that the Mauris' presumptive standing has been effectively rebutted, it must find that the plaintiffs' claimed basis for aggrievement is "not well founded" or that their claims "lack any factual foundation."

In arguing that they are persons aggrieved, the plaintiffs make the following assertion:

> The Mauris claim...that "they are "aggrieved" by the decision of the Board, insofar as the Chanskys' proposed construction (Dwelling) at Locus *will result in a violation of plaintiffs' privacy.*"[32] (emphasis added)

For their part, the Chanskys readily concede as follows:

> The *only issue* by which the Mauris claim that they would be aggrieved by the construction of a home on the Garage Lot is one of privacy (Mauri Depo at 26, 32, 34-35, 38-39, 66-Exhibit 19).[33] (emphasis added)

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[31] *See Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 622 (1993).
[32] Plaintiffs' Brief in Support of Motion for summary Judgment (Plaintiffs' Brief), pp. 2-3.
[33] Defendants' Memorandum, p 7.

Given these acknowledgements, this court limits it consideration of the Mauris' standing, to privacy related concerns.

In their Memorandum, [34] the defendants argue as follows:

> The Mauris, as abutters to 31 Bradford, are "parties in interest" who enjoy a rebuttable presumption that they are "persons aggrieved" from a decision of the ZBA. Once there is a challenge to the plaintiffs' standing, however, any presumed status as "person aggrieved" recedes, and "the jurisdictional question is decided on 'all the evidence with no benefit to the plaintiffs from the presumption'... [T]he plaintiff must [then] put forth credible evidence to substantiate his (her) allegations. (internal citations omitted)

The defendants suggest that once a challenge is lodged, the plaintiffs' presumptive standing recedes. Thus, in the case at bar, extracts [35] from a deposition of Maureen M. Mauri have been provided in which the defendants inquired as to her aggrievement. In the course of her deposition Ms. Mauri testified, in relevant part, as follows:

> A. "... the primary issue was the issue of privacy.
> Q. How would the construction of a house on the garage lot, how would that impact your privacy?
> A. Well, the way my house is built, it's 4 ½ feet from our lot line, and the proposed house is then 7 ½ feet from the lot line....
> We have a den that is the room that we pretty much live in that would look out onto this house, that's a room that we don't want to keep the blinds closed at all times. It's a room that we watch TV in, exercise in, fold laundry in, sit in and read.
> Q. So part of the issue with privacy is the fact that the proposed house would be about—
> A. 12 feet....
> Q. Those were... concern about privacy on upper levels of the house?
> A. On all levels of the house, except the basement.
> Q. You previously talked about the den, and that's on the first floor, right?
> A. Yes.
> Q. And you also expressed concerns about privacy issues from a house being built next door with the two upper levels?
> A. I have... two 84 inch windows that go up the staircase, and that looks directly on the sitting area on the landing and right directly into my bedroom that is on a path from a closet to a bathroom. [36]

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[34] *Id.* p. 18.
[35] A limited number of deposition extracts only, have been provided the court.
[36] Deposition of Maureen M. Mauri (Deposition), pp. 32-34.

Q. Aside from privacy issues, are there any other issues that you discussed with Mr. Rieske ? [37]
A. Yes,... actually this goes again to privacy. We talked about our deck, which goes off our kitchen.... And the new house, the proposed new house, would go beyond our house and past our deck and there would be a room with windows also [in the proposed house]. [38]
Q. And again, the issue with that [deck] you expressed concern about is related to privacy?
A. Yes, because in the summertime we have, on a nice day, we would have breakfast out there, we could have lunch out there; when we're home on weekends, we entertain out there and sit out there. And suddenly, now the [proposed] house extends way back there beyond our house, so that would be a privacy issue.... [39]
Q. ...[S]etting aside privacy issues, are there any other issues that you've identified...associated with the construction of a house on the garage lot?
A. Well there would be things like the noise factor from a house being so close. We're unable to put an air conditioner in on our third floor, so we in the summer would keep those windows open. They are round windows and can't accommodate an air conditioner....so one would assume that there would be noise with a house so close.

Additionally, the defendants have provided an Affidavit of William J. Pastuszek, Jr., an appraiser.

According to Mr. Pastuszek:

[He has] been engaged by the Defendants James D. Chansky, Bonnie E. Chansky and Ernest D. Rogers to provide [his] expert opinion as to the impact, if any, of the construction of a single family residence at the Chanskys' property at 31 Bradford Street, Newton, Massachusetts on the value of the adjacent single family residence located at 35 Bradford street, Newton. [40]

His Affidavit continues:

I have...conducted diminution of value studies and have reviewed such studies done by others. These include measuring the effect of existing or proposed potential adverse influences, easements, lot line discrepancies, and title errors. [41]

He concludes as follows:

It is my opinion that the construction of the residence will not have an adverse impact on the abutters' home at 35 Bradford Road, or on any other properties in the immediate area.

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[37] See affidavit of Dennis C. Rieske, AIA as presented by the plaintiffs.
[38] Deposition, p. 34.
[39] Id. 37.
[40] Affidavit of William J. Pastuszek, Jr. (Pastuszek Affidavit), ¶ 2.
[41] *Id.*, ¶ 5.

It is noteworthy that Mr. Pastuszek nowhere references the issue of privacy. Rather, as an appraiser, he focuses, not surprisingly, upon a possible diminution in value of the Mauris' property. However, this is a form of aggrievement that Ms. Mauri raises only in passing in her deposition testimony. [42] A possible diminution in value is taken up by neither party in their respective briefs. [43]

This court concludes therefore that in focusing exclusively upon a possible diminution in value, the Pastuszek Affidavit is of no moment in challenging or countering the plaintiffs' standing, presumptive or otherwise.[44] Moreover, in weighing the testimony before it, [45] this court is satisfied that the defendants have failed to rebut the presumption of standing enjoyed by the plaintiffs. The Mauris have provided compelling testimony concerning a likely loss of privacy. They have done so to a degree well beyond that required under *Butler, supra.* That loss of privacy, in turn, is adequately tethered to an interest protected by the Ordinance. The court concludes therefore that the plaintiffs' presumption of standing has not been rebutted.

Were this court to conclude, arguendo, that the Mauris' presumption of standing *had* been effectively rebutted, the burden would rest with the plaintiffs to "demonstrate, not merely speculate, that there has been some infringement of [their] legal rights"[46] and "that [their] injury is special and different from the concerns of the rest of the community."[47] In *Standerwick*, the Court concluded that "a person aggrieved . . . must assert a plausible claim of a definite violation

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[42] This conclusion is predicated upon the relatively few pages of deposition testimony in the summary judgment record.

[43] See Mauri Deposition p. 39. At 39:19, Ms. Mauri raises the issue of "[d]ensity in the neighbor[hood?]," as well.

[44] Nor does it counter the plaintiffs' Rieske Affidavit which is concerned solely with privacy issues.

[45] This court does not believe that the privacy concerns voiced by Ms. Mauri are "beyond the scope of common knowledge, experience and understanding" and that expert testimony is necessary therefore to establish aggrievement. See *Standerwick* , 447 Mass. at 36.

[46] *See Barvenik v. Alderman of Newton,* 33 Mass. App. Ct. 129, 132 (1992).

[47] *See Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass. App. Ct. 208, 211 (2003) (emphasis added).

of a private right, a private property interest, or a private legal interest."[48] Moreover, if one is to demonstrate standing, one must show that the injury occurred to "an interest the zoning scheme [sought] to protect." *Standerwick*, 447 Mass. at 32.

If the Mauris are to defeat a motion for summary judgment predicated upon a claimed lack of standing, they must proffer "credible evidence to substantiate [their] allegations." *See Marashlian*, 421 Mass. at 721. In *Butler v. City of Waltham*, 63 Mass. App. Ct. 435 (2005), the court discussed the burden of proof needed for a demonstration of standing, as follows:

> Frequently, the question whether a plaintiff has made the requisite showing is a question of fact and, for that reason, a judge's finding that a person is or is not aggrieved will not be set aside unless the finding is clearly erroneous... The "findings of fact" a judge is required to make when standing is at issue, however, differ from the "findings of fact" that [a] judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, *a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true.* "Rather the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge." (emphasis added)
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> Although decided zoning cases have not discussed the ingredients of "credible evidence," cases discussing the same concept... have observed that "credible evidence'" has both a quantitative and a qualitative component. ... Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made.... Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action. Conjecture, personal opinion, and hypothesis are therefore insufficient. *Id* at p.441. (internal citations omitted)

In *Marhefka v. Zoning Board of Appeals of Sutton*, 79 Mass. App. Ct. 515, 521, n.10 (2011), the Court determined that "a protected interest can [. . .] arise implicitly from the intent of the by-law's provisions." [49] Further, where the injury alleged "relate[d] to protected density

[48] *See Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 33 (2006), *quoting Barvenik*, 33 Mass. App. Ct. at 132 (internal quotations omitted); *See also Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1998).

[49] *Quoting Sheppard v. Zoning Bd. of Appeal of Boston*, 74 Mass. App. Ct. 8, 12 (2009) ("The requirements regarding lot size, lot width, and side yard are intended to further [the general purposes of the by-law]").

and dimensional interests," the *Marhefka* Court held that "[t]he density and dimensional requirements of the by-law confer[red] standing on the plaintiffs [. . .] based on the aggravation of the preexisting nonconformity of adjoining lots." [50] *Id.* at 520.

See in this regard, § 30-2 of the City of Newton Zoning Ordinance, captioned *Purpose of chapter*, which provides inter alia, as follows:

> The provisions of this chapter are ordained by the city for the purposes of promoting the health, safety, convenience and welfare of its inhabitants by:
>
> ...(b) Preventing overcrowding of land and undue concentration of population;
> ...(e) Lessening the congestion of traffic.
> ...(j) Providing for adequate light and air.

In the case of *Dwyer v. Gallo,* 73 Mass. App. Ct. 292, 296 (2008), the plaintiffs raised density concerns regarding proposed construction on two adjacent undersized lots next to their home. The Court in construing provisions of the Walpole Zoning By-Law somewhat analogous to § 30-2 supra, made the following relevant observation:

> [S]ome of the local by-law's purposes are to "prevent overcrowding of land, lessen congestion, [and] avoid undue concentration of population," all of which are furthered to some extent by the area and frontage requirements of the by-law. There can be little doubt, then, that the Dwyers have raised a private property or legal interest protected by the zoning by-law.

After discussing the Dwyers' concerns including those related to increased artificial light and decreased backyard privacy, the Court concluded as follows:

> Especially given the close quarters involved here [construction on two 20,000 square foot lots rather than the required 40,000 square feet], the plaintiffs' concerns cannot reasonably be characterized as ill-founded or speculative. Accordingly, it was error for the judge to conclude that the plaintiffs lacked standing.... *Id.* at pp. 296-297.
>
> [C]rowding of an abutter's residential property in violation of the density provisions of the zoning by-law will generally constitute harm sufficiently

[50] It is this court's view that the density and dimensional requirements of the Ordinance may confer standing based upon compelling privacy concerns.

> perceptible and personal to qualify the abutter as aggrieved and thereby confer standing to maintain a zoning appeal. [51]

The case of *Sheppard v. Zoning Board of Appeals of Boston*, 74 mass. App. Ct. 8 (2008), also concerned issues of standing predicated upon, inter alia, privacy and density concerns. In *Sheppard*, the Court observed as follows:

> This injury relates to density interests protected by applicable zoning laws.... [T]he stated purposes of Boston's zoning code include "prevent[ing] overcrowding of land;...lessen[ing] congestion in streets; [avoiding]undue concentration of population; [and providing] adequate light and air." *The requirements regarding lot size, lot width and side yard are intended to further these purposes.* (emphasis added)

Given the foregoing decisional law, this court is satisfied that the Mauris' privacy concerns are sufficiently tethered to density interests of the sort protected by the local Zoning Ordinances. *See* § 30-2 referenced supra.

To lend additional support to their claims of aggrievement, the plaintiffs enlisted the services of Dennis C. Rieske, an AIA [52] Registered Architect (Rieske). By means of an affidavit, Mr. Rieske provided this court with a comprehensive analysis of the impact of the Chanskys' proposed dwelling on the Mauris parcel. In conducting his analysis, Mr. Rieske studied the permit plans for the proposed dwelling, obtained field measurements, made visual observations and provided photographs.

In furtherance of his analysis, Rieske located thirteen windows on the proposed structure and determined how they would orient to the twelve windows located on the northwest face of the Mauris' dwelling.[53] Mr. Rieske also analyzed the lines of sight from the proposed dwelling's

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[51] The parcels at issue were two pre-existing non-conforming lots, i.e. Lot IA and 2A. The zoning requirements since "at least 1956....required 20,000 square feet and 125 feet of frontage for buildable lots in the residential B zoning district." However, Lot IA contained 12,918 square feet and 71.42 feet of frontage. Lot 2A contained 13,418 square feet and 71.94 feet of frontage.

[52] American Institute of Architects

[53] *See* Affidavit Of Dennis C. Rieske, A1A ¶ 6 ("[T]he banks of windows proposed for Lot 31, containing a total of 13 windows, would be (moving from right to left on the elevation drawings) the following approximate distances

anticipated window banks into the Mauris' home.[54] Among Mr. Rieske's conclusions, are the following:

> [T]he windows proposed for the Lot 31 [Garage Lot] dwelling will create direct lines of sight into all the windows on the northwest side of the Mauris' house, on the first, second and third floors. These windows permit views into the front hall, living room and den on the first floor, the staircase and hallway leading to the master bedroom on the second floor, and stairway and hallway leading to office areas on the third floor.... In addition, the windows in the bank on the left (rear) of the southeast wall of the proposed dwelling would look directly onto the middle of the Mauris' rear deck.... I anticipate other effects to include diminished ambient daylight....
>
> Based on the foregoing, it is my professional opinion that construction of the house proposed for Lot 31 will have a substantial and negative impact on the Mauris' privacy and the use and enjoyment of their property.
>
> Construction of the proposed house would also require removal of a large, twelve foot tall dense rhododendron that now provides significant screening for the Mauris' rear deck.
>
> Since my visit on May 2, 2010, the Chanskys erected a six-foot (6.0') high stockade fence along much off the property line separating the Mauris' home and Lot 31. I have inspected the fence, and because it extends at most, only one foot, approximately, above the sill lines of the first floor windows of the Mauris' home, it is my further professional opinion that it will not significantly mitigate the negative impacts described above. [55]

The photographs provided by the Affiant depict a small single story, one car garage at an appreciable distance from the Mauri residence. The Chanskys propose to demolish the garage replacing it with a two and one half story residential dwelling that would be approximately twelve feet from the Mauri residence at the nearest point. The materials provided by Mr. Rieske including elevations and photographs make clear the disparity between the size and location of the proposed dwelling verses that of the existing garage.

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from the Mauris' house measured on a perpendicular to the closest point: #1 – eighteen feet (18'); #2 – sixteen and one-half feet (16.5'); #3 – twenty-eight feet (28'); and the windows at #4 – twenty-eight feet (28') and looking onto the Mauris' rear deck.").

[54] *See* Affidavit Of Dennis C. Rieske, A1A ¶ 9 ("[T]he windows in the bank of the left (rear) of the southeast wall of the proposed dwelling would look directly onto the middle of the Mauris' rear deck, which is an open structure with baluster railings.")

[55] *See* Affidavit Of Dennis C. Rieske, A1A (Filed on December 1, 2010) (app. 20). Mr. Rieske is a principal at BTA Architects, Inc. and Developmental Resources, Inc. of Cambridge.

The Chanskys do not effectively rebut the privacy concerns raised by the plaintiffs regarding lines of sight into the Mauris' windows and onto their deck. Rather, they rely in large measure upon their argument that compliance with the 7.5 foot setback renders irrelevant any density concern related to frontage and lot area. For their part, the plaintiffs seek to couple their privacy concerns with "deficient lot size and frontage." [56] [57]

The following opinions lend support to the plaintiffs' assertions of standing based upon claims of privacy. The first, *Ulliani v. Board of Appeals of Burlington*, No. 03-P-1562 (2003) is an Unpublished Opinion of the Appeals Court which this court cites for its persuasive value. In *Ulliani,* the Court discussed standing in the context of the plaintiff's privacy concerns, as follows:

> Standing is essentially a question of fact for the trial judge, which we will reverse only if the finding is clearly erroneous. [Here] [t]he judge found that [the plaintiff] had standing because she was an abutter whose privacy would be "greatly diminished by the presence of two homes abutting her backyard," and because the noise level would be increased.
>
> *That [the plaintiff's] concerns were related to the objectives of the town's density regulation required no testimony.* The Zoning Act, permits a municipality to deal with a variety of matters including density of population and intensity of use, adequate provision of light and air, prevention of overcrowding, and promotion of open space.... It is implicit that the town's density regulation was within the scope and concern of the Zoning Act.... Accordingly it was not error for the judge to conclude that [the plaintiff] had standing. (emphasis added) (internal citations omitted)

The case of *Bertrand v. Board of Appeals of Bourne*, 58 Mass. App. Ct. 912 (2003), is also relevant to the case at hand. In *Bertrand,* the trial judge had upheld the grant of a variance on grounds that the plaintiffs lacked standing to challenge it. In reversing that decision, the Appeals Court observed as follows:

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[56] Plaintiffs' Reply Brief with Respect to Standing, p. 2.

[57] *See* Stipulation of Facts ¶ 14. See also Section 30-15 Table 1- Density and Dimensional Controls. While the Minimum Lot Area in the Single Residence 2 district is normally 15,000. For lots created before 12/7/53 however, as is the case with the three lots at issue, the minimum Lot Area is reduced to 10,000 feet. Likewise, the frontage requirement in the District is typically 100 feet. In those pre-12/7/53 Lots however, the frontage requirement is reduced to 80 feet. So too, the side setback requirement is given as 15 feet, but for those lots created before 12/7/53. As to those, the side setback requirement is given as 7.5 feet.

> Since 1971,...Gibbons has owned two contiguous vacant lots (locus), each consisting of approximately 20,000 square feet. At the time of purchase, both lots were of buildable dimensions. Thereafter, in 1986, Bourne increased the minimum square footage required for constructing as single family house... to 40,000 square feet... [The plaintiffs] articulated concerns about increased noise, increased artificial light and decreased backyard privacy....
> [T]he grounds for the plaintiffs' objections related directly to the objectives of the density regulation at issue. Especially given the close quarters involved here, the plaintiffs' concerns cannot reasonably be characterized as ill-founded or speculative.

Lastly, another Unpublished Opinion of the Appeals Court, *Ruggles v. Board of Appeal of Boston*, No. 03-P-960 (2005), is cited for its persuasive value. Once again, the Appeals Court addressed a challenge to the plaintiff's standing as a "person aggrieved." Concurring with the motion judge that the plaintiff possessed standing, the Court noted that a "[p]erson aggrieved" is a term that should not be construed narrowly.

It continued, as follows:

> The variance [granted to the defendants] allows construction of a house *within fourteen feet of the westerly wall of a house owned by the plaintiff*... There are *ten windows in that wall*, through which, prior to the [defendants'] construction, [the plaintiff] had a westerly view of eighty feet to the nearest building wall. The new [defendants'] house now obscures the view from those windows. There is a reduction of light and air flow from the new construction, and [the plaintiff] experiences a diminution in privacy in the warmer months when the windows are open. (Emphasis added)

The facts in *Ruggles* are not without their parallel to the case at bar.

In view of the foregoing, this court is satisfied that the Mauris have advanced a "plausible claim of a definite violation of a private right, a private property interest, or a private legal interest."[58] Consequently, even if their presumptive standing had been adequately rebutted, this court believes that the plaintiffs have amply demonstrated their aggrievement, and therefore standing under G.L. c. 40A, § 17.

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[58] *See Harvard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989); *See also Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 130-132 (1992).

Merger

G.L. c. 40A § 6, fourth par., provides exemptions from the Merger Doctrine in relevant part as follows:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to the then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet or frontage.

The Garage Lot finds no protection in the Merger Doctrine set out in G.L. c. 40A, § 6 fourth par... In this regard, the defendants, in their Memorandum of Law state as follows:

> The Mauris' reliance upon case law interpreting the fourth paragraph of G.L. c. 40A, § 6 is inapplicable here, because that portion of the statute is inapplicable if "building upon such lot is not prohibited by the zoning ordinance or by-laws in effect in the city or town."

The relevant sentence of paragraph 4, as cited by the defendants, supra, reads in its entirety, as follows:

> The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited *by the zoning ordinances or by-laws in effect in a city or town.* (emphasis added)

Thus, cities and towns are afforded the opportunity to enact essentially more lenient merger exemptions than those appearing in G.L. c. 40A, § 6, fourth par. The instant appeal turns on the relevant provisions of the Ordinance, and whether they exempt the Chanskys' Garage Lot from the operation of the Merger Doctrine.

In reaching its Decision that the Locus was exempt from the operation of the Merger Doctrine, and therefore, constituted an independent, buildable lot, the Zoning Board was called upon to construe § 30-15(c)(3)(b) of the Ordinance.

Section 30-15 provides in relevant part as follows:

Section 30-15 Density/Dimensional Requirements

> Except as provided in section 30-21 (non-conforming uses), the density and dimensional controls set forth in the Tables below shall apply to all buildings, structures and uses in each of the said districts.

Subsection 30-15(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.[59]
>
> 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 the recording or endorsement, whichever occurred sooner, 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.

[59] *See* Newton's Ordinance at § 30-15, Table 1. Locus is located in a "Single Residence 2" district. The minimum required lot size for pre-1953 properties is 10,000 square feet of area, and the minimum frontage requirement is 80 feet.

(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, [60]
>
> 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. (emphasis added)

It is undisputed that both the Garage Lot and the House Lot, at all times relevant hereto [61] have been held in common ownership, are adjoining lots, and have continuous frontage on the same street, Bradford Road.[62] The point of disagreement concerns the particular lot to which the phrase "such lot" refers.[63] The Mauris argue that "such lot" refers to its immediate antecedent, "the lot in question," i.e. the Garage Lot. Were that to be the case, the Garage Lot would have merged with the House Lot, thereby rendering the Garage Lot unbuildable.

For their part, the Chanskys assert that "such lot" refers to "adjoining lot or lots." In the present context, the "adjoining lot" must be taken as a reference to the Chanskys' House Lot. If the interpretation urged upon this court by the Chanskys were deemed correct, the Garage Lot would not have merged with the House Lot. As a consequence, the Garage Lot would be a

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[60] Section 30-15 (c)(3)(a) is not applicable inasmuch as the lot at issue, the Garage Lot, was held in common ownership prior to and "after January 1, 1995."

[61] *See* Stipulation of Facts ¶ 9 (Chanskys were deeded 25 and 31 Bradford Road in 1987, and have been owners of those lots from that date until the present).

[62] *See* Stipulation of Facts ¶ 1, 4.

[63] To an overwhelming extent, the merits of this case have been argued and are herein decided, so as to pinpoint the proper interpretation of § 30-15(c)(3)(b)'s language, "such lot".

buildable lot protected from increased frontage and area requirements. In their respective determinations, both the ISD [64] and the Board have espoused the latter view.

The case turns on this narrow point of interpretation.

It is this court's view that the language of Subsection b) is clear insofar as the phrase "such lot" refers, quite naturally, to its immediate antecedent, the "lot in question." *See Cottone v. Cedar Lake, LLC*, 67 Mass. App. Ct. 464, 469, n. 7. ("The 'rule of last antecedent' holds that the 'qualifying phrases are to be applied to the words or phrases immediately preceding and are not to be construed as extending to others more remote.'") The "lot in question," is, in turn, a reference, also clear, to the opening phraseology of Subsection b), i.e "If *the lot* was held in common ownership...." (emphasis added)

This court is satisfied that the Garage Lot, one of two commonly owned adjoining lots, sharing frontage on the same street, will have merged with the House Lot unless it can be shown that the lot in question, the Garage Lot, has been improved by a "single-family or two-family dwelling." However, as the use of term Garage Lot in the present context suggests, Lot 31 has been improved not by a dwelling but by a garage. Inasmuch as the Locus remains unimproved by a dwelling of any sort, the lots will have been merged, thereby rendering the Garage Lot unbuildable.

This view gains support from the case of *Carabetta v. Board of Appeals of Truro,* 73 Mass. App. Ct. 266 (2008) In Carabetta, the Court cited the following principle:

> It is well settled that "[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities...." This general rule has been applied both prior to and "after enactment of our current zoning enabling act." Id., at 268.

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64 *See* Appendix to Plaintiffs' Brief, p.2. The ISD Commissioner, in his Memorandum of October 23, 2009 to the Board, effectively reworded § 30-15 (c)(3) (b) by inserting the word "adjoining" so that the relevant phrase read "such adjoining lot." As so rewritten, the language appeared to support the ISD position.

The statutory "grandfather" provision contained in G.L. c. 40A, s. 6, incorporates this doctrine by providing protection from increases in lot area and frontage requirements only to nonconforming lots that are not held in common ownership with any adjoining land. While a town may choose to adopt a more liberal grandfather provision it must do so with clear language. (internal citations omitted) Id., at 269.

The Affidavit of George E. Mansfield (Mansfield Affidavit) provides useful insight into [65] the legislative history associated with § 30-15 (c)(3) (b). In the case of *Petrucci v. Board of Appeals of Westwood*, 45 Mass. App. Ct. 818, 823, n. 7, the Court observed that "[a]lthough clear statutory language ordinarily obviates the need to resort to rules of interpretation... legislative history may be referenced by way of supplementary confirmation of the intent reflected in the words used." In the case at bar, the Mansfield Affidavit serves such a confirmatory purpose. [66]

Conclusion

For the foregoing reasons, this court concludes that the issuance of the building permit upon the application of the named defendant Ernest D. Rogers, as agent for Bonne E. Chansky and James D. Chansky was based upon legally untenable grounds. The decision of the Zoning Board of Appeals to uphold the determination of the Commissioner of the Inspectional Services Department likewise, was legally untenable as it was based upon an erroneous interpretation of the Zoning Ordinances of the City of Newton.

In reaching these legal conclusions the court has, under the doctrine enunciated in *Petrucci*, supra, considered the Affidavit George E. Mansfield. The Affidavit of Michael Ullman, a Tufts university English professor stands on a different footing, however. As to the affidavit of

[65] Appendix to Plaintiffs' Brief, Exhibit 7.
[66] See also in this regard, Memorandum of the Associate City Solicitor to the Board of Alderman dated July 6, 2001. Appendix to Plaintiffs' Brief, Exhibit 4.

William J. Pastuszek, Jr. the court has considered same, although for the reasons specified supra, has concluded that it is bears little relevance to the standing issue.

Accordingly, it is hereby

ORDERED that the defendants' Motion to Strike the Affidavit of Michael Ullman, PhD. is hereby **ALLOWED.** It is further

ORDERED that the defendants' Motion to Strike the Affidavit of George E. Mansfield, is hereby **DENIED.** It is further

ORDERED that the plaintiffs' Motion to Strike the Affidavit of William J. Pastuszek, Jr. is hereby **DENIED.**

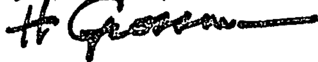
ORDERED that the plaintiffs' Motion for Summary Judgment is hereby **ALLOWED.** It is further

ORDERED that the defendants' Cross-Motion for Summary Judgment is hereby **DENIED.**

Judgment to issue accordingly,

SO ORDERED

By the Court (Grossman, J.)



Attest:

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Dated: December 22, 2011.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss. CASE 10 MISC 419859 (HMG)

MAUREEN MAURI and
RONALD A. MAURI

Plaintiffs

v.

ZONING BOARD OF THE CITY OF
NEWTON, ET AL.

Defendants

JUDGMENT

This case came to be heard on the Motion of the Plaintiffs and the Cross-Motion of the Defendants for Summary Judgment. An Order allowing the Plaintiffs' motion and Denying the Defendants' Motion has been entered this day.

In accordance therewith, it is hereby

ORDERED and **ADJUDGED** that the Building Permit [1] issued by the City of Newton Inspectional Services Department in conjunction with undersized lot at 31 Bradford Road, Newton, Massachusetts, [2] is hereby **REVOKED.**

It is further

[1] Building Permit No.09080027.
[2] The Chanskys' Garage Lot.

ORDERED and **ADJUDGED** that the decision of the City of Newton Zoning Board of Appeals is hereby **ANNULLED.**

By the court. (Grossman, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: December 22, 2011.

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER