

CITY OF NEWTON

IN BOARD OF ALDERMEN

ZONING & PLANNING COMMITTEE REPORT

MONDAY, JUNE 22, 2009

Present: Ald. Yates (Chairman), Ald. Baker, Lappin, Swiston, Linsky, Danberg, and Harney; absent: Ald. Ciccone; also present: Ald. Hess-Mahan, Merrill, and Parker  
City staff: Michael Kruse (Director of Planning & Development), Marie Lawlor (Assistant City Solicitor), John Lojek (Commissioner of Inspection Services), Linda Finucane (Chief Committee Clerk, Candace Havens (Chief Planner)

Appointment by His Honor the Mayor

#153-09 WILLIAM M. McLAUGHLIN, 117 Hammond Street, Chestnut Hill, appointed as an associate member of the Zoning Board of Appeals for a term of office to expire July 30, 2010 (60 days:07/31/09).

ACTION: APPROVED 7-0

NOTE: Mr. McLaughlin has been a Newton resident for 16 years. He has a Bachelor's degree in Economics from Harvard and has overseen the development, rehabilitation and management of more than a billion dollars in real estate. He is the past Chair of the Greater Boston Real Estate Board. He has appeared before Zoning Board of Appeals in several communities including Newton twice on behalf of the Avalon Bay developments on Needham Street and Boylston Street and feels that he could bring useful qualities to the Board's deliberations. The Committee thanked him for his willingness to serve and voted unanimously to approve his appointment.

Re-appointment by His Honor the Mayor

#152-09 THOMAS J. PHILLIPS, 138 Algonquin Road, Chestnut Hill, re-appointed as an associate member of the ZONING BOARD OF APPEALS for a term to expire June 30, 2010 (60 days:07/31/09).

ACTION: APPROVED 6-0-1 (Harney abstaining)

NOTE: Since Mr. Phillips graduated from Boston University Law School in 1987, he has had 20 years of experience in commercial real estate and the development of retail properties. He is a partner at Brown Rudnick and served in numerous leadership positions in retail/commercial real estate professional associations. He participated in the development of a major biotechnology development in Cambridge. This experience might be helpful in getting more vacant parcels or buildings in Newton used for biotechnology manufacturing though it is irrelevant to the ZBA. The Committee voted 6-0-1 to approve Mr. Phillips' re-appointment, with Alderman Harney abstaining because he would like a breakdown of where members of various boards and commissions live.

Re-appointment by His Honor the Mayor

#165-09        NANCY GRISSOM, 7 Orris Street, Auburndale, re-appointed as a member of the NEWTON HISTORICAL COMMISSION for a term to expire June 30, 2012 (60 days: 8/15/09).

ACTION:        APPROVED 7-0

NOTE: Ms. Grissom is a 30 year resident of Newton and has been a realtor in Newton for 8 years. She is the former President of the Newton Council of Realtors and would continue to fill a seat on the Historical Commission assigned to be filled by a realtor. She is a member of the Society for Preservation of New England Antiquities. The Committee voted unanimously to approve Ms. Grissom's re-appointment.

Re-appointment by His Honor the Mayor

#166-09        MARK ARMSTRONG, 61 Vaughn Avenue, Newton Highlands, re-appointed as an alternate architect member of the AUBURNDALE HISTORIC DISTRICT COMMISSION for a term to expire June 30, 2012 (60 days: 8/15/09).

ACTION:        APPROVED 7-0

NOTE: Mr. Armstrong is an architect with 15 years of experience in retail, residential and restaurant structures with a focus on historic adaptations. He has done several homes in Newton. He is a member of the American Institute of Architects and holds a Bachelor of Architecture degree from Wesleyan University and a Master of Architecture degree from the Yale School of design. The Committee voted unanimously to approve his re-appointment.

#542-03(2)    CLEAR CHANNEL RADIO, BEASLEY BROADCASTING GROUP and CHAMPION BROADCASTING SYSTEMS, INC. offering in accordance with the Conservation Commission's Order of Conditions referenced in special permit #542-03, dated November 21, 2005, a Conservation Restriction on portions of property located at 750 Saw Mill Brook Parkway.

ACTION:        APPROVED 6-0-1 (Swiston abstaining)

NOTE: The land in question is adjacent to Oak Hill Park and near the flood plain of the Charles River. It contains 12.5 acres and is comprised of a maintained upland meadow surrounded by a mixture of upland and wetlands forests; a bordering vegetated wetland associated with the Charles River; a portion of Oak Hill Swamp; and one federally protected isolated vegetated wetland. In addition, it contains one vernal pool. Adjacent property of the grantor, not subject to this Conservation Restriction, contains vernal pools within isolated and bordering vegetated wetlands. The Conservation Restriction will be held by the Conservation Commission. The process requires acceptance by the Board of Aldermen and the Mayor. The Committee voted unanimously to do so after Alderman Lappin and Mr. Kruse explained the background of the special permit petition.

#142-09 ALD. BAKER, DANBERG, HESS-MAHAN, MANSFIELD, PARKER, YATES proposing that Chapter 30 be amended to provide a cumulative floor area ratio bonus of .05 for renovation of existing one- and two-family homes which meet otherwise applicable dimensional requirements; to provide an additional .02 floor area ratio bonus for renovation of existing one- and two-family homes on old zoning lots which meet new zoning lot dimensional requirements; to clarify the application of the existing .05 floor area ratio bonus for new construction of one- and two-family homes; to end such floor area ratio bonuses on July 30, 2010; and to clarify the application of the *de minimis* rule, in accordance with language provided. **(90 days: 9/6/09)**

ACTION: MOTION TO APPROVE FAILED TO CARRY 3-4 (Baker, Linsky, Yates voting in the affirmative; Danberg, Harney, Lappin, Swiston opposed)

#108-07(3) ALD. SANGIOLO proposing the suspension/rescission of Ordinance Z-44, voted on March 16, 2009, which deleted Footnote 7 of Section 30-15, Table 1 relative to floor area ratio.

ACTION: MOTION TO APPROVE AS AMENDED WITH A SUNSET DATE OF JULY 30, 2010 FAILED TO CARRY 3-3-1 (Harney, Lappin, Swiston voting in the affirmative; Baker, Linsky, Yates opposed; Danberg abstaining) **(90 days: 9/6/09)**

NOTE: **History of petition nos. 108-07 and 108-07(2)**

On March 16, 2009, the Board of Aldermen voted unanimously (Ordinance Z-44, #108-07(2)) to delete in its entirety the following footnote 7 contained in Section 30-15:

<sup>7</sup> FAR requirements shall apply only to (1) all above-grade new construction; (2) total demolition of a single family residential structure or dwelling when the owner seeks to replace it with a two family structure or dwelling; (3) reconstruction where more than fifty (50) per cent of an existing structure is demolished; and (4) in a multi-residence zoning district, construction of any residential dwelling unit which lies in whole or in part outside the walls, i.e., the existing footprint, of any existing residential dwelling unit, regardless of whether such construction does nor does not increase the number of dwelling units on the lot.

This footnote was one of the elements in chapter 30 identified in 2005 by Inspectional Services Commissioner John Lojek and others as problematic. The Commissioner questioned the original intent of the footnote. Different Commissioners have interpreted it differently. Was the original intent to allow limited reconstruction of existing dwellings that already exceeded the FAR, but not enlargement of those dwellings and/or to allow owners of damaged property to restore their properties? Was it intended only for catastrophic events? Over time, the provision came to be a loophole through which in the Commissioner's words "could be used to drive a truck through." It was used to enlarge existing dwellings without FAR limitation, with some architects and contractors going as far as incorporating the walls of the existing structures into new large structures.

Referred to a Zoning Task Force established in 2006 and chaired by Alderman Hess-Mahan, Footnote 7(3), also known as the 50% demolition ordinance, became the focus of discussion in the 50% Demo Subcommittee of the Task Force. Ultimately, the Task Force recommended the following:”

#108-07 that Footnote 7 be deleted and replaced by (1) specifying the method for calculating what constitutes 50% demolition based on total surface area of the walls and roof; (2) defining demolition to include the conversion of an exterior wall to an interior wall; (3) where less than 50% of the building is demolished, limiting total gross floor area of remaining portion of building plus any addition to 140% of the applicable FAR, provided that the resulting structure complies with all other applicable dimensional controls; (4) requiring that the Inspectional Services Department determine that an existing wall not proposed to be demolished is structurally unsound after demolition and/or construction has begun and review and approve plans for replacement with an identical wall prior to such replacement.

The Committee had several discussions and discussed various approaches relative to the loophole and the proposed amendments. Those discussions also included an item to amend the *de minimis* ordinance, which is still pending. However, after ascertaining that other provisions of the Zoning Ordinance allowed for replacement of damaged or destroyed homes, the Committee agreed with the Planning Director’s recommendation that the troublesome footnote be deleted. The Board of Aldermen voted No Action Necessary on #108-07(2) on December 1, 2008 in accordance with the Committee’s recommendation. The Planning Director then docketed #108-07(3) to delete footnote 7 in its entirety, which resulted in Ordinance Z-44.

The consequence is that FAR requirements now apply to *all* additions and enlargements to existing single- and two-family homes and makes such additions and enlargements extensions of nonconformities requiring special permit. Individuals who applied for building permits prior to the first advertisement on February 9 of the public hearing on #108-07(2) held on February 23, 2009 were able to build under the provisions of footnote 7; however, the footnote no longer applied for individuals who sought building permits as of the date of the advertisement or later.

The Planning Department was contacted by several homeowners who expressed their frustration with the change, including some that might not have needed FAR relief prior to the deletion of footnote 7, and others where additions would have exceeded allowable FAR, and others that were already nonconforming and sought to increase the nonconforming FAR. Eight homeowners chose the special permit process and the Land Use Committee and Board of Aldermen expedited eight petitions between May and June.

**Petition nos. 142-09 and 108-07(3)**

Aldermen Baker, Danberg, Hess-Mahan, Mansfield, Parker and Yates docketed #142-09 to provide temporary relief pending a study by the Director of Planning approved in resolution #142-09(2) (attached).

Alderman Sangiolo docketed #108-07(3) to rescind Ordinance Z-44, which would reinstate footnote 7.

**Public Hearings June 8, 2009**

The public hearings on #142-09 and #108-07(3) were opened and closed on June 8, 2009. Present: Ald. Yates (Chairman), Ald. Baker, Lappin, Swiston, Danberg, Linsky, and Harney; also present: Ald. Albright, Hess-Mahan, and Johnson  
Planning & Development Board members: Doug Sweet, David Banash, Leslie Burg, and Michael Kruse

Principal Planner Jennifer Molinsky presented a PowerPoint (attached). Speakers included:

Architect Henry Finch said that 20-25% of homes in the City are in older areas and on small lots, which includes much of the north side of the city. Now there are multiple streets where homeowners are prohibited from constructing modest additions without a special permit because they are nonconforming. He suggested increasing the number of residential districts. He said that nobody knew about the proposed amendment or deletion of footnote 7.

Architect Peter Sachs suggested that the Board look at the towns of Wellesley, Lexington, and Lincoln where all space is counted except an amount of square footage allowed for garages. He also suggested establishing an architectural review board or involving the Planning & Development Board, with appeals to the Zoning Board of Appeals, to streamline and perhaps in his opinion de-politicize the process. He agreed with Mr. Finch, that the deletion of footnote 7 had taken many people by surprise.

Architect Mark Sangiolo said that the existing FAR makes 25% of the houses in Newton nonconforming. He noted there is an economic component for architects, but agreed that all the FAR needs to be looked at.

Architect Anatol Zukerman said that the removal of footnote 7 was for the most part a positive action, but it did create a temporary financial hardship for homeowners who were caught midway through projects.

Miceal Chamberlain of 99 Gate House Road, said that people who wanted to sell their houses were affected as well because potential buyers found out that modifications they wished to make to the property would in many cases require a special permit.

Tom Greytak, 29 Acacia Road, president of the Chestnut Hill Association, supported deletion of footnote 7 and supports #142-09 as well. Robust tools are needed by the City to enforce zoning and withstand the pressure of those who would push the limits.

Jay Walter, 83 Pembroke Street, spoke of the unintended consequences that the deletion of footnote seven had disproportionately imposed on small lots. He urged the Committee

to consider rescinding ordinance Z-44 and to properly study the FAR with the design community.

Steven Winer, 1 Billings Park, said he had purchased his home last August and wanted to add an attached garage that will now require a special permit.

Pam Wright, 30 Eden Avenue, was in the process of lining up a contractor for a modest 8-foot bump out to her kitchen and 6-foot addition for a mudroom on a lot a little over 12,000 sf, which will now require a special permit.

Deb Crossley, 26 Circuit Avenue, spoke of her experience as an architect and homeowner who had personally gone through the special permit process for two small additions onto her home on a 3,866 sf lot. Ms. Crossley said this is the tip of the iceberg. She does not support either item.

Janet Sterman, 120 Church Street, supports rescission of ordinance Z-44.

Jonathan Kantar a local builder and member of the Zoning Task Force, said that the whole process was “lousy.”

Architect Chris Chu spoke in favor of rescinding ordinance Z-44. She suggested looking at Wellesley’s ordinance. She likened this to the small fish getting caught with the big fish and favors rescission of ordinance Z-44.

Alderman Parker said the cure is sometimes worse than the disease. Although the 50% demolition rule clearly needed reform, footnote 7 was eliminated without putting something in its place. Although a co-docketor of #142-09, he feels it doesn’t go far enough. A significant number of property owners cannot do anything to their properties. #142-09 is not the solution, nor is #108-07(3), although with a sunset clause, it probably gets the closest.

Alderman Hess-Mahan explained the Zoning Task Force agreed that this was a difficult issue. The current FAR doesn’t fit a significant number of parcels and cannot be consistently and fairly applied. Any further amendments need to be done in a timely manner and need to include input from design professionals. It appears to make more sense for minor projects to be reviewed by some other body other than the Board of Aldermen and the protracted special permit process

Commissioner of Inspectional Services John Lojek said it was disingenuous to say that nobody knew. The 50% demolition ordinance has been a subject of discussion for three and half years, when the Commissioner brought it to the Committee’s attention as one of the difficult ordinances. The Committee voted unanimously to delete the footnote and the Board voted unanimously to do so as well. He said that Newton’s zoning has more exceptions than rules. FAR is a perfectly legitimate way to regulate bulk/size. The method of relief is through the special permit process, which is the same relief used in other communities. He said that the portion of footnote 7, known as the 50% demolition

rule, was incomprehensible. There is simply no way to measure what 50% means. One company devoted an engineer full-time finding ways to circumvent the ordinance. He suggested that the FAR across the City be reviewed. Perhaps the FAR should count all space, but be realistic, for example if the true FAR is .55, then change the FAR table.

That concluded the public hearing on June 8. See attached letters.

### **Working Session, June 22, 2009 #108-07(3)**

Several Committee members had strong feelings in support of this item as a way of temporarily undoing the restrictions on making changes in existing houses imposed by the repeal of footnote 7. The Chairman accepted the addition of a termination date of July 30, 2010 as within the scope of the advertised item. This removed the argument that this restoration would just add another level of complication to an already extremely complicated code. The remaining arguments are that the Inspectional Services Commissioner will henceforth only interpret reconstruction of a partially demolished home as re-building what was there before the demolition. This interpretation is what is common in other communities, including Brookline where he most recently worked before coming to Newton. It conflicts with past practice in Newton where "reconstruction" had previously allowed building of virtually anything provide the faux facade of reconstruction was followed. In the course of the hearings and deliberations on this item, Mr. Lojek was attacked for continuing to follow what he believes was an incorrect previous practice that he followed for sake of continuity. He now believes that strict use of the proper definition of "reconstruction" is the only proper course to uphold the Zoning Ordinance. This argument swayed Alderman Linsky's vote. A motion to approve the item as amended with a sunset date of 7/30/10 failed to carry 3-3-1 (Harney, Lappin, Swiston voting in the affirmative; Baker, Linsky, Yates opposed; Danberg abstaining). Since the public hearing was June 8, the item could be held until the August Board meeting and be within the 90 days allowed for deliberations under State Law.

The major argument for it is that it would let people make minor additions to their homes. The major argument against is that it would let people start building monster homes again like the examples shown in the attached PowerPoint presentation.

### **Working Session June 8, 2009 #142-09**

The Committee had agreed at the public hearing that the Planning Department should do a comprehensive review of the FAR citywide and recommend changes in the definition and exclusions to reflect more accurately the existing uses in the city and to map changes, putting neighborhoods in districts that reflect their uses and their dimensions including accurate FAR.

In the interim, Alderman Baker and others worked with the Planning, ISD, and Law Departments to develop temporary measures that would allow homeowners of properties that were made nonconforming by the deletion of footnote 7 to make small additions to their homes to meet changing family needs without having to file for special permits. The temporary bonuses proposed by this amendment would terminate by July 30, 2010. Aldermen Yates and Baker voted for it from the beginning. They were joined by

Alderman Linsky after he became convinced that the repeal of the elimination of Footnote 7 would re-open the door for monster homes and provide no relief for homeowners seeking expansion rather than actual reconstruction. He also reminded the Committee that eight property owners had received relief through the prompt action of the Land Use Committee. The other Committee members felt that the proper action was to repeal the vote that had triggered the problems. The item failed 3-4, with Baker, Linsky, Yates voting in the affirmative; Danberg, Harney, Lappin, Swiston opposed.

#322-08        ALD. BAKER, YATES, & COMMISSIONER LOJEK requesting discussion of possible amendments to the City of Newton Ordinances to assist in assuring that properties that appear abandoned or severely dilapidated can be appropriately maintained or restored.

ACTION:        HELD 7-0

NOTE: Attached to the agenda was language drafted by Code Enforcement official Dave Norton. Ms. Lawlor said that the Law Department had not yet had the opportunity to review the draft ordinance. Alderman Baker acknowledged that the item was not ready for action, but he wished to have a preliminary discussion to the Committee's attention the seriousness of the matter. Mr. Lojek produced a binder with a series of photographs of various abandoned houses throughout the City. So far, the Inspectional Services Department has documented 34 properties, which Mr. Lojek finds shocking for a city like Newton. One property, located in Ward 7, has a number of animals living in it. Various City departments are aware of the public safety and health hazards posed by these houses, but there is little the City can do, outside of using building code enforcement and criminal court. Several Committee members remembered how long it took through the courts to resolve a situation on Harvard Street. Alderman Baker moved to hold the item, which motion carried 7-0.

All other items were held without discussion and the meeting was adjourned at approximately 10:45 PM.

Respectfully submitted,

Brian E. Yates, Chairman