


CITY OF NEWTON  
LAW DEPARTMENT  
INTEROFFICE MEMORANDUM

DATE: May 26, 2017  
TO: Mark Laredo, Chairman, Land Use Committee  
All Members, Land Use Committee  
FROM: Ouida C.M. Young, Deputy City Solicitor  
RE: Protest to Rezoning  
Washington Place Properties  
Docket #95-17

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**BACKGROUND**

As members of the Land Use Committee know, the current request of Mark Newtonville, LLC (hereinafter the “Developer”) to rezone a portion of land bounded by Walnut Street, Washington Street, Washington Terrace and residential properties to the north from B1 and B2 to MU4 (hereinafter the “Orr Block”) differs from the Developer’s prior rezoning request. Specifically, the current request seeks to rezone only a portion of the Orr Block to MU4, leaving a strip of land running along the northern boundary abutting the residential properties in its current B2 zone. The width of the strip of land which is *not* being rezoned (hereinafter the “Buffer Strip”) varies from approximately 90 feet abutting Washington Terrace to approximately 35+ feet abutting Walnut Street. The Buffer Strip is owned by the Developer and will be used for parking and circulation purposes for the Washington Place Project, which are permitted accessory uses in the B2 zone. As with the prior rezoning request, a Protest Petition pursuant to G.L. c. 40A §5 has been filed (hereinafter the “#95-17 Protest”). In this instance ten (10) property owners signed the #95-17 Protest, four (4) of whom were found to be owners of the “area of the land immediately adjacent extending three hundred feet therefrom” the land to be rezoned with regard to the prior re-zoning request.<sup>1</sup> G.L. c. 40A §5.

**QUESTION**

Given the #95-17 Protest, is a 2/3rds or 3/4ths vote of the full membership of the City Council required to approve the rezoning proposed by petition #95-17?

**SHORT ANSWER & DISCUSSION**

Rezoning petition #95-17 can be approved with a 2/3rds vote of the full City Council. As discussed at considerable length in a memorandum titled *Protest to Rezoning Washington Place Properties Docket #180-16*, dated January 11, 2017, (hereinafter the “#180-16 Protest Memorandum”), based upon principles of statutory construction, the Law Department concluded that only owners of land immediately adjacent to the northern boundary of the Orr Block qualified to file a protest pursuant to G.L. c. 40A §5. In the present rezoning petition, the Buffer Strip interrupts the immediate adjacency of the land owned by the four (4) Foster Street property

<sup>1</sup> The owners of 14-16 Foster Street, 20 Foster Street, 30 Foster Street and 34 Foster Street joined in the original protest petition and were considered qualified to file that protest petition. See Exhibit D attached to the #180-16 Protest Memorandum.

owners to that portion of the Orr Block being rezoned. For the reasons set forth in the #180-16 Protest Memorandum, the Foster Street property owners are no longer qualified to file a protest pursuant to G.L. c. 40A §5, and the vote to rezone can be approved with a 2/3rds vote of the City Council.

In a letter dated May 24, 2017 to the Law Department (and filed with the City Clerk as well), the attorney representing the owners protesting the current rezoning petition sets out a legal argument for why the Foster Street protestors should still be qualified to file a protest and that a 3/4ths vote of the City Council should still be required to approve the rezoning petition. Several out of state judicial decisions, all considering slightly different statutory language or facts, are cited as grounds against applying a strict interpretation to the statutory requirement in section 5 of G.L. c. 40A, that to qualify to file a protest an owner must have land which is "immediately adjacent", *i.e.* abutting, the land to be rezoned. I do not find those judicial decisions persuasive absent guidance from a Massachusetts court as to who is qualified to file a zoning protest where the land owned by the protesting party is not immediately adjacent to the property being rezoned due to a buffer strip of some width or a street, for that matter, which may not be as wide as the Buffer Strip in the current rezoning petition.