


CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

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David A. Olson, CMC
Newton, MA 02459

DATE: January 11, 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 # 180-16

BACKGROUND

Mark Newtonville, LLC seeks to rezone a portion of land bounded by Walnut Street, Washington Street, Washington Terrace, and residential private properties fronting on Foster Street from B1 and B2 to MU4 (hereinafter the "Orr Block"). A 2/3 vote of the City Council is required to rezone property pursuant to G.L. c. 40A §5 unless a protest against the rezoning is filed, in which case a 3/4 vote is required. The required vote to approve the Orr Block special permits/site plan approvals remains 2/3 regardless of whether or not there is a protest filed against the rezoning.

In pertinent part, §5 of c. 40A sets out the requirements for a protest as follows:

...provided, however, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to the final action by the council a written protest against such change, stating the reasons duly signed by owners of twenty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no such change of any such ordinance shall be adopted except by a three-fourths vote of all members. (*emphasis added*).

A petition protesting the proposed rezoning (hereinafter the "Protest") has been filed with the City Clerk by a number of owners whose property abuts the Orr Block. Owners of property which does not abut the Orr Block have also joined in the Protest.^{1 2}

QUESTION

Given the Protest, is a 2/3 or 3/4 vote of the full membership of the City Council required to approve the proposed rezoning?

¹ A copy of one of the Protest Petitions is attached hereto as Exhibit A. A list of owners who have signed the Protest is attached hereto as Exhibit B. A map showing the location of the properties whose owners have signed the Protest Petition, the Orr Block, and the land located within 300 feet of the boundary of the Orr Block is attached as Exhibit C.

² The original petition to change the zoning of the Orr Block from B1 and B2 to MU4 has been withdrawn without prejudice and refiled with slight modifications due to procedural concerns unrelated to the Protest. The Petitioner has expressly waived any objection to allowing the already filed Protest to apply to the refiled rezoning petition.

SHORT ANSWER

For the reasons set forth below, the Law Department believes that the Protest has met the requirements of G.L. c. 40, §5, and a 3/4 vote (18 members) of the City Council is required to rezone the Orr Block to MU4.

DISCUSSION AND ANALYSIS

The answer to the question depends on determining which owners qualify to file a protest as well as determining how to calculate the land area of those owners (the numerator) as well as the total area of what might be considered the "Protest Corridor" (the denominator). Is the Protest Corridor restricted to just the land immediately adjacent, *i.e.*, actually abutting, extending 300 hundred feet from the land being rezoned, and is a protest filed by the owners of 20% of the area of the Protest Corridor sufficient to require a 3/4 vote to rezone? Alternatively, is the Protest Corridor calculated based on the entire area of land extending 300 feet from the boundary of the land being rezoned? Using this approach, do only those owners of land actually abutting the land to be rezoned qualify to file a Protest or does any owner of land in the Protest Corridor qualify to join the Protest? In addition, where the area being rezoned abuts a street, as the Orr Block does on three sides, does the street prevent land on the other side of the street from being immediately adjacent to the land to be rezoned where the municipality does not own the fee in the public street? Further, does it matter if the street is a private way albeit the public has a right of access?

Unfortunately, there are no Massachusetts judicial decisions that have addressed any of these issues, and answers are sorely needed.³ While there have been out of state decisions interpreting different zoning amendment protest provisions, those decisions provide limited guidance, and different courts have reached opposite conclusions on the same question involved in a rezoning protest.

Interpreting the phrase "immediately adjacent" to qualify both who can file a protest and how to calculate the Protest Corridor would allow only those owners of land actually abutting the Orr Block to file a protest, and would restrict the area of the Protest Corridor to such abutting land extending up to 300 feet from the Orr Block. Following this approach, the area of land within 300 feet but not abutting the Orr Block would not be included in calculating the area of the Protest Corridor. Only 6 parcels of land along the south side of Foster Street qualify as immediately adjacent to the area of land being rezoned. The owners of all 6 parcels have filed a written protest with the City Council, although the owners of one of the properties has since withdrawn from the Protest.⁴ Accordingly, under this interpretation of the statute, owners of 84% of the area of land immediately adjacent have signed the Protest, and it will take a 3/4 vote to approve the requested rezoning of the Orr Block. One of the virtues of this approach is the ability to determine with a high degree of certainty whether the protest satisfies the statutory requirements, and a 3/4 vote is required.

³ This issue was raised in a recent Land Court decision, *Farrington, et als v. City of Cambridge and Lesley University*, 19 LCR 142 (2011). Judge Sands reported in n. 4, that the City of Cambridge originally told the plaintiffs that "anyone within 300 feet of the [area to be rezoned] was eligible to sign", but at the public hearing on the rezoning the City limited qualified protestors to the immediate abutters. The City Engineer determined that the area of land owned by qualified protestors was 19%, which was challenged by the protestors who argued that the area of land owned by qualified protestors was 31%. See n. 19. Judge Sands did not, however, decide this issue because more than 3/4 of the City Council passed the challenged rezoning, rendering the issue moot.

⁴ Those properties are 14-16 Foster Street, 20 Foster Street, 24-26 Foster Street, 30 Foster Street, 34 Foster Street, and 227 Walnut Street, although the new owners of 24-26 Foster Street have withdrawn from the Protest. The determination of ownership for purposes of this Memorandum is based on the information in the Newton Assessors' Database. Consistent with prior opinions from this Office, all the owners must sign the Protest where a property is owned by more than one owner, albeit there is disagreement between courts on that point. *Cf.*, *Disco v. Bd. of Selectmen of Amherst*, 115 NH. 609, 347 A.2d 451 (1975) (Only one owner needs to sign the petition); *Woldan v. City of Stanford*, 22 Conn. Supp. 164, 164 A.2d 306 (1960) (All co-owners must sign the petition).

However, this office has taken the position in two prior rezoning protest situations (the Nahanton Woods and the Jordon Marsh Warehouse rezonings) that if the City does not own the fee in a street, then land on the other side of a street from the property being rezoned is still immediately adjacent to the land being rezoned.⁵ In addition, both prior opinions counted all the land area within 300 feet of the land being rezoned as the Protest Corridor, including the area in the streets. If a court adopts this reasoning, then the requirement that the owners of 20% of the area of the immediately adjacent land within 300 feet has not been satisfied. In that case, a 2/3 vote would be sufficient to approve the rezoning. The problem with this approach is the high degree of uncertainty that results in determining if streets prevent land on the other side from being “immediately adjacent.” Does this analysis require a determination of who owns the fee in the street, or whether the street is public, private, or paper? If land on the other side of a street is considered immediately adjacent, how should the area of the streets be counted – is the land area to be included in the area of the owners on either side, or is it to be excluded altogether in calculating the total land area of the Protest Corridor?

Based on more extensive legal research done in preparing this memorandum and for the reasons set out in the Discussion section of the Memorandum, I believe it is more likely that a court would give greater weight to the phrase “immediately adjacent” in calculating both who is qualified to file a protest as well as how the area of the Protest Corridor is calculated. This approach is consistent with one of the principals of statutory construction:

The words of a statute are the main source for the ascertainment of a legislative purpose. They are to be construed according to their natural import in common and approved usage. The imperfections of language to express intent often render necessary further inquiry. Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs, ...

Com. v. Welosky, 276 Mass. 398, 401-402 (1931).

I. Legislative History

A procedure to protest a rezoning appears in many state zoning statutes and reflects some version of the protest language found in the Standard State Zoning Enabling Act (“SSZEA”). Drafted by the U.S. Department of Commerce and first issued in 1923 as a model zoning enabling act, the SSZEA proposed a means of protesting zoning amendments based on land ownership as a way to provide stability in zoning. If the owners of 20% or more of the area of lots in various classes of land protested the rezoning, the vote required to approve the rezoning increased from a simple majority to 3/4 vote. The SSZEA recognized 3 classes of property owners who could protest a proposed rezoning based on the location of the land each class owned.⁶ Most importantly, the SSZEA used the phrase “immediately adjacent to the rear” to define one of the class of land owners, and stated in an explanatory note that this phrase was “... necessary for precision; otherwise, there will be doubt, and owners of lots in the rear but some distance away might claim the right to be included in the objection.”, SSZEA n. 33.

The SSZEA has been considered to have influenced many state zoning acts, including Massachusetts. As noted in one well respected Massachusetts land use treatise:

⁵ An even earlier opinion from the office took a contrary position and held that regardless of whether the City owned the fee in a street, the street would prevent an owner on the opposite side from being immediately adjacent to the property being rezoned.

⁶ The 3 classes were owners of lots: 1) included in the area to be rezoned; 2) “immediately adjacent to the rear” of the land to be rezoned extending “X” feet therefrom; or 3) “directly opposite” of the land to be rezoned extending “X” feet therefrom. The SSZEA also suggested that a distance provision be selected by the states based on the “prevailing lot depth in the municipalities of the State.” See SSZEA n. 34.

The purpose, nonconforming use, **protest**, and enforcement clauses of 1933 Mass. Act 269 ...borrow heavily from the Standard State Zoning Enabling Act. (*emphasis added*).

Bobrowski, *Massachusetts Land Use and Planning Law* 3rd Ed., §2.03 p. 33 (2011)

Massachusetts may have been heavily influenced by the SSZEA, but the protest language is not identical. One difference is that the SSZEA refers to the owners of the area of lots, while the Massachusetts protest provision refers to the owners of the area of land. However, the Massachusetts legislature retained the phrase "immediately adjacent." If that phrase means abutting or adjoining, then land that is separated from the rezoned land by the land of another owner is not "immediately adjacent." *See* Section II Definition of "Immediately Adjacent" *infra*. Thus, using the word "land" rather than "lot" does not seem to make any difference in terms of which owners are qualified to file a protest.⁷

Prior to the adoption in 1975 of the current language in §5 of c. 40A (the "Zoning Act") regarding protest petitions, the protest procedure appeared in §7 of c. 40A (the "Zoning Enabling Act"). While §5 provides for just two classes of owners entitled to protest a zoning amendment, §7 recognized 3 classes in line with the SSZEA. Those classes were:

...owners of 20% or more of the area of the land proposed to be included in such change, or of the area of the land immediately adjacent, extending 300 feet therefrom, or of the area of other land within 200 feet of the land proposed to be included in such change.

The change that occurred in the protest provision is partially explained in the Report of the Department of Community Affairs Relative to Proposed Changes in the Zoning Act (the "DCA Report"), which is often referred to as the legislative history for the Zoning Act.⁸ The DCA Report recommended eliminating the protest provision altogether except where there was an unfavorable report by the planning board or regional planning commissioner on grounds that this provision made it "unnecessarily difficult" to revise zoning. *See* DCA Report, p. 34, *Sec. C. Vote Required*.

The Legislation did not, however, fully implement the DCA's recommendation, although it did eliminate one of the classes of land owners, *i.e.*, owners of land within 200 feet of the land to be rezoned. It is significant that the Legislature eliminated the class of land owners within 200 feet of the land to be rezoned because the land of these owners did not have to be immediately adjacent to the property being rezoned. For example, the class eliminated could have included owners of land separated from the land to be rezoned by land owned by another person, or by a street. The effect of this statutory change was to narrow the number of owners who could qualify to file a protest, allowing only those owning land being rezoned or immediately adjacent to the land being rezoned to file a protest.

⁷ Note, however, that if the owner of the abutting lot also owned the lot abutting the abutting lot, then the phrase "area of land" would include both lots held in common ownership. This raises the question of whether the area of 221 Walnut Street should be included in the Protest Corridor, given that it abuts 227 Walnut Street which is an immediate abutter. However, the Assessors' Database shows different owners for those two lots, and that source is being used to verify ownership. Accordingly, 221 Walnut Street is not counted in the Memorandum as immediately adjacent land.

⁸ The DCA Report is also referenced as Mass. H.R. Rep. No. 5009 (1972).

The significance of the legislative decision to retain a protest provision notwithstanding the recommendation of the DRC Report, but to narrow the number of owners who could file protests, should also be understood in the context of one of the few Massachusetts decisions involving a zoning protest. The same year that the Legislature revised the zoning protest section, the Appeals Court in the case of *Parisi v. City of Gloucester*, 3 Mass. App. Ct. 680 (1975) considered a zoning protest filed under §7 of the Zoning Enabling Act, rather than the current §5. The requirement considered by the Court is the same under either the earlier or current statute -- owners must sign and file "... a written protest against such change, stating the reasons..." The question presented to the Court was whether a written protest that was signed by the owners but failed to give any reasons for the protest was sufficient to increase the required vote to approve the rezoning to 3/4.

The Court held that the protest petition was deficient because it contained no written statement of reasons, although the owners had appeared during the public hearing and stated their objections orally. The Court found that the language in the statute calling for a written protest stating the reasons had to be strictly followed, and the failure to file a written protest stating the reasons was no "trivial procedural defect." The Court stated:

Statutes providing for a greater than majority vote of the appropriate governing body in order to override a protest of a given percent of the landowners affected by a proposed zoning amendment exist in many states. *See Trumper v. Quincy*, 358 Mass. 311, 312 (1970) Such statutes are designed to give affected landowners 'some leverage in the adoption or rejection of the propos(ed) amendment' (*Id.* at 314) and are expressions of 'the precise degree of extra diligence those citizens (whose property rights it is proposed to alter) will be guaranteed.' *Id.* at 313 *See Opinion of the Justices*, 234 Mass. 597, 606 (1920). However, the landowner's leverage to invoke the unanimity requirement derogates from the normal legislative process by majority rule even more drastically than the statutory two-thirds rule (see fn. 1) which otherwise applies to the enacting of zoning amendment. The limitations upon and conditions of that leverage must therefore be strictly enforced. (citations omitted) Additionally, such conditions and limitations represent a legislative response to the conflict between the rights of the landowner and the public welfare (*See e.g. Raymond v. Building Inspector of Brimfield*, 3 Mass. App. 38 (1975)). And we must take care not to vary the balance it has set. (*emphasis added*).

Parisi v. City of Gloucester, 3 Mass. App. Ct. at 682, 683.

Similarly, the statutory requirement that a citizen must be an owner of land immediately adjacent to the land being rezoned to file a protest under §5 should be understood as a limiting qualification on the pool of citizens entitled to exert leverage on the legislative rezoning process, most especially after the Legislature narrowed that pool by deleting the class of owners that owned land simply within 200 feet of the rezoned property.

II. Definition of "Immediately Adjacent"

Absent a specific legislative definition of a term or phrase, statutory construction looks to the ordinary or common meanings of words or phrases. See *Com. v. Welosky*, *supra*. A second principle of statutory construction is that every word in a statute is to be given meaning. See *Matter of Yankee Milk, Inc.* 372 Mass. 353, 358 (1977).

The New College Edition of *The American Heritage Dictionary* defines "adjacent" as "close to; next to; lying near; adjoining." In §5, the word "adjacent" is modified by the word "immediately" which is defined by *The American Heritage Dictionary* as "without intermediary; directly." (See also definition of "immediate" in *Black's Law Dictionary* 9th Ed., as "not separated by other persons or things.") Accordingly, the phrase "immediately adjacent" should be understood to mean land adjoining or abutting the land to be rezoned, not just land near the land to be rezoned.

Several out-of-state courts have considered the phrase "immediately adjacent" to mean adjoining or abutting in the context of a zoning protest petition. These courts have also held that the ownership of abutting land is a requirement in order to file a protest, not simply ownership of land within the statutory distance from the land being rezoned. See *Parsons v. Town of Whethersfield*, 135 Conn. 24, 60 A.2d 771 (1948) (A 66 foot wide right of way owned in fee by a railroad prevented the owners of land on the other side of the right of way from being "immediately adjacent" to rezoned property and disqualified such owners from filing a protest even though their land was within 100 feet of the rezoned land.); *Putney v. The Township of Abington*, 176 Pa. Super 463, 108 A.2d 134 (1954) (A 100 ft. railroad right of way preventing the signers of a protest land and the rezoned land from "touching" and therefore signers' land was not "immediately adjacent" to the rezoned land, disqualifying the owners from protesting the rezoning even though their land was within 100 feet of the rezoned land.)

Applying the ordinary meaning of the words "immediately" and "adjacent" as well as considering the holdings in both the *Parsons* and *Putney* judicial decisions, in order to qualify to file a protest pursuant to §5 an individual must own land that adjoins or abuts the land to be rezoned. Up to 300 feet of that such owner's land can be included in determining the area to be counted towards the numerator, but if land within 300 feet of the land to be rezoned is owned by a different individual, the area of that land should not be included in the numerator in calculating whether the 20% requirement has been met.

What is still somewhat unclear under this approach is whether the area of the denominator, *i.e.*, the Protest Corridor, should be the area of all the land extending 300 feet from the common boundary of the immediately adjacent land and the land being rezoned. However, this confuses matters by restricting the pool of owners qualified to file a protest to only those immediately abutting the land to be rezoned, but increasing the area to be included in the denominator to land that may be owned by persons who are not qualified to file a protest but who own land within 300 feet of land to be rezoned. The better approach is to say that the area of the Protest Corridor should be restricted to the area of land whose owners are qualified to file a protest, and that 20% of those qualified owners must file the protest in order to require a 3/4 vote to rezone.

III. Streets Keep Land on the Opposite Side From Being Immediately Adjacent to the Rezoned Land

As noted above, prior to adoption of the current language of §5, there was no requirement that land within 200 feet of the rezoned land be immediately adjacent to such property in order for the owners of that land to protest the rezoning. This allowed owners of land located across a street from the rezoned land to join in a protest. The deletion of this class of owners, however, from the protest provision should be understood as

reflecting intent by the Legislature to have streets interrupt the potential area of land from which protestors can be drawn.⁹

The prior opinions from this office which held that property located on the other side of a street opposite the land to be rezoned was immediately adjacent did so on grounds that under common law principals reflected in G.L. c. 183, §58 (also known as the Derelict Fee Statute), unless there is clear evidence reflected in deeds or in an order to taking, the land abutting a way includes the fee interest to the center line of the way. *See Tattan v. Kurlan*, 32 Mass. App Ct. 239, 243 (1992). This approach renders the phrase “immediately adjacent” meaningless, which is contrary to statutory construction principles. In addition, this approach runs afoul of a number of instances in which courts have found that the issue of ownership of the fee reflected in the Derelict Fee Statute does not control issues related to zoning.

Thus, for example, the fee owned under an abutting private way was not added to that property owner’s lot in order to calculate the minimum lot area required by a zoning by-law. *See Sears v. Building Inspector of Marshfield*, 73 Mass. App. Ct. 913 (2009). Streets, whether public, private, or even paper, have also been held to prevent substandard lots from merging for zoning purposes as would otherwise be required by the provisions of G.L. c. 40A, §6. *See Dowling v. Board of Health of Chilmark*, 28 Mass. App. Ct. 547, 548-549 (1990); *Johnson, Trustee of Vale Realty Trust v. Casper et als*, 16 LCR 87, 89-90 (2008).

Further, given that the protest provision requires one to calculate the area of both the land owned by those filing the protest (the numerator) as well as the area of the land within what this memorandum refers to as the “Protest Corridor,”(the denominator) in calculating whether the 20% requirement has been met, there is no suggestion in the statute as to how to treat the area in the street itself. Is this area to be excluded altogether, or is 1/2 of the area under the street to be added to each of the adjacent properties? These questions are hardly rhetorical. The uncertainty of this approach is an additional reason to decline to find the land separated from the land to be rezoned by a public or private street as included in the “area of land immediately adjacent within 300 feet” of the land to be rezoned.¹⁰

The drawback to this approach is almost present in the instant case – if the property to be rezoned is surrounded on all sides by streets, then only the owners of the land being rezoned would be able to protest. This result, however, would appear to be a possible consequence of what the Legislature intended to do when it re-wrote the zoning protest provisions in 1975. It should also be noted that holding the area of the Protest Corridor to just the area of land abutting the area to be rezoned makes it easier to reach the 20% threshold. The fact that the entity seeking to rezone land may take advantage of any “safe harbor” a statute provides has been recognized by a number of different state courts. (See the discussion of the use of “buffer zones” in Rohan, *Zoning and Land Use Controls*, §38.03[5][b], pgs. 38-100-38-104 (2008) (A number of courts have held that an owner can create a so-called buffer zone on the same lot which is not be rezoned in order to prevent abutting land of a different owner from being “immediately adjacent” to the land being rezoned as required by the statute.)

⁹ The Legislature certainly had alternative language to identify property owners than the restrictive language used in §5. As an example, the Legislature required written notice of special permits and variances to be sent to “parties in interest” which the Legislature statutorily identified as the “petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner....” This description stands in contrast to the language of §5 that refers more narrowly to “owners ... of the area of the land immediately adjacent extending three hundred feet therefrom”

¹⁰ New Hampshire has addressed the many problems identified in this approach by modifying its statutory protest language. *See RSA 675:5*. New Hampshire has two classes of owners who may protest – those owning 20% of the area of lots to be rezoned and the “owners of 20 percent of the area within 100 feet immediately adjacent to the area affected by the change or across a street from such area.” *RSA 675:5 I-c*. further provides that “The area of streets, commons, or land owned by a governmental entity shall not be included in any calculation under this section.”

CONCLUSION

In view of both the legislative history of the rezoning protest provision as well as established principles of statutory construction, a court would likely limit the area of land from which owners can protest the rezoning, the "Protest Corridor", to land that actually abuts the northern boundary of the Orr Block. In that event, the protest has been signed by the owners of 84% of the area of land immediately abutting the Orr Block and a 3/4 vote will be required to approve the rezoning petition.

Even if the Protest Corridor is extended out the full 300 feet from the Orr Block northern boundary, crossing Foster Street, which should interrupt the immediate adjacency of the land to the north of Foster Street for the reasons set forth above, 37% of the owners of the area of land in this larger Protest Corridor have signed the Protest. See Exhibit D for the map showing this conclusion based on the City's GIS mapping application.

However, for the reasons set forth in the Discussion, the Protest Corridor should not be calculated based on the area of all the land within 300 feet of the Orr Block boundary, or even on the area of land which is separated from the Orr Block by a street, whether public or private. See Exhibit E for the map showing the area of land separated from the Orr Block by streets.¹¹

¹¹ The electronic copy of this Memorandum posted at the City's website includes pdfs of the Maps which can be enlarged to more clearly read the square foot of the various areas of land listed in the Legend on each Map.



We, the undersigned owners of land in Newtonville, Ward 2, Newton, MA under the provisions of Massachusetts General Law Chapter 40A, Section 5, hereby state our protest to Newton City Council Docket No. 180-16 and No. 179-16, proposals for permits and rezoning of 245-261 Walnut St, 845-855, 857-859, 867, and 875 Washington St from Business Use 1 and 2 to Mixed Use 4, and rezoning of 241 Walnut St, 14-18 and 22 Bailey Pl, an unnumbered lot on Bailey Place, 861-865 and 869 Washington St, 6-8, 10-12, 16-18 and 22 Washington Terrace from Business Use 1 and 2 to Mixed Use 4.

As abutters to the proposed development, we object strongly to the zoning change and special permit applications. The proposed use of the site for a 5-story structure containing 40,000 square feet of retail store space and 171 apartments, is wholly out of keeping with the adjacent local Historic District, local business district, and adjoining neighborhood. The excessive size, scale, massing and density of the proposed steel-frame development will erode the integrity of the abutting Newtonville Historic district (including structural damage to historic buildings), increase traffic and parking density, displace affordable housing, drive up residential and commercial rents, and radically undermine the village model on which Newton is based. The enclosed pages enumerate 10 reasons for our petition objecting to the request for special permits and rezoning.

RECEIVED
NEWTON CITY CLERK
JAN 26 11:25 AM '08

Signature	Print Name	Newtonville Address
✓ 1. <i>Bette A. White</i>	BETTE A. WHITE	14 FOSTER ST.
✓ 2. <i>Ellen Fitzpatrick</i>	Ellen Fitzpatrick	20 FOSTER ST.
✓ 3. <i>John + Mari Wilson</i>	John + Mari Wilson	30 Foster St
4. <i>Elizabeth B. Smith</i>	Elizabeth B. Smith	40 Foster St.
5. <i>Robert H. Smith</i>	ROBERT H. SMITH	40 Foster St.
6. <i>William R. Koss</i>	William R. Koss	142 Lowell Ave
7. <i>Kimberly Davis</i>	Kimberly Davis	128 Lowell Ave.
✓ 8. <i>Meghan Smith</i>	Meghan Smith	34 Foster st.
9. <i>FA Choi GEE</i>	FA CHOI GEE	15 FOSTER ST
10. <i>Jean Chang</i>	Jean Chang	205 Walnut St
11. <i>Odile Poirier</i>	Odile Poirier	133 Lowell Ave
12. <i>ERAN CASPI</i>	ERAN CASPI	137 Lowell Ave
13. <i>MICHA KLUGMAN-CASPI</i>	MICHA KLUGMAN-CASPI	137 Lowell ave
14. <i>Maura Harrington</i>	Maura Harrington	157+ Lowell Ave.
15. <i>Minjie Xie</i>	Minjie Xie	161 Lowell Ave.

all done
at 11:25

only one
checked

Abutters' Reasons for Protesting Newton City Council Petition #180-16 and #179-16

1. Size, Scale, Massing and Density of the Development out of Character with Village Concept

The current municipal plan, evidenced by the existing zoning districts and described on the Municipal web site, is to maintain Newton as a city of 13 villages. Current zoning in this area allows for two stories. We believe this development and zoning plan is sound. The 5-story plan of the Washington and Walnut Street development and lack of setbacks from the street are entirely out of line with the scale of the rest of the village, which is predominantly one- and two-story buildings. The proposed zoning change will forever alter the village concept of Newtonville by creating an excessively large, dominant, dense retail and residential structure that will overshadow the adjoining residential neighborhood and existing business district.

2. Lack of Buffer Zone to Protect Adjacent Newtonville Local Historic District

The abutting Local Historic District on Foster Street, Lowell Ave. and Walnut Street is in an MR1 zone. Rezoning the Washington Street parcel to MU4 would provide no transitional area between the site, and the residential MR1 zone where the historic district is located. Furthermore, the density, aesthetic design, scale and massing of the proposed development and the area's rezoning as a MU4 fundamentally undermines and compromises the integrity of the abutting Newtonville Local Historic District which the Board of Aldermen itself recognized as worthy of historic preservation in its 2002 vote to create the Local Historic District. As Newton's own Historic Preservation guidelines states: "the study which formed the basis of the historic designation describes the cohesive nature of the neighborhood resulting from the overall massing, scale, lot size, setbacks and craftsmanship of its buildings." The Washington Street development will seriously compromise "the cohesive nature of the neighborhood" that the City has deemed worthy of protection.

3. Potential for Site Construction to Cause Structural Damage to Historic Dwellings

The demolition, pile-driving construction and creation of an underground garage involved in the proposed development pose a serious threat to the structural integrity of surrounding homes in the historic district. Many adjacent homes are built on 19th century fieldstone foundations that are structurally sensitive to such processes. Damaged historic windows, foundations, walls and ceilings are prohibitively costly, or indeed impossible, to replace "in kind." No mitigation can reverse damage to historic structures which the City itself has affirmed are worthy of protection and preservation.

4. Traffic Impact and Site Access

We are concerned that an adequate study of traffic impacts has not been done, and we request that the city conduct a "peer review" traffic study. The intersection of Washington & Walnut as well as Washington and Lowell are not designed to accommodate the additional volume of traffic that will be generated by the larger residential and commercial complex proposed. Walnut Street between Washington Street and Newton North High School is already a crowded north/south traffic conduit and may need redesign to deal with the increased traffic as well as significant pedestrian population going to the commuter rail and high school.

The access to and from the site is not designed to provide for traffic to return north on Walnut Street and east on Washington Street. Because the site access on Walnut Street is within 100 feet

of the busy intersection at Walnut and Washington Streets, northbound traffic trying to turn left into the site will likely have a negative impact upon the functioning of the intersection. Current southbound traffic on Walnut Street is routinely backed up to Page Road and Turner Street, and this development could significantly push that backup all the way to Watertown Street.

5. Lack of Adequate Parking

The developer is asking for numerous waivers for parking when it is still unclear whether his major commercial tenants will be restaurants, retail, or a health club, all of which have different parking projections. The current request for 1.25 spots per housing unit is also clearly insufficient, particularly with 74 two-bedroom units. This parking insufficiency is likely to cause spillover into adjacent streets such as Lowell Avenue. This parking insufficiency may be particularly acute in winter due to snow piles and the overnight parking ban on city streets. Snow will also inevitably reduce parking in the proposed ground level lot during the winter months.

6. Net Loss of Affordable Housing in Newtonville

Over 20 units of naturally occurring affordable apartments are being displaced by the project, and only 17 units (10%) are required to be built in the new development. Therefore, the project will result in a net *loss* of moderate/low income affordable housing units. Even if 15% of the units (26) were set aside as affordable, the net gain would be negligible (only 5 or 6 units). We support the addition of low-income and moderate housing in Newtonville, but this project does not promise to significantly add to that number, given the housing that is being displaced by it. There also is a concern that a development of this nature could drive up the rents of other affordable housing in the area, which would be a serious concern. For a development this large, the City Council should request a study of the economic impact upon rents in the village and environs.

7. Lack of an Environmental Impact Report

The developer of a project of this magnitude should be required to produce an environmental impact review, but none has been conducted. Since the project will demolish a gas station, the ground ought to be studied for gasoline contamination. Digging for an underground garage may affect rock ledges or ground water tables, so those environmental impacts should be assessed to determine that there is no significant adverse impact on the environment.

8. Noise, Lighting, and Other Disturbances to Abutters

The residential abutters would be subjected to escalating traffic, noise, lighting and density impacts which would violate Newton's Zoning Ordinance for an MR1 district. Nighttime lighting of the parking lot and apartment buildings will disturb residential abutters on Foster Street, whose bedrooms directly overlook the site. Constant traffic going in and out of the site will create noise and air pollution that will disturb local residents of homes a few feet away from the two site exits/entrances.

9. Possible Impact on Other Municipal and State Services

171 new apartments will have a financial impact on city services, such as schools and waste removal, and will increase ridership on MBTA bus and commuter rail lines, but no details have been forthcoming about impacts on these services. Since 43% (74) of the units in the building

are 2 bedroom, it is reasonable to expect that sizeable numbers of children will reside in the Washington Street development, a fact which must be taken into consideration when projecting enrollments and ensuring adequate staff and classroom space at Horace Mann (soon to be Carr), Day Middle, and Newton North.

10. Unknown Effects of 2 Other High-Density Developments in Newtonville

A 36-unit development on Court Street and a 68-unit mixed-use development on Austin Street with 5000 square feet of commercial space were approved in 2015. The effects of these projects on Newtonville's traffic congestion, parking demand, and school enrollment are unknown. It would be misguided for the city to consider rezoning the 'Washington Place' site at this time before the impacts of these other high-density developments can be registered and felt.

Our protest is in accordance with MGL Chapter 40A, Section 5, fifth paragraph:

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting; provided, however, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to final action by the council a written protest against such change, stating the reasons duly signed by owners of twenty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no such change of any such ordinance shall be adopted except by a three-fourths vote of all members.

Washington Place Properties

Adjacent Properties

Signed Petition

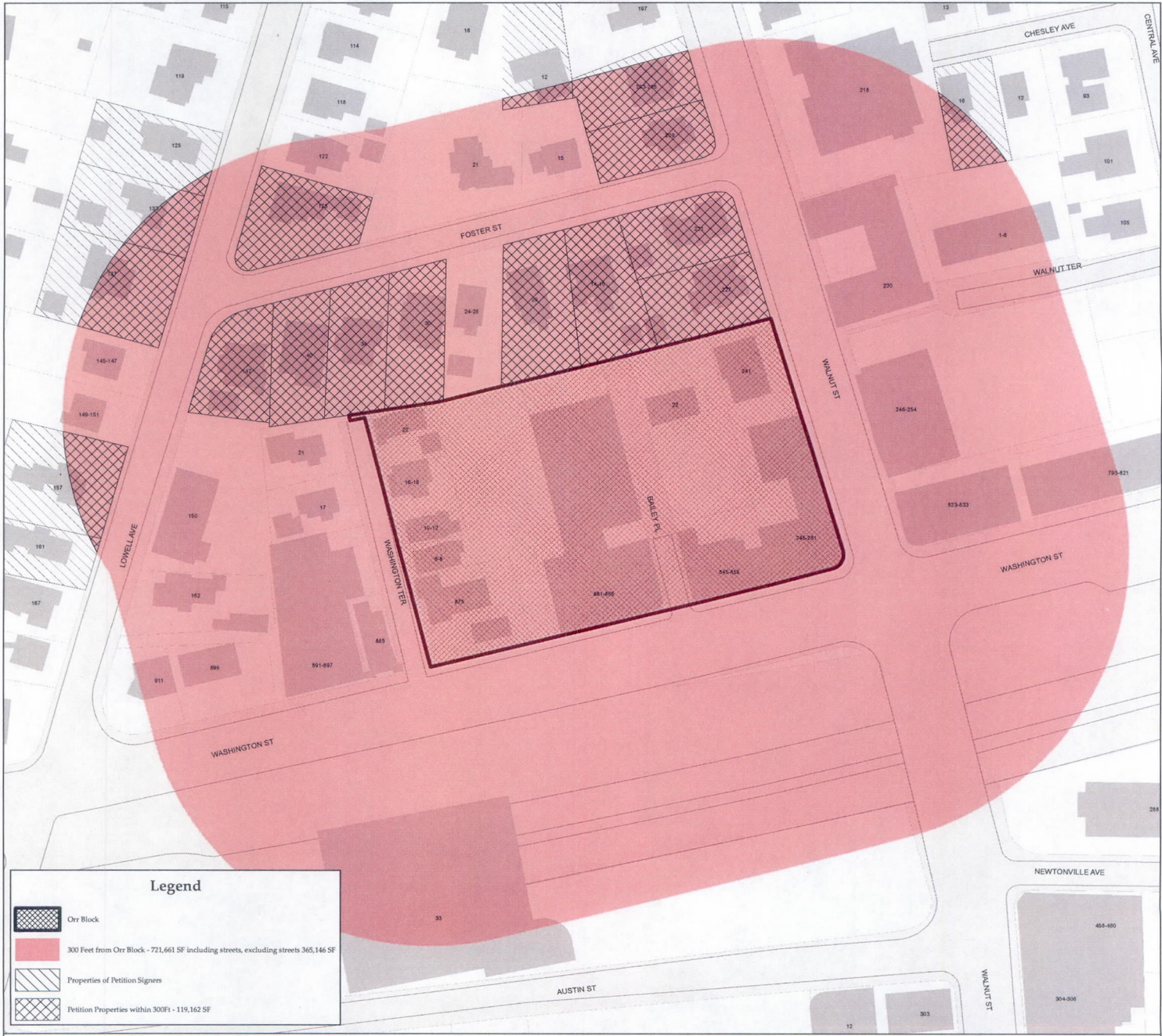
Draft as of January 9, 2017

Number	Street	Sq. Ft. of property*	Owner
33	Austin Street	25,860	Star Markets Company Inc.
14-18	Bailey Place		Mark Lolich LLC
22	Bailey Place		Mark Lolich LLC
	Bailey Place		Mark Lolich LLC
119	Central Avenue	944	Verizon
16	Chesley Avenue	2,741	Denn Thomas C & Alice M
14-16	Foster Street	10,458	White Betty
15	Foster Street	7,079	Gee FA Chwi & Wah Kum
20	Foster Street	11,185	Fitzpatrick Ellen F
21	Foster Street	17,813	The Second Step
24-26	Foster Street	9,154	24-26 Foster St. LLC (Galia Carlos D & Gertrud Trs)
30	Foster Street	9,073	Wilson John L & Mari
34	Foster Street	8,930	Smith David J & Francine M (deceased); Belson David & Smith Meghan M
40	Foster Street	8,008	Smith Robert H & Elizabeth B
118	Lowell Avenue	482	Shatkin Gavin M
122	Lowell Avenue	5,759	McLaughlin Marion B
125	Lowell Avenue	387	Bemporad Brenda
128	Lowell Avenue	10,427	Davis Jonathan G & Kimberly Chabot
133	Lowell Avenue	3,323	Poirier Jean-Jaques & Odile B
137	Lowell Avenue	8,004	Caspi Efran & Micha Klugman
142	Lowell Avenue	8,226	Koss William R
145-147	Lowell Avenue	5,072	DCL Investments LLC
149-151	Lowell Avenue	4,283	DCL Investments LLC
150	Lowell Avenue	18,499	Italian Pentecostal Christian Church
157	Lowell Avenue	4,643	Harrington Maura J
161	Lowell Avenue	104	Xie Minjie
162	Lowell Avenue	9,412	A & M Joint Ventures LLC
	Lowell Avenue	3,266	Paper Street/Alley ??
12	Page Road	1,120	Dawes Phillip Jr & Nickki P
200	Walnut Street	-	Miller Donald C Tr
203-205	Walnut Street	7,150	Chang Jean TR 205 & Jasper Michael S 203
209	Walnut Street	7,510	Lewis Adam Marc
218	Walnut Street	23,910	Boston Chinese Evangelical Church
221	Walnut Street	8,692	Slattery Patrick J Tr
227	Walnut Street	9,181	Slattery Patrick J
230	Walnut Street	15,579	Walnut Terr LLC
	Walnut St/Terr Alley	542	City ???
241	Walnut Street		Lolich Mark LLC
245-261	Walnut Street		Mark Lolich LLC
246-254	Walnut Street	34,897	Hanlon Patricia A Tr
288	Walnut Street	245	Spencer Bradford A
1-6	Walnut Terrace	13,674	Walnut Terrace LLC
793-821	Washington Street	6,698	Bram S Richard & Vivian R Trs
823-833	Washington Street	10,682	Handler Newtonville LLC
845-855	Washington Street		Mark Lolich LLC
857-859	Washington Street		Mark Lolich LLC





861-855	Washington Street		Mark Lolich LLC
867	Washington Street		Mark Lolich LLC
869	Washington Street		Mark Lolich LLC
875	Washington Street		Sunoco Inc
885	Washington Street	3,203	Santosuosso Elena & John Trs
891-897	Washington Street	14,978	Postal Limited Partnership
899	Washington Street	7,675	HLC Aroma LLC
911	Washington Street	3,214	Martino Eric M & V Ronald
	Washington Street	2,051	City of Newton
	Washington Street	45,348	City of Newton - Southern Half of Street
	Mass Pike	154,454	MassDot/MBTA Rail Lines
6-8	Washington Terrace		Arcuri Joseph A & Rosina
10-12	Washington Terrace		Lafave Lance R
16-18	Washington Terrace		Saminsky Valery & Elena
17	Washington Terrace	5,543	Coletti Daniel A Tr
21	Washington Terrace	5,400	MacNeil Edna B & Patricia A
22	Washington Terrace		Chow Siu Ming

* does not include to centerline of street

one owner did not sign



Legend

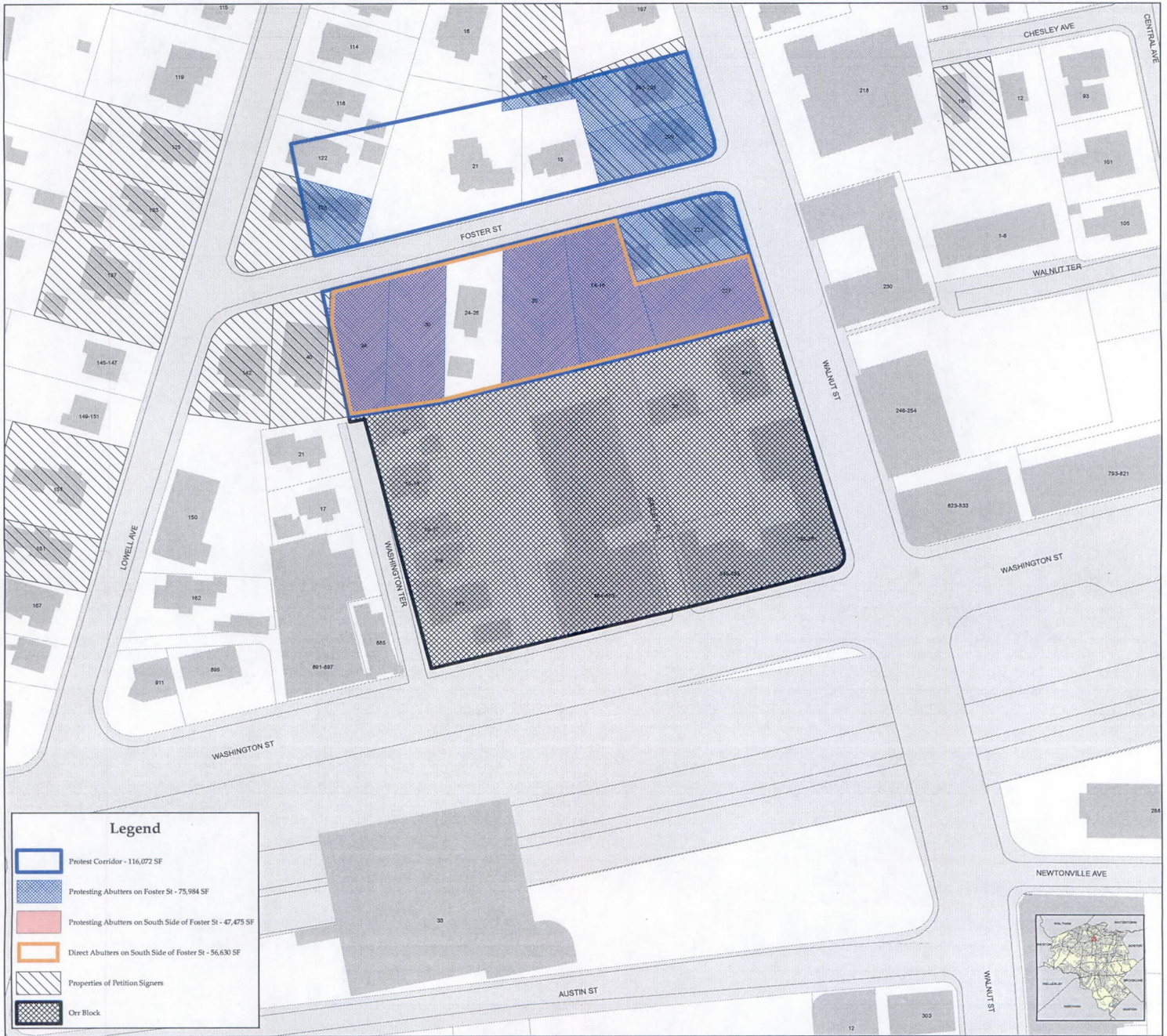
-  Orr Block
-  300 Feet from Orr Block - 721,661 SF including streets, excluding streets 365,146 SF
-  Properties of Petition Signers
-  Petition Properties within 300ft - 119,162 SF

Orr Block-300 Feet From Boundary

The information on this map is from the Newton Geographic Information System (GIS). The City of Newton cannot guarantee the accuracy of the information. Each user is responsible for determining the data's suitability for its intended purpose. City departments will not approve applications based solely on GIS data. City staff correct errors as they are identified.



CITY OF NEWTON, MASSACHUSETTS
 Mayor: Scott D. Wilson
 Department of Information Technology
 880 Commonwealth Avenue
 Newton, MA 02459
 GIS Information: Douglas Goodrich
 Map Date: January 11, 2017

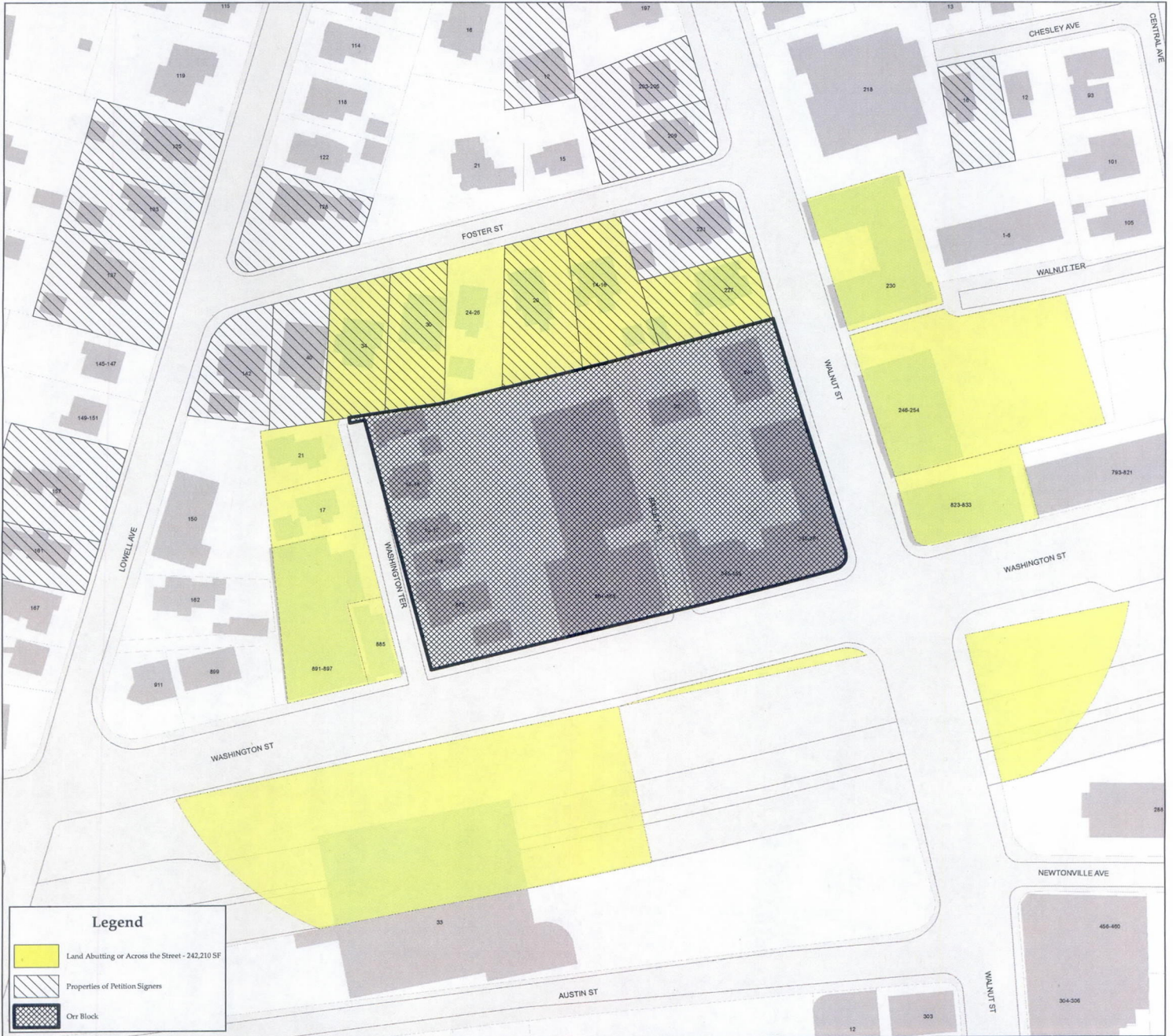


Orr Block-Land Immediately Adjacent-Protest Corridor

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CITY OF NEWTON, MASSACHUSETTS
Maple Street, Newton
Department of Information Technology
800 Commonwealth Avenue
Newton, MA 02459
GIS Administrator: Peter Gombosi
Map Date: January 09, 2017



Legend

- Land Abutting or Across the Street - 242,210 SF
- Properties of Petition Signers
- Orr Block

Orr Block-Land Abutting or Across the Street

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CITY OF NEWTON, MASSACHUSETTS
Map Date: January 11, 2017