

CITY OF NEWTON  
LAW DEPARTMENT  
INTEROFFICE MEMORANDUM

DATE: February 5, 2021  
TO: Rick Lipof, Chairman, Land Use Committee  
All Members, City Council  
FROM: Jonah Temple, Assistant City Solicitor  
RE: Protest to Rezoning  
1149-1151 Walnut Street  
Docket # 319-20

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**Background**

Newton Walnut LLC seeks to rezone two parcels of land located at 1149 and 1151 Walnut Street from Business 2 (BU2) to Mixed Use 4 (MU4). Under recent amendments to Massachusetts General Laws Chapter 40A, a majority vote of the City Council is required to approve this rezoning unless a protest against the rezoning is filed, in which case a 2/3 vote is required.

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

If, in a city or town with a council of fewer than 25 members, there is filed with the clerk prior to final action by the council a written protest against a zoning change under this section, stating the reasons duly signed by owners of 50 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 300 feet therefrom, no change of any such ordinance shall be adopted except by a two-thirds vote of all members.

A petition protesting the proposed rezoning (hereinafter the "Protest Petition") has been filed with the City Clerk by a number of owners whose property is located near the area to be rezoned. A copy of the Protest is attached hereto as Exhibit A.

For the reasons set forth below, the Law Department believes that the Protest Petition does not meet the requirements of G.L. c. 40A, § 5, and that therefore a majority vote of the City Council is required to approve the proposed rezoning.

**Analysis**

As a starting point, there has historically been a lack of clarity and judicial guidance on how to determine which owners qualify to file a protest, how to calculate the land area of those owners (the numerator), and how to calculate the total area of what might be considered the "protest corridor" (the denominator). However, a recent decision of the Land Court (in determining the sufficiency of a protest filed by abutters to the Washington Place development in Newton) has

provided much needed instructions for determining when the threshold for a successful zoning protest is met.<sup>1</sup>

The evaluation of a protest requires a calculation of the quotient, where:

- The numerator is the “area of land” owned by protesting owners whose land is “immediately adjacent extending three hundred feet” from the land to be rezoned.
- The denominator is the “area of land immediately adjacent extending three hundred feet” from the land to be rezoned.

If the quotient derived from this calculation is at least fifty percent, the protest is successful and a 2/3 vote will be required to approve the rezoning.

A plan showing the properties and area of land that make up the numerator and the denominator of the protest calculation is attached hereto as Exhibit B.

#### Numerator

As determined by the Land Court, the numerator can only be made up of land that is directly touching, or abutting, the land to be rezoned. While owners of property that do not directly abut the land to be rezoned here did sign the Protest Petition, those owners are ineligible to protest and their land cannot be counted towards the numerator.

As shown on the attached plan, the only properties that directly abut the land to be rezoned whose owners have signed the Protest Petition are 1141 Walnut Street, 1145 Walnut Street, and 23-33 Lincoln Street. The total square footage of these properties is **34,027** square feet.<sup>2</sup>

#### Denominator

As determined by the Land Court, all land extending for a radius of 300 feet from the land to be rezoned must be included in the denominator, including land in the streets and other land owned by the developer of the proposed project.

As shown on the attached plan, the 300-foot radius drawn around the area to be rezoned comprises **420,764** square feet.

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<sup>1</sup> See *Harrington v. Newton City Council*, 2018 WL 327905 (Mass. Land Ct. 2018). This decision in the Washington Place litigation remains good law and was not appealed by any of the plaintiffs in that case. Notably, the attorney representing the signatories of the current Protest Petition also represented one of the sets of plaintiffs in the Washington Place litigation, where the argument that all property owners within 300 feet of the land to be rezoned should be eligible to protest was rejected.

<sup>2</sup> The Law Department has not evaluated nor made any determination as to the sufficiency of the signatures of the property owners. In other words, this memorandum assumes the individuals who signed the Protest Petition hold sufficient ownership interest of the properties listed necessary to file a protest.

Final Calculation

Numerator: protesting direct abutters	34,027 square feet
Denominator: 300 ft radius from land to be rezoned	420,764 square feet
<b>Final Percentage</b>	<b>8.0%</b>

Conclusion

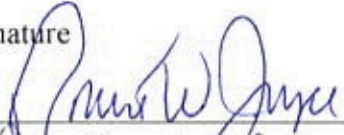
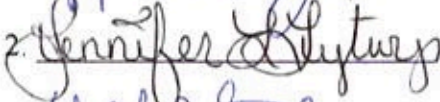

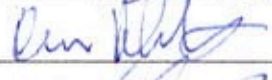

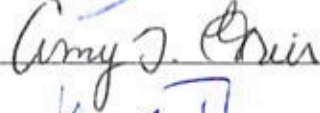

The result of the calculation using the above measurements is that the protesting landowners who are eligible to protest as direct abutters own 8.0% of the area of land within 300 feet of the land to be rezoned. This is well short of the requisite fifty percent necessary for a successful protest. Consequently, the Protest Petition is not sufficient to trigger a requirement of a 2/3 vote of the City Council.

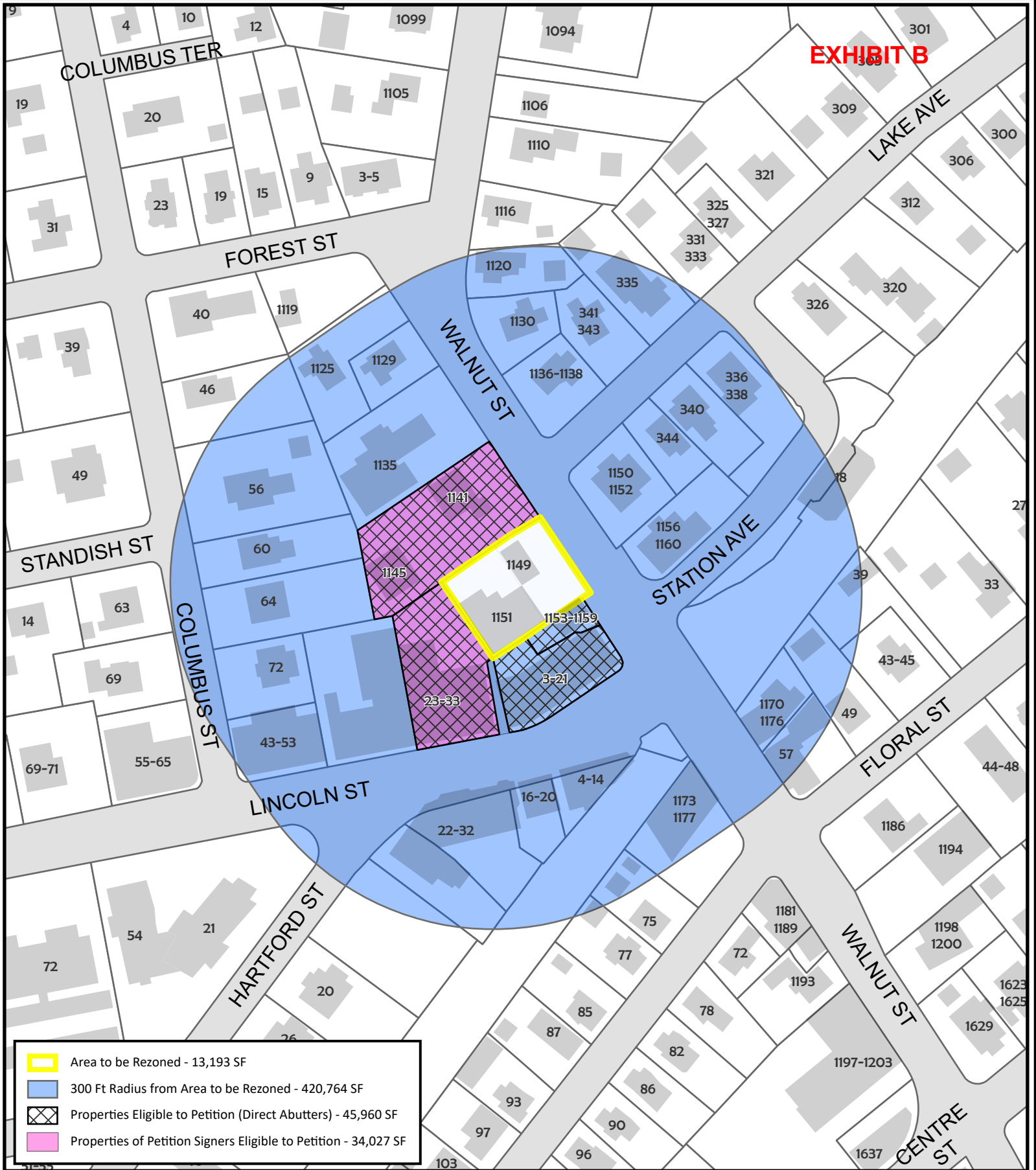
**Protest Petition to Proposed Rezoning of 1149-51 Walnut Street, Newton MA**

We the undersigned owners of land in Newton, Massachusetts, under the provisions of Massachusetts General Law Chapter 40A, Section 5, hereby state our written protest to:

City Council Docket No. 319-20 & 320/20, proposal to rezone all of the land located at 1141 Walnut Street (Section 52, Block 8, Lot 13) and 1151 Walnut Street (Section 52, Block 8, Lot 14), currently zoned BU-2 to the MU-4 district.

As abutters we object to the proposed zoning change because the proposal is out of character with the adjacent residential neighborhood and business district in Newton Highlands. The excessive size, height, and density of the proposed development will erode the integrity of the abutting 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.

Signature	Print Name	Newtonville Address
1. 	Robert W. Joyce	1150 WALNUT ST NEWTON, MA 02461
2. 	Jennifer L. Lytwyniec (previously)	1130 Walnut St Unit 1 Newton, MA 02461
3. 	WALTER B. Einstein	29-31 Lincoln St Newton 02459
4. 	Ken Holsten	331 Hake Ave Newton 02459
5. 	WILL MUELLER	56 Columbus St 02461
6. 	Amy S. Grier	1141 Walnut St 02461
7. 	Paul Feinberg	EAGLESPAN LLC 35 41 LINCOLN ST
8. _____	_____	_____
9. _____	_____	_____
10. _____	_____	_____
11. _____	_____	_____
12. _____	_____	_____
13. _____	_____	_____
14. _____	_____	_____
15. _____	_____	_____
16. _____	_____	_____
17. _____	_____	_____
18. _____	_____	_____
19. _____	_____	_____
20. _____	_____	_____
21. _____	_____	_____



# Rezoning at 1149-1151 Walnut Street

## City of Newton, Massachusetts

CITY OF NEWTON, MASSACHUSETTS  
 Mayor - Ruthanne Fuller



The information on this map is from the Newton Geographic Information System (GIS). The City of Newton cannot guarantee the accuracy of this information. Each user of this map is responsible for determining its suitability for his or her intended purpose. City departments will not necessarily approve applications based solely on GIS data.



Map Date: January 29, 2021