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**Barney S. Heath**  
Director

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**DATE:** March 8, 2019

**TO:** Councilor Susan Albright, Chair  
Members of the Zoning and Planning Committee

**FROM:** Barney Heath, Director of Planning and Development  
James Freas, Deputy Director of Planning and Development  
Rachel Nadkarni, Long Range Planner/Zoning Specialist

**RE:** #518-18 - DIRECTOR OF PLANNING requesting review, discussion, and direction relative to the draft Zoning Ordinance.  
**Development Review Process – Articles 10 & 11.**

**MEETING DATE:** March 11, 2019

**CC:** City Council  
Planning and Development Board  
Jonathan Yeo, Chief Operating Officer  
John Lojek, Commissioner of ISD  
Alissa O. Giuliani, City Solicitor  
Marie Lawlor, Assistant City Solicitor  
Jonah Temple, Assistant City Solicitor

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The decision-making processes that constitute how the City reviews development projects is a central and important part of the Zoning Ordinance. Conducted well, these processes establish trust with the community and applicants, promote building investment by property owners, and lead to positive development projects for the City. These processes must be fair, they must be transparent in how decisions are reached, and they must be efficient with both City and applicant time and resources. Newton generally has a good track record on these measures, but there is room for improvement. The 1<sup>st</sup> Draft Zoning Ordinance recommends a number of changes to improve the development review process across these measures.

An overarching objective of the Zoning Redesign project is to better match the level of review to the scale and significance of the development project. Given the range and importance of issues that the City Council is attempting to address in any given year, befitting a community as large and complex as

Newton, it seems incongruous that the City Council is also the decision-making body on small additions to single family homes, restaurant parking waivers, and small mixed-use or residential development projects, to provide a few examples. That is not to say that these are not important issues, because they are, but that the role of the City Council should perhaps be in deciding the parameters of how these decisions are made through legislating the rules in the Zoning Ordinance while leaving the individual decisions to an appointed body of experts. This approach is the one taken by most communities across the country and here in Massachusetts.

For the purposes of this memo, the term 'development activity' or 'development' is meant to encompass everything from small residential additions to large multi-family or commercial development projects, and also includes such actions as adding a sign or changing out a business use in an existing structure.

**Reading List:** In preparation for this meeting, Committee members should read this memo and all of Articles 10 and 11. It may also be helpful to review the first section of Articles 3, 4, and 6 (titled Development Review) and the Use Tables found in each of those articles.

**Key Questions to Consider:**

1. Should some portion, or all, of the Special Permits currently considered by the City Council be shifted to the Zoning Board of Appeals or the Planning Board?
2. If the City Council retains only those special permits deemed to be of Citywide significance, what size project constitutes Citywide significance?
3. Should all non-conformities have the right to alteration and expansion? If only some non-conformities are entitled to alteration or expansion, which ones?

**Special Permits**

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A special permit is required where the nature of a proposed development activity, due to its size, location, or some external effect, requires additional review and may require conditioned approval in order to mitigate its impacts. Special permits are approved by the special permit granting authority, which under the current ordinance in Newton is always the City Council and under the 1<sup>st</sup> draft ordinance is split between the Planning and Development Board (also referred to as the Planning Board) and the City Council based on the scale of the proposed development activity.

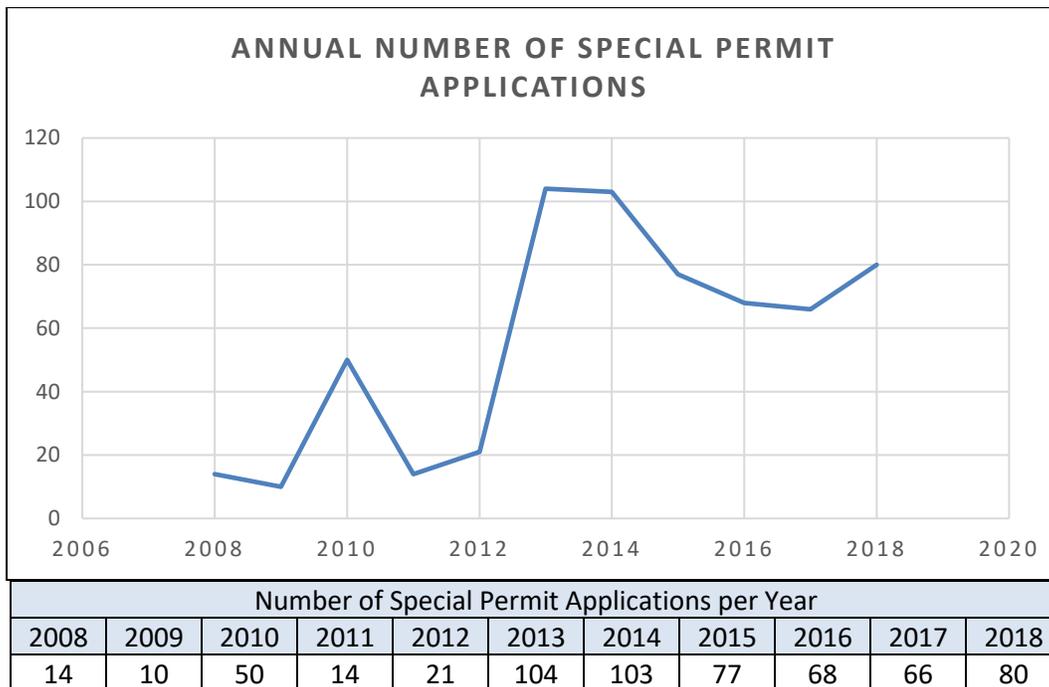
A special permit is a quasi-judicial decision, rather than a legislative decision. In making a decision on a special permit, the granting authority is limited to the record of materials submitted by the applicant as well as commentary received in the public hearings, be they in person or in writing. The granting authority also must make a decision in consideration of the criteria provided in the ordinance. The granting authority may not refuse to issue a permit for reasons unrelated to those criteria; for instance, a special permit cannot be denied based on community opposition to a project. In contrast, a legislative action such as writing the zoning ordinance and the criteria contained within it, can benefit greatly from broad public discourse.

Newton requires special permits for a wide range of development activities which, among many other specific examples, includes:

- expansions of non-conformity and exceeding the maximum floor area ratio (FAR), which together draw a number of single and two-family projects into the special permit process
- waivers of parking related requirements,
- many specific commercial uses,
- any project with three or more residential units
- and all developments over 20,000 square feet

For most businesses or individuals contemplating development activity in the City, a special permit requirement constitutes an additional cost that is avoided to the extent possible. Special permits are permanently in place, and the conditions of a special permit rarely expire. This creates an environment in which simple changes years after a project is constructed result in special permit amendments, even when the proposed development activity itself would not otherwise require a special permit.

The number of special permits issued per year by the City has varied widely over the last ten years but has generally increased over this time period. While there may be other factors involved, this trend tracks closely with the strengthening of the regional economy, which makes sense as a stronger economy results in larger amounts of money available to spend on development activity. Another possible factor in the increase could be the adoption of the new FAR rules in 2011 as the data show a significant increase in special permits beginning in 2013, especially those for projects involving single or two-family buildings. The tables below provide data on special permits.



Number of Special Permit Applications per Year										
2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
14	10	50	14	21	104	103	77	68	66	80

Special Permit Details		2008	2013	2018
Number of Residential Units in the Project	0 Units <i>(Commercial Only)</i>	11 <i>79% of total</i>	51 <i>49% of total</i>	29 <i>36% of total</i>
	1-2 Units	2 <i>14% of total</i>	40 <i>39% of total</i>	35 <i>44% of total</i>
	3-8 Units	1	12	7
	9-20 Units	-	1	5
	20+ Units	-	-	4
Project Details	Includes a Parking Waiver	1 <i>7% of total</i>	13 <i>(only parking waiver: 1)</i> <i>13% of total</i>	11 <i>(only parking waiver: 1)</i> <i>14% of total</i>
	Includes a Sign Special Permit	1	9	6
	Change of Use Only	-	7	8
	Tenant change only (change of use/sign)	-	9 <i>9% of total</i>	9 <i>11% of total</i>
Projects with Nonconformity	Includes an Extension of a Nonconformity	1	17 <i>(only nonconformity: 5)</i>	23 <i>(only nonconformity: 5)</i>

## **Recommendations**

The 1<sup>st</sup> draft Zoning Ordinance proposes that the Planning Board become the special permit granting authority for most development activity, reserving large projects with Citywide significance for the City Council. As a preliminary recommendation, the scale for citywide significance was set at 20 residential units or 20,000 square feet of commercial space. There are two primary reasons for this recommended change, first the issue of prioritizing the City Council's time and second, the challenge of the conflicting legislative and judicial roles individual Council members must navigate. Each of these is discussed below. To be clear, there is nothing inherently wrong with the City Council serving as the special permit granting authority, but it is valuable for the City Council to periodically assess the challenges and benefits of serving in this role, particularly given that most other communities have made a different decision.

As the number of special permit applications reviewed has grown, as shown above, the amount of City Council time directed to this activity has also increased and the number of special permit applications related to single family homes has also increased substantially. The Land Use Committee is now meeting three times a month and likely could still use more time. Reducing this workload can be accomplished by either changing the rules so that fewer projects require a special permit or switching some category of special permits to a different permitting authority or a combination of both.

The second issue is the potential for conflict in the judicial review of the special permit process and the broader legislative role of the City Council. Special permit decisions are reached in a quasi-judicial

process where all information about a project is meant to be received by the members of the special permit granting authority in public – that is in the public hearing and through publicly accessible documents submitted to the entire body. When serving as the special permit granting authority, there should not be private meetings with either the applicant or with members of the public on the proposed development activity. This rule applies to the entire City Council, not just the members of the Land Use Committee. Preventing such communication would require a high level of vigilance by all members of the City Council, preventing constituents from inadvertently violating this rule during open office hours, in emails, or in other conversations. As it is inherently the role of a legislator to be in communication with his or her constituents on the issues that concern them, it can be difficult to segregate out those issues that relate to projects in front of the special permit granting authority for adjudication as opposed to those that relate to their legislative role in defining the zoning ordinance.

The advantage of making the Planning Board the special permit granting authority for all but the most significant projects is that the City Council, through its role in approving the membership of this body, could ensure that the appointed members reflect the incredible depth of knowledge available in Newton in real estate development, land use planning, law, design, and other topics of relevance to the special permit decision making process. Once special permits are being handled by this body of experts the City Council can focus on ensuring the rules and criteria of the Zoning Ordinance itself are set to achieve their desired outcomes.

Clear special permit criteria are an important part of the 1<sup>st</sup> draft zoning ordinance proposal and an essential part of transitioning the special permit granting role. The draft ordinance includes specific criteria for every single development activity requiring a special permit, above and beyond the general special permit granting criteria. This specificity ensures that the attention of the permitting authority is clearly directed to the potential issues of concern for a given project.

Lastly, a number of the special permits required within the 1<sup>st</sup> draft ordinance also have mandatory design review. This process is described separately below, but in short, the intent of that design review process is to further highlight how design can be used in a project to mitigate perceived negative external impacts.

## **Site Plan Review**

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Site plan review is intended to offer a level of development review that is less intensive than a special permit but more than a by-right development. Under the current ordinance there are two types of site plan review; the site plan approval procedures of the City Council and the administrative site plan review procedures employed by Planning Department staff for educational and religious institutions.

The purpose and intention of the site plan approval process in the existing zoning ordinance is unclear. This review is required for every project that requires a special permit, the review criteria overlap with, and seem essentially the same as, the special permit criteria, and the only key difference seems to be that the necessary vote for site plan approval is a simple majority and yet no separate vote is ever taken.

The administrative site plan review procedures in the existing ordinance are exclusively for religious and educational uses subject to the “Dover” rule which exempts such uses from certain zoning

requirements. These procedures allow only for a non-binding advisory review by the Planning Department staff.

### **Recommendations**

The 1<sup>st</sup> draft zoning ordinance includes a staff-based site plan approval process. The intention of this site plan approval is to provide review and limited conditioning as necessary for projects that would otherwise be allowed by-right, but require some additional, highly prescribed review. The 1<sup>st</sup> draft only identifies a few instances where this approval process would be used. Examples include determining the correct application of the “proximity rule” for certain building types (see building type House D). Individual sign reviews are also proposed to change from review by the Urban Design Commission to this site plan approval process. There may be other uses or development activities that could use this site plan approval process rather than a special permit such as cottage cluster developments, rear lot subdivisions, museums, or formula businesses.

The Dover protected educational and religious uses are also proposed to be reviewed through a site plan approval process using the same criteria as are currently in Newton’s Zoning Ordinance. The key difference is the Planning Department review would change from an advisory review provided to the Commissioner of ISD to an approval with with reasonable restrictions granted by the Planning Department.

### **Section 6 Findings**

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Section 6 Findings is the term used to describe the review process through which a nonconforming aspect of a property can be altered or expanded. All such determinations are reviewed against the following standard – whether the proposal is “substantially more detrimental than the existing nonconforming use to the neighborhood.” The current zoning ordinance requires a special permit for expansions or alterations of nonconformities. The term Section 6 Finding comes from the section number of Chapter 40A, the State Zoning Enabling Act where this type of permit is authorized.

A nonconformity exists anytime a building, use, or other aspect of a property is legally created but, due to a zoning amendment, becomes inconsistent with the current rules of the zoning ordinance. For example, a house that was built before Newton adopted a zoning ordinance would be legally created. If that house was set closer to the street than the current zoning ordinance allows, the house would be considered nonconforming with regard to its front setback. If the house otherwise met the requirements of the zoning ordinance, it would be conforming in all other aspects. That house would be able to get a section 6 finding to further encroach into the front setback. Notably, the house would not have the ability to seek a section 6 finding encroach into any other setback.

### **Recommendations**

The 1<sup>st</sup> draft zoning ordinance explores the idea of removing the special permit requirement for expansion of a nonconformity and transferring this review to the Zoning Board of Appeals using a section 6 finding approach. As with other special permits above, shifting this review to the Zoning Board of Appeals redirects what is typically a small-scale project to a body of experts appointed by the Mayor and confirmed by the City Council, thereby reducing the burden on the Council itself.

Overall, the new zoning ordinance is intended to significantly reduce the degree of nonconformity such that this review would be less likely to occur than it is today. In the sampling of special permits collected, extensions of nonconformities are included in as many as a third of the special permits reviewed in a given year, usually as part of a project that includes a number of special permit requests.

Another approach to managing nonconformities is to limit the extent to which a nonconformity can be altered or expanded. Under the current ordinance, a house that is nonconforming in the front yard setback could seek a Special Permit to not only expand in line with the current front wall, but also to expand further forward into the front setback. The City Council could set tighter limits on the degree to which an alteration or extension of a nonconformity would be allowed and Planning staff is working with our legal advisors to understand the limits of that ability, if any.

## **Design Review**

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Design review is a non-binding advisory review by the Urban Design Committee on the design characteristics of a proposed development and can encompass issues ranging from site layout, building massing, architectural features, and materials among other aspects of a project. Under the current zoning ordinance the review by the Urban Design Committee is generally optional and only required for the review of signs.

## **Recommendations**

The 1<sup>st</sup> draft zoning ordinance incorporates design review by the Urban Design Committee as a formal part of the development review process for a number of different development activities that require a special permit. Design review may be sought by an applicant voluntarily before submitting a special permit application and, if the subsequent application incorporates the recommendations of the Committee, the required formal review may be waived.

Design review is required for many special permit projects that include residential or commercial development. In particular, design review is required for any special permit to allow a larger house, effectively serving as an approach to a “large house review” process. The focus of the design review is on design recommendations that can mitigate potential impacts of a project.

The recommendations of the Urban Design Committee are advisory to both the applicant and the permit granting authority and therefore, to the extent permissible, may be incorporated into the conditions attached to a special permit.

Design Review as an advisory review could also be incorporated into the Site Plan Approval process for certain development activities. For instance, in the draft sign section, the staff administering a site plan approval for a particular sign, can request design review if the staff requires further advice from the Urban Design Commission for a complex sign issue.