

CITY OF NEWTON  
LAW DEPARTMENT  
INTEROFFICE MEMORANDUM

DATE: April 9, 2021

TO: All Members, City Council  
All Members, Planning Board

FROM: Jonah Temple, Assistant City Solicitor

RE: Voting Requirement for Riverside Zoning and Special Permit Amendments  
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**BACKGROUND**

On January 14, 2021, Governor Charlie Baker signed into law *An Act Enabling Partnerships for Growth*, a comprehensive economic bill that provides Covid-19 economic relief to various sectors. The Act included the long-awaited Housing Choice legislation that was previously proposed by Governor Baker in an effort to increase housing development. The legislation made several amendments to Chapter 40A of the General Laws, commonly known as the Zoning Act. Among these amendments are (1) the reduction of the number of votes required to enact certain kinds of zoning amendments from  $\frac{2}{3}$  to a simple majority; and (2) a reduction of the number of votes required for the issuance of certain kinds of special permits from  $\frac{2}{3}$  to a simple majority. These new voting thresholds became effective immediately on January 14, 2021 and currently apply to any zoning amendment or special permit that comes before the City Council and meet the criteria for being approved by a simple majority vote.

BH Normandy Riverside LLC (the “Petitioner”) has filed petitions to amend the special permit and to amend provisions of the Newton Zoning Ordinance that govern the development site known as “Riverside,” which is comprised of 13.05 acres of land on two lots: 355 Grove Street and 399 Grove Street. Both lots are either currently in the Mixed Use 3/Transit Oriented Development (“MU-3”) zoning district or will be rezoned to MU-3 in accordance with a previously approved rezoning order. Both lots are also governed by existing Special Permit #27-20 that was issued by the City Council in October 2020 (the “2020 Special Permit”) to allow construction of a ten building mixed-use development (the “Riverside Project”).

More specifically, the Petitioner seeks to amend the text provisions of the Zoning Ordinance that control the MU-3 district to allow for laboratory, research and development and elderly housing uses and to increase the maximum height of certain buildings. The Petitioner seeks to amend the 2020 Special Permit to change the footprints and heights of several buildings, and to amend the approved sign plan.

## QUESTIONS

Given the changes to the Zoning Act, does the new simple majority voting threshold apply to the proposed zoning ordinance amendments related to the Riverside Project?

Given the changes to the Zoning Act, does the new simple majority voting threshold apply to the proposed amendments to the 2020 Special Permit governing the Riverside Project?

## SHORT ANSWER

For the reasons set forth below, the Law Department believes that the proposed zoning amendments (with the exception of one general text amendment) and the proposed amendments to the 2020 Special Permit meet the criteria for being approved by a simple majority vote.

## DISCUSSION AND ANALYSIS

### I. Process

The Massachusetts Executive Office of Housing & Development recently issued guidance for determining voting thresholds under the new provisions of the Zoning Act (the “State Guidance”).<sup>1</sup> The State Guidance sets forth a recommended process for determining whether a proposed zoning ordinance amendment triggers new majority voting threshold. As background, the Zoning Act has always required that the Planning Board hold a public hearing on proposed zoning amendments and make a report and recommendation to the City Council as to whether the amendment should be adopted. In light of this existing requirement, the State Guidance recommends that the Planning Board, after consultation with the Law Department, include in its report a determination of whether the land area affected meets the criteria for an “eligible location” and a determination of which voting threshold applies to the proposed zoning amendments. Accordingly, this memorandum can be read as a recommendation to the Planning Board as to the voting thresholds on the zoning amendments.

The State Guidance is silent as to the process for determining the voting thresholds for special permits. As the Planning Board plays no role in reviewing special permits, this memorandum sets forth the Law Department’s determination as to the voting threshold for the proposed 2020 Special Permit amendments.

### II. The Zoning Ordinance Amendments

Under the amended Zoning Act, the following applicable types of zoning amendments are now subject to a simple majority vote: (1) Amendments that allow as of right or by special permit multi-family or mixed-use developments in an “eligible location”; and (2) Amendments that allow

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<sup>1</sup> The economic bill enacting the Zoning Act amendments directed the Executive Office of Housing and Economic Development, in consultation with the Department of Housing and Community Development (“DHCD”), the Attorney General’s municipal law unit, and the Massachusetts Housing Partnership, to issue this guidance to assist local officials in determining the voting thresholds. DHCD has also issued separate guidance concerning the obligation of certain communities, including Newton, to adopt a by right multifamily zoning district.

by special permit an increase in the permissible density or intensity of use in a multi-family or mixed-use development.

The first question is whether the development parcel is located in an “eligible location.” Section 1A of the Zoning Act defines “eligible locations” as areas that by virtue of its infrastructure, transportation access, existing underutilized facilities, or location is a highly suitable location for residential or mixed-use smart growth zoning districts or starter home districts, including areas near transit stations such as rapid transit, commuter rail, bus or ferry terminals, or areas of concentrated development such as town and city centers and other existing commercial districts in cities and towns and existing rural village districts.

The recently issued State Guidance also clarifies how to identify eligible locations. The guidance provides that a land area qualifies as an eligible location if it is “near” a transit station, and that “[a]ny parcel that is at least partially within 0.5 miles” of a transit station should be deemed to be an eligible location.” The guidance further provides: “[a]ll other land areas may be determined to be “eligible locations” if, in the judgment of the planning board, the land area is a highly suitable location for residential or mixed-use development based on its infrastructure, transportation access, or existing underutilized facilities.”

Based on the language of the Zoning Act and the State Guidance, and after consultation with the Planning Department, the Law Department believes the development parcel is in an eligible location because it is located next to the MBTA Riverside station. The parcel also likely qualifies on the separate basis that it is located in an area of concentrated development, currently bounded by the Hotel Indigo, the Riverside Center office park, and an interstate highway. Apart from these reasons, the Planning Board may also deem the development parcel to be in an eligible location if it finds that the area is a highly suitable location for a mixed-use development.

The second question is whether the proposed Riverside Project constitutes a “mixed-use development.” Section 1A of the Zoning Act defines “mixed-use development” as development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses. The FAQ section of the State Guidance further clarifies that there is no requirement that the mix of uses be in any particular ratio or configuration, and that a mixed-use development does not need to be primarily residential. Based on this definition, the Riverside Project, which contains a mix of both residential and non-residential uses, is a mixed-use development within the meaning of the Zoning Act.

The third question is whether the proposed zoning amendments constitute amendments to *allow* a mixed-use development. As a starting point, the MU-3 zoning district was created in order to allow “the development of a mixed-used center” on the development parcel (Sec. 4.2.1.B). Therefore, there is no question that adoption of the MU-3 zoning district now would only require a majority vote. While acknowledging the absence of any guidance on this issue, it is logical and reasonable to conclude that amendments to the MU-3 zoning district of the nature proposed should likewise trigger a majority vote because they serve the same purpose of encouraging a mixed-use development in this location. This approach is consistent with the basic principles 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, 401-02 (1931).

The legislative intent behind the Zoning Act's revised voting thresholds is clear: to encourage new housing production through the development of multi-family and mixed-use projects. The specific MU-3 amendments being proposed are to increase the maximum height of certain buildings, increase the intensity of the laboratory, research, and development use, and to add elderly housing with services as an allowable use. Each of these amendments are in furtherance and in facilitation of allowing a mixed-use development.<sup>2</sup> Accordingly, the Law Department believes it is more likely a court would support this interpretation rather than a narrow reading of the Zoning Act.

The Law Department also believes that each of the proposed zoning amendments to the MU-3 text constitute "an increase in the permissible density of population or intensity of a particular use in a proposed mixed-use development." The increase in building height allows for more density, and the changes to the breakdown of allowable uses and the addition of elderly housing as an allowable use permit a greater intensity of uses. Therefore, the MU-3 amendments meet two separate criteria for a majority vote: they allow a mixed-use development (G.L. c. 40A, §5(1)) and they increase the permissible density and intensity of uses in a mixed-use development (G.L. c. 40A, §5(2)(b)).

Finally, the Zoning Act does not allow zoning amendments that require a simple majority vote to be combined with amendments that require a two-thirds vote. The Petitioner has also proposed a zoning amendment that would change the use definition of elderly housing with services found in Section 6.2.10.A of the Zoning Ordinance. Because this is a general definition that applies to all zoning districts in the City, it does not meet the criteria for a majority vote. As a result, the City Council must take a separate vote on this particular proposed zoning amendment. The Law Department recommends that the Petitioner withdraw this requested amendment and refile it separately so that it can be docketed and voted on independently.

### **III. The 2020 Special Permit Amendments**

Under the amended Zoning Act, a special permit must be issued by a simple majority vote if it permits a mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns and rural village districts. To qualify, the mixed-use development must also have at least 10% affordable housing for households whose annual income is less than 80% of the area median income with the

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<sup>2</sup> The Law Department does not preclude the possibility that a future discreet or stand-alone amendment to the MU-3 text may not always trigger a majority vote. As here, consideration will need to be given as to whether any proposed amendment allows or facilitates the mixed-use development.

affordability assured for a period of not less than 30 years through the use of an affordable housing restriction.

The first question is whether the proposed Riverside Project is located in a “center of commercial activity” or “commercial district.” For the same reasons that the development parcel is located in an “eligible location” as set forth above, it meets this criterion. The MU-3 is a mixed-use zoning district that, along with the City’s business districts and manufacturing districts, falls under the umbrella term of “commercial district.” Additionally, the purpose of the MU-3 district is to allow a project that will be a center of commercial development. As set forth in the intent section of the MU-3, it seeks to promote a mixed-use development with commercial components that integrates complementary uses. The 2020 Special Permit references the project’s “diverse commercial options” and “commercial uses” throughout, and includes a finding that the project “meets the goals in the Comprehensive Plan by maintaining a significant commercial real estate tax base, maintaining a significant employment base, and encouraging business grown proximate to public transportation.”

The second question is whether the Riverside Project meets the affordability criteria. Because the City’s inclusionary zoning requirements exceed the minimum affordability requirements—by requiring 15% affordability at or below 80% AMI for the life of the project—the project meets this criterion.

The third question is whether the special permit being sought permits the proposed mixed-use development. Again, it is clear that approval of the 2020 Special Permit now would only require a majority vote. Currently, the Petitioner is seeking substantive modifications to that permit, namely changes to the approved plans to account for changes to the heights, footprints, and densities of the buildings and uses. At bottom, the amended special permit that the Petitioner is seeking is still a special permit that will allow a mixed-use development.<sup>3</sup> Additionally, unlike for zoning amendments, section 9 of the Zoning Act governing special permits does not say special permit relief requiring different voting thresholds can’t be combined. This difference in language indicates that special permits must be looked at as a whole with a focus on the ultimate project being approved, which here is a mixed-use project that the new voting requirement was enacted to promote. Even parsing the amendments, each of the proposed special permit amendments are in furtherance of and will facilitate the production of a mixed-use development. Accordingly, the Law Department believes it is more likely a court would support this interpretation rather than a narrow reading of the Zoning Act. In contrast, a narrower reading of the law that imposes a higher voting threshold to amendments to a special permit that itself is subject to a majority vote would frustrate the policy behind the new law.

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<sup>3</sup> Under the Zoning Act, an amendment or modification of a special permit is treated the same as an application for the issuance of a new special permit. The same notice and hearing requirements must be followed, and the City Council must exercise its reasonable discretion in weighing whether to grant the amendments in the same manner as prescribed for original applications. *See Barlow v. Planning Bd. Of Wayland*, 64 Mass.App.Ct. 314, 320-21 (2005).

## **CONCLUSION**

The answers to the questions presented depend on interpreting the new language of the Zoning Act that was enacted less than four months ago. Understandably, there are no Massachusetts judicial decisions that address any of these issues. While various state departments have issued basic guidance, they provide limited assistance. Against this backdrop, and in view of the language of the Zoning Act, the legislative history, and established principles of statutory construction, the Law Department believes a court would likely find that both the proposed zoning amendments and the proposed special permit amendments for the Riverside Project meet the criteria for approval by simple majority vote.