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October 1, 2021

Via Email commission@NewtonMa.gov; VBirmingham@newtonma.gov;
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Newton Historical Commission
1000 Commonwealth Avenue
Newton, MA 02459

Re: demolition of 29 Greenwood St., Newton

Dear Commissioners:

In the matter of Ty Gupta and his demolition of the landmarked house at 29 Greenwood St. I write to comment on the letter of September 17, 2021, from the Mayor and the Director of Planning and Development to the Historical Commission.

I believe that the Mayor's letter confuses two different laws, and therefore underappreciates the authority of the Commission. Demolition of 26 Greenwood, a landmarked property, is governed by Newton's *Landmarks Ordinance*. Under the *Landmarks Ordinance* (Newton City Ordinances, §§ 22-60 to 22-75), the Commission has power to block any rebuild of another structure. Indeed, after demolition, blocking rebuild is essentially the *only* option for the Commission. Consenting to replacement is specifically *barred* by the Ordinance (§ 22-65(a)). The Mayor's letter analyzes Mr. Gupta's actions under the *Demolition Delay Ordinance* (§§ 22-50 to 22-59). The two Ordinances are different. Limitations under the Demolition Delay Ordinance do not translate into limitations on the Commission's authority under the Landmarks Ordinance. It's important to keep them separate.

By looking at the wrong law, the Mayor's letter compromises the Commission's ability to do its job under the right law. Before demolition, the Commission has great latitude to negotiate with a developer. After demolition, the Landmarks Ordinance requires the Commission to say "no." That before/after difference is essential: if the Commission does not have clear authority to say "no" after demolition, then it has no leverage to negotiate before, and the purposes of the Landmarks Ordinance cannot be served.

The Mayor's letter overlooks a key sentence of the Landmarks Ordinance

The Landmarks Ordinance gives the Commission the authority to block Mr. Gupta's project—indeed, on the facts as I understand them to be, the Commission has no other alternative (¶ 22-65(a), emphasis added):

Sec. 22-65. Review authority.

(a) Except as this division may otherwise provide, unless the commission shall first have issued a certificate of appropriateness, a certificate of non-applicability, or a certificate of hardship, ***no building, structure, exterior architectural feature or landscape of a landmark shall be altered or demolished nor any building or demolition permit issued therefor by the city or any department thereof.***

The Ordinance sets out a few limited carveouts in which the Commission may fashion an intermediate compromise solution before demolition, but none apply after demolition.

The Mayor's letter states:

Notably, [the Commission's] review authority by law is limited to determining whether the proposed plans restore the historic value of the property to the extent reasonably possible.

The Mayor's letter does not cite any source for this "limit" on the Commission's authority. While analogous wording appears in the Demolition Delay Ordinance, such language does *not* appear in the Landmarks Ordinance. The Mayor's letter seems to be 180° opposite the wording that *is* in the Ordinance, at § 22-65(a).

Likewise, the Mayor's letter states: "The NHC does not have legal authority to determine that the owner may never construct a building on the property." Again, there is no such limit on the Commission's authority stated in the Landmarks Ordinance, and such a limit is incompatible with the language that *does* exist. If a developer "forgot" to ask the Commission for a certificate of appropriateness, "***no ... building or demolition permit [shall be] issued therefor by the city or any department thereof.***" Far from being outside the Commission's authority, after demolition, blocking all further construction is the *only* remedy the Ordinance provides.

Before demolition, the Landmarks Ordinance gives the Commission power to grant a certificate of appropriateness, disapprove it, or grant it with conditions, as the Mayor's letter describes. § 22-67. But *after* demolition, the Landmarks Ordinance specifically tells the Commission ***not*** to retroactively consent to any new construction. If any retroactive consent is available, it's only available from a court.

The relevant ordinance, the Landmarks Ordinance, does not provide a demolisher an option to "remediate the violation"

The Mayor's letter states:

"The owner must come ... with a proposal to reverse the violation on the property and reconstruct the Hyde house; in legal language, this is called "remediating the violation." The NHC has the power to accept or reject proposed reconstruction plans based upon whether, in their expert opinion, the proposal remediates the violation.

The "remediation of violation" language is taken from the *Demolition Delay Ordinance*, § 22-50(e), but does not appear in the *Landmarks Ordinance*. The only relevant language in the Landmarks Ordinance provides for disapproval of a certificate of appropriateness, or a \$300/day fine. The Landmarks Ordinance contains no language that allows a demolisher to escape liability by "remediating the violation."

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More importantly, consent for rebuilding attenuates any authority and negotiating leverage the Commission might have against future violators.

Under the Landmarks Ordinance, disapproval is the appropriate action. If there is any ambiguity in the Ordinance (which I don't think there is), disapproval is the best (indeed only) way to resolve it. Because the Ordinance creates a right to court review for only a limited number of parties—the developer and abutters, **but not** the Commission or those members of the public with a general interest in Newton's historic preservation—the only way to resolve disagreement over the scope of the Landmarks Ordinance is for the Commission to disapprove Mr. Gupta's permit, so that Mr. Gupta has the opportunity to initiate a court proceeding. In court, Mr. Gupta, the City, and the public as *amicus curiae* can all be heard, and the Court can order whatever compromise seems just.

Reading between the lines of the Mayor's letter, it seems everyone is agreed that the morally-appropriate remedy is to disapprove any further rights to build, and to prevent Mr. Gupta from profiting from disregard of the law. As I read the Mayor's letter, there's some question whether the Commission has authority to stop him. I believe that § 22-65(a) of the *Landmarks Ordinance* is clear, and that disapproval of a certificate is not only within the Commission's authority; it's the only permissible action, and it results in a denial of all permits. It's also the only way to resolve whatever legal ambiguity exists in the Landmarks Ordinance.

The Mayor's letter misapprehends the division of authority between the Commission and the Superior Court

The Mayor's letter states that the options open to the Commission and Superior Court are limited to "... restoration, recreation or remediation..." However, the Mayor's letter does not cite any portion of the Landmarks Ordinance. The wording in the Mayor's letter is taken from the Demolition Delay Ordinance. In contrast, the *Landmarks Ordinance* (§ 22-65(a)) *requires* both the city and all departments to refuse any permit for any rebuild.

Options for a court are specified in § 22-71, which provides that enforcement and appeals from the Commission go to the Middlesex Superior Court. The words "sitting in equity." in § 22-71 mean that the Superior Court has the full range of remedies open to it: from no action, to fine, to injunction, to ordering Mr Gupta to reassemble every toothpick of the structure so that he can perform a perfect reconstruction, to whatever other remedy the Court deems just and equitable, limited only by the Due Process and Takings clauses of the Constitution.

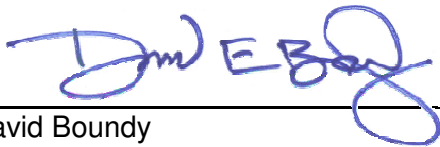
Options for the Commission, *after demolition*, are specified in §§ 22-65 and 22-67: the Commission can either disapprove (with the consequence that no city agency can issue any further permit, § 22-65(a)) or a whitewash approval. (The other options, such as a certificate of hardship and similar exceptions, are not applicable after demolition).

If Mr. Gupta wants a full or partial waiver of the Landmarks Ordinance, the Court can order some intermediate equitable remedy. Mr. Gupta had fair warning of the law before he demolished the structure. He's not without options now, but they're only available from the Middlesex Court, not this Commission.

Newton Historical Commission
October 1, 2021

Conclusion

Sometimes, it's *not* easier to get forgiveness than permission. For a developer that illegally destroys a landmark building, the Landmarks Ordinance doesn't have a forgiveness provision. Mr. Gupta should not be permitted to profit from his misconduct. To allow otherwise, would be to gut the intent of the Landmarks Ordinance. The Commission is not a toothless tiger. This Commission has authority to deny Mr. Gupta any right to profit from his misconduct, and should exercise that authority.



David Boundy

October 1, 2021
Date

October 18, 2021

Re: 29 Greenwood Street, Newton

Newton Historical Commission
1000 Commonwealth Avenue
Newton, MA 02459

Dear Commissioners,

Ty Gupta, the developer of a landmarked but now demolished house at 29 Greenwood, has submitted plans in support of his request to correct the violations and be allowed to rebuild the house he demolished. On September 17, 2021 the Mayor and the Director of Planning and Development wrote a letter outlining what they asserted were the legal standards governing your decision. The undersigned Newton lawyers write to correct several points of incorrect legal statements in that letter.

I. THE BASIC FLAW OF THE LETTER IS THAT IT IS BASED UPON THE WRONG NEWTON ORDINANCE- THE DEMOLITION DELAY ORDINANCE, NOT THE LANDMARKS ORDINANCE.

These are two entirely different Ordinances which apply to separate categories of Newton properties and give completely different sets of procedures and remedies. As one can even tell from its title, the Demolition Delay Ordinance¹ merely creates a timetable for when demolition can occur (12 months or 18 months) with houses over 50 years old having some historical significance.

The Newton Landmarks Ordinance, on the other hand, is a significantly stronger ordinance with a stated goal of ... “the preservation or protection of the landmark”. This ordinance prevents the demolition of the 26 Landmarked houses in Newton, except in very limited cases which it can approve only prior to demolition according to the detailed review process specified in the Ordinance. See Sec 22-65. Simply stated, one cannot demolish a landmarked structure, and then seek retroactive permission to demolish and rebuild.

¹ Both Ordinances can be found in Chapter 22 “Planning and Development” of the Newton City Ordinances (updated 7/27/20). Demolition Delay is Article III, Div. sec. 22-50 – 22-59. Landmarks Ordinance is sec 22-60- 22-75.

The only way to get approval to demolish a Landmarked structure is to file an Application for a Certificate of Appropriateness with the NHC and receive a Certificate of Appropriateness to demolish prior to demolition. Sections 22-65 through 22-67 set forth the procedure for the Application, materials to be submitted by the developer, timing for the scheduling of a public hearing and decision, and the legal standards for the NHC’s review and decision. The NHC has power to grant the Application, deny it or grant it with conditions. (See “Determination” sec. 22-67).

If the NHC denies the application to demolish, the landmark stays as is. Any “aggrieved person” (as defined by the Ordinance)² wanting to appeal the NHC decision may do so to the Massachusetts Superior Court sitting in Equity. The applicant’s only recourse under the Landmarks Ordinance therefore is to appeal to Superior Court. He cannot go ahead and demolish and then come back to the Commission and try to get approval for his plans after the fact to remediate the violation.

II. THE RELEVANT ORDINANCE, THE LANDMARKS ORDINANCE, PROVIDES NO RIGHT FOR SOMEONE WHO HAS ILLEGALLY DEMOLISHED A LANDMARK TO “REMEDiate THE VIOLATION”—THE MAYOR’S LETTER PROCEEDS UNDER THE DEMOLITION DELAY ORDINANCE, WHICH DOES NOT APPLY HERE

The Mayor’s letter states:

“The owner must come ... with a proposal to reverse the violation on the property and reconstruct the Hyde house; in legal language, this is called “remediating the violation.” The NHC has the power to accept or reject proposed reconstruction plans based upon whether, in their expert opinion, the proposal remediates the violation (emphasis added).

The “remediation of violation” language is taken from the Demolition Delay Ordinance, not the Landmarks Ordinance. Demolition Delay Ordinance Sec. 22-50(e) states:

“Non-Compliance...

In addition, unless a demolition permit issued in accordance with this section was obtained ... the commissioner may elect to (1) issue a stop work order halting all work ... until the commission notifies the commissioner in writing that ... the commission has accepted the applicant’s plans to remediate such noncompliance; (2) refuse to issue any certificates of occupancy, temporary or final, until any noncompliance has been remediated.”

² *Person aggrieved*: the applicant, an owner of adjoining property, an owner of property within the same historic district or of property within one hundred feet of the property lines of the property subject to the application, and any charitable corporation having as one of its purposes the preservation of historic buildings or places. “Definitions” Sec. 22-61.

There is no language or procedure in the Landmarks Ordinance which refer to “remedying” or “remediation” of a violation. The only language in this Ordinance regarding violations refers to their enforcement in the Superior Court and a \$300/day fine:

“Sec. 22-71. Enforcement.

Middlesex Superior Court sitting in equity shall have jurisdiction to enforce the provisions of this division and any regulations enacted hereunder and the determinations, rulings, and regulations issued pursuant thereto and may, upon the petition of the mayor or of the city council or of the commission, restrain by injunction violations thereof; and, without limitation, such court may order the removal of any building, structure, or exterior architectural feature constructed in violation thereof, or the substantial restoration of any building, structure, exterior architectural feature or landscape of a landmark altered or demolished in violation thereof, and may issue such other orders for relief as may be equitable.

Whoever violates any of the provisions of this division shall be punished by a fine of three hundred dollars (\$300.00). Each day during any portion of which a violation continues to exist shall constitute a separate offense.”

III. THE LETTER INCORRECTLY STATES “NOTABLY, THEIR REVIEW AUTHORITY IS LIMITED TO DETERMINING WHETHER THE PROPOSED PLANS RESTORE THE HISTORIC VALUE OF THE PROPERTY TO THE EXTENT REASONABLY POSSIBLE (EMPHASIS ADDED)

The Mayor’s letter does not cite any source for this limit on the Commission’s authority. No analogous wording appears in the Landmarks Ordinance, no such principle is inferable from the language of the Landmarks Ordinance, and no such limit is contained in any case interpreting the Ordinance

IV. THE LETTER INCORRECTLY STATES: “THE NHC DOES NOT HAVE LEGAL AUTHORITY TO DETERMINE THAT THE OWNER MAY NEVER CONSTRUCT A BUILDING ON THE PROPERTY.”

Again there is no such language by its terms or implication in this Landmarks Ordinance. The statement shows a complete misreading or basic lack of comprehension as to how the Ordinance works. The NHC has stated power to grant the Application, deny it or grant it with conditions. (See “Determination” sec. 22-67). But there is nothing in the law which states that the NHC must allow the owner to construct a house on the property after it has demolished a Landmarked

house. If the NHC denies an applicant’s application for a Certificate of Appropriateness to demolish a Landmarked house, the Landmarked house cannot be demolished and must remain on the property, unless the developer files a successful lawsuit in Superior Court.

The Ordinance provides only one mechanism to obtain approval to demolish a landmarked structure: a developer must file an application for a certificate of appropriateness with the commission and receive a certificate of appropriateness to demolish. If the commission denies an applicant’s application for a certificate of appropriateness, “no building, structure, exterior architectural feature or landscape of a landmark shall be altered or demolished nor any building or demolition permit issued therefor by the city or any department thereof (Sec 22-65(a)).” Far from there being such limit on the commission’s authority, the Commission has clear authority under the Ordinance to prevent demolition and rebuilding.

V. THE ASSERTION THAT “THE PURPOSE OF A COURT ACTION IS TO PRESERVE OR RESTORE A LANDMARKED PROPERTY” IS LEGALLY INCORRECT

Again there is no such language by its terms or implication in this Ordinance as to what the Court should do. The “sitting in equity” language means that the Superior Court has the full range of remedies open to it: from no action, to fine, to injunction, to permit reconstruction, to allow a new house, or whatever other the Court deems just and equitable on the facts of the case. The Middlesex Superior Court sitting in Equity will do what it deems just and equitable with clearly no legal requirement to “preserve or restore” the demolished house as claimed. On the compelling facts of this case, we would think it appropriate that the Court would impose the most serious penalties against the developer-a denial of Mr. Gupta’s attempt to rebuild and profit therefrom.

VI. THE LETTER MISCHARACTERIZES THE OPTIONS AVAILABLE TO THE COMMISSION

The letter’s attempt to limit the NHC’s options to“... restoration, recreation or remediation...” is without any legal basis in the language of the Landmarks Ordinance and misrepresenting what the NHC’s legal options are as described above. The Commission has the legal right to deny the developer’s request to rebuild and we encourage them to do so.

CONCLUSION

Mr. Gupta must not be granted authority to rebuild that which he has illegally destroyed. To allow otherwise, would be to gut the language and intent of the Newton Landmarks Ordinance. His conduct in demolishing the 1744 Gershom Hyde house was clearly illegal and this Commission should not allow him to rebuild a replica and profit from his misconduct. Allowing this developer to flagrantly violate the Landmarks Ordinance and then be allowed to build a new “replica” house would create a dangerous precedent to other unscrupulous developers to demolish other Newton Landmarks.

RESPECTFULLY SUBMITTED,

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Kenneth W. Halpern, Esq.
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Peter T. Robertson, Esq.
Robert Tuchmann, Esq.
Gerald W. Tutor, Esq.

cc. w/ Exhibits: Honorable Ruthanne Fuller
Barney Heath, Director of Planning and Development
Stephen C. Farrell

- Ex. 1. Annotated copy of September 17, 2021 from the Mayor and the Director of Planning and Development
- Ex. 2. Newton Landmarks Ordinance
- Ex. 3. Newton Demolition Delay Ordinance

SIGNATURES ON THE FOLLOWING PAGES

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September 17, 2021

Dear Mr. Farrell and our many concerned residents,

A critical mission for the City of Newton via our Historical Commission is caring for our historic resources, designating City landmarks, and protecting these historic properties.

My job as Mayor and the job of our Planning Department staff is to support fully these preservation efforts and the Historical Commission.

I as Mayor and Barney Heath as Director of Planning and Development share our Commissioners and our residents' outrage that the owner/developer at 29 Greenwood demolished one of our treasured landmarked properties. It was completely wrong. Its demolition went completely against our City's goal of ensuring our landmarked historic properties remain part of Newton's fabric in perpetuity.

The City vests in our Newton Historical Commission (NHC) the regulatory authority over the landmark ordinance. They have my full support and the full weight of my office in this important work.

I know our Commissioners take their role as stewards of Newton's historic properties seriously, act with great care, and willingly work many long hours.

What has happened at 29 Greenwood to date?

Enforcement: The City of Newton Inspectional Services Department (ISD) immediately issued a stop work order upon notification that the owner demolished 29 Greenwood. Thereafter, the Newton Historical Commission took the most swift and decisive action available to them under the City of Newton ordinances. They quickly met and formally determined that the owner's actions constituted a violation of the landmark ordinance. They directed ISD to maintain the stop work order. They imposed the maximum daily penalty, which continues to accrue.

What happens next at 29 Greenwood?

Reconstruction: The owner cannot restart any construction activities on the property prior to receiving approval from the NHC. The fines assessed by the Commission will continue to accrue until the owner receives such approval.

The owner must come before the Newton Historical Commission with a proposal to reverse the violation on the property and reconstruct the Hyde house; in legal language, this is called "remediating the violation." The NHC has the power to accept or reject proposed reconstruction plans based upon whether, in their expert opinion, the proposal remediates the violation.

Notably, their review authority by law is limited to determining whether the proposed plans restore the historic value of the property to the extent reasonably possible. The NHC's decision must be based on an objective review and does not and cannot have a punitive component. The NHC does not have the legal authority to determine that the owner may never construct a building on the property.

Court Action: Under the City of Newton landmark ordinance, the City may seek court action to enforce the provisions of the ordinance. Specifically, the City can request that the Court order the removal of structures constructed in violation of the ordinance. The City can also request that the Court order reconstruction of a building demolished in violation of the ordinance. The purpose of a Court action is to preserve or restore a landmarked property. The option of seeking court action is one the City will continue to consider and use if necessary.

The actions the owner of 29 Greenwood will be required to take with regards to removal of any built structures and/or reconstruction of any built structures is under the purview and the authority of the Newton Historical Commission. I know the NHC will take great care when they render a decision as to what they think would be most historically appropriate and I support the Newton Historical Commission taking the strongest legally possible measures.

How can we prevent this from happening to a landmarked property ever again?

The Planning Department and the Chair of the Historical Commission are working with the Law Department on ways the landmark ordinance and the landmark review process could be strengthened to lessen the chance of this type of egregious action ever occurring again. We welcome ideas. For example, one idea that resonates strongly is having the NHC require a third party, independent architect to monitor regularly construction activity on key properties that have been approved by the NHC. This possible requirement may need an ordinance change to make it possible.

The owner's next available opportunity to be heard is at the October 28 NHC meeting. We understand that the owner intends to present an official submission on how they will restore the building. The Commission will decide if they agree and will officially respond in due course.

In the meantime, the City will continue to enforce the stop work order at the site and to assess daily fines. This will continue until the Newton Historical Commission approves an acceptable resolution.

Let us reiterate that the demolition of the Hyde house was wrong. While no restoration, recreation or remediation will ever be satisfying, we are confident that the Newton Historical Commission will do the most they can do in this onerous, terrible situation.

We welcome your continued communication with us and with the members of the Newton Historical Commission.

Sincerely,

Ruthanne Fuller, Mayor

Barney Heath, Director of Planning and Development

Chapter 22

PLANNING AND DEVELOPMENT*

Art. I.	In General, §§ 22-1—22-18
Art. II.	Conservation Commission, §§ 22-19—22-37
Art. III.	Historical Provisions, §§ 22-38—22-79
	Div. 1. Commissions and Districts, §§ 22-38—22-49
	Div 2. Demolition Delay, §§ 22-50—22-59
	Div. 3. Landmarks, §§ 22-60—22-75
	Div. 4. Public Buildings, §§ 22-76—22-79
Art. IV.	Urban Design Commission, §§ 22-80—22-94
Art. V.	Economic Development Commission, §§ 22-95—22-99
Art. VI.	Commission on Disability, §§ 22-100—22-104

**ARTICLE I.
IN GENERAL**

Sec. 22-1. Department established; duties.

- (a) A department of planning and development is hereby established in the city to:
- (1) plan zoning, urban renewal, land use and related municipal functions in the field of city planning;
 - (2) coordinate efforts directed toward the future development of the city;
 - (3) plan its continued improvement consistent with its physical, social and economic conditions and resources;
and
 - (4) exercise the powers, duties and functions of housing and redevelopment authorities under General Laws, chapter 121B as provided in chapter 705 of the Acts of 1975.

(b) The department shall include the director, the planning and development board established by section 22-3, the historical commission, the conservation commission, the urban design commission and such other boards, committees, commissions, agencies or departments as may from time to time be authorized under state or federal law or by ordinance to undertake community development activities. (Rev. Ords. 1973, § 15-2; Ord. No. 102, 12-15-75)

Sec. 22-2. Director; powers and duties.

(a) There shall be a director of planning and development who shall be an executive officer of the city and all provisions of law for the appointment and removal of department heads shall be applicable to the position.

***Cross references**—Administration, Ch. 2; buildings, Ch. 5; fire protection and prevention, Ch. 10; health and human services, Ch. 12; parks and recreation commission, Ch. 21; public works department, Ch. 25; streets and sidewalks, Ch. 26; zoning, Ch. 30

State law reference—Planning generally, G.L. c. 41, § 81A et seq.

(g) Exemptions

- (1) The owner may request exemption from this ordinance if the owner can prove to the commission that maintenance of the landmark will cause substantial hardship according to the standards set forth in Section 22-40(f)(10); provided, however, that the owner's self-created hardship shall not qualify as a basis for a hardship exemption.
- (2) In situations where, in the commission's view, it is impracticable to immediately repair an architectural feature, or prohibitively expensive to replace it, then the owner shall remove and store such architectural feature safely, until such time as it becomes financially possible to recreate the feature from the original pieces. The owner shall make temporary repairs in its place to protect the structure and/or provide for the safe use of the landmarked premises. (Ord. No. X-179, 12-19-2006)

Secs. 22-52—22-59. Reserved.

DIVISION 3. LANDMARKS

Sec. 22-60. Landmark Preservation—enactment and purpose.

This division is enacted pursuant to the authority derived from section 6 of the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts, and Charter of the City of Newton.

The purpose of this enactment is to promote the educational, cultural, economic and general welfare of the public through the preservation and protection of the distinctive architecture and other characteristics of buildings, structures, landscapes, and places significant in the history and prehistory of the Commonwealth of Massachusetts and the City of Newton and through the maintenance and improvement of settings for such buildings, structures, landscapes, and places and through the encouragement of compatible development and the discouragement of destruction of or damage to such resources. (Ord. T-288, 9-9-93)

Sec. 22-61. Definitions.

For purposes of this section, the following words shall be defined as follows:

Altered: changed in exterior color, otherwise changed, rebuilt, reconstructed, restored, removed, or remodeled.

Building: a combination of materials forming a shelter for persons, animals, or property.

Commission: the Newton Historical Commission or particular Historic District Commission acting under the provisions hereof.

Constructed: built, erected, installed, enlarged, or moved.

Demolished: destroyed or altered in such a substantial manner as to constitute destruction.

Exterior architectural feature: such portion of the exterior of a building or structure as is open to view from a public or private street, way, park, or body of water which is identified for preservation by its designation by the commission as a landmark, including but not limited to the architectural style and general arrangement and setting thereof, the kind, color, and texture of exterior building materials, the color of paint or other materials applied to exterior surfaces and the type and style of windows, doors, lights, signs, and other appurtenant exterior fixtures.

Historic district: any area containing distinctive buildings, structures, landscapes, and places as established in

accordance with G.L. c. 40, s. 8D and chapter 22 of the Revised Ordinances.

Landmark: any building, structure, landscape or place which has been designated for preservation for reasons of its historic significance.

Landscape: a streetscape or an arrangement of land for human use and enjoyment, including placement of structures, vehicular and pedestrian ways and plantings.

Person aggrieved: the applicant, an owner of adjoining property, an owner of property within the same historic district or of property within one hundred feet of the property lines of the property subject to the application, and any charitable corporation having as one of its purposes the preservation of historic buildings or places.

Structure: a combination of materials other than a building, including, but not limited to, a bridge, tower or other engineering work, sign, fence, wall, terrace, walk or driveway. (Ord. No. T-288, 9-9-93)

Sec. 22-62. Eligibility for designation.

All buildings, structures, landscapes and places currently listed on the National Register of Historic Places as individual sites or otherwise listed as eligible for said National Register as individual sites shall be eligible for landmark designation and preservation. No additional investigation and report on the historical and architectural significance of the buildings, structures, landscapes or places to be designated as a landmark shall be required for such sites.

Buildings, structures, landscapes, and places listed on the National Register of Historic Places as part of an historic district, but not individually, or which are eligible for said National Register as part of an historic district, but not individually, may be eligible for landmark designation and preservation if the commission determines that such building, structure, landscape or place is a contributing element of such National Register historic district and possesses one or more of the National Register criteria. The commission may reject the nomination of any such building, structure, landscape or place if it determines that such property lacks sufficient historical or architectural significance for landmark designation. Buildings which are eligible for the National Register either individually or as part of a district may be nominated for landmark designation if they possess historic characteristics sufficient to qualify for listing on the National Register as certified by the Massachusetts Historic Commission.

Any land which, as of August 9, 1993, is contained in the same lot upon which a building or structure eligible for landmark designation is located regardless of whether such lot is later divided, subdivided or redrawn, or any land which, as of August 9, 1993, is contained in an adjoining or surrounding lot(s) held in common ownership or control or used in connection with the lot upon which the building or structure eligible for landmark designation is located, shall be subject to inclusion in the landmark designation as a Newton Landmark Preservation Site, where the preservation and maintenance of such land is necessarily and reasonably related to the stated legislative goal of landmark preservation. Any such designation of land shall include a statement of the reason(s) for the inclusion of the land in the landmark designation pursuant to the legislative standards established herein.

Should any owner, subsequent owner, lessee, heir or assign seek to place a new building or structure on a lot which has been included in a designation as a landmark, the design, size, shape and location of said new building or structure shall be subject to the full review authority of the commission as set out in sections 22-65 and 22-66 as a condition to any building permit to insure that such new building or structure is not detrimental to the landmark status of any pre-existing building or structure, and does not undermine the purpose and intent of this division of the preservation of any building, structure, landscape or place of historic significance. (Ord. No. T-288, 9-9-93; Ord. No. U-25, 9-7-94; Ord. No. X-159, 07-11-05; Ord. No. X-240, 11-6-06)

Sec. 22-63. Nomination

(a) Petitions for nomination of buildings, structures, landscapes and places for consideration of designation as a landmark shall only be submitted to the commission, on a form provided by the department of planning and development, by any of the following:

- (1) all record owners of the nominated property;
- (2) a member of the city council, provided that at least one (1) member of the commission must co-petition the nomination; or
- (3) the mayor, the director of planning and development, or the commissioner of inspectional services, provided that at least one (1) member of the commission must co-petition the nomination.

(b) The commission by three-quarters (3/4) vote may, after public hearing, designate as a landmark any property within the city being or containing a structure or landscape which it determines to be either (1) importantly associated with one or more historic persons or events, or with the broad architectural, aesthetic, cultural, political, economic, or social history of the city or the commonwealth or (2) historically or architecturally significant (in terms of period, style, method of construction, or association with a famous architect or builder) either by itself or in the context of a group of structures and may order amendments to any designation of landmark theretofore made. Designation of a landmark or amendment or rescission of previous designation shall include a statement of the reasons for such designation pursuant to the legislative standards established herein.

(c) The commission shall consider the following conditions:

- (1) that the location and setting is compatible with future preservation and use;
- (2) that the distinguishing characteristics of significance are for the most part original and intact or capable of restoration;
- (3) that the existing or proposed use is compatible with the preservation and maintenance of the site.

(d) The commission shall hold a public hearing prior to any designation of landmarks. The commission shall give not less than fourteen days notice of such public hearing by publication in a newspaper of general circulation in Newton and by mailing notice thereof to the owner of the proposed landmark and to every property owner abutting the proposed landmark (each such owner to be determined from the then current records of the assessing department), and to the mayor, the planning board, and the city clerk.

Prior to the public hearing, the commission shall transmit copies of the agenda to the planning board for its consideration and recommendation.

(e) The Newton Landmark Preservation Sites shall be recorded as follows:

- (1) The office of the city clerk shall record with the Middlesex County recorder the legal description of all buildings, lands, sites or areas designated as Newton Landmark Preservation Sites by the board, and shall send a copy to the commissioner of inspectional services. In addition, the same may be made available to the public in form and fashion as the commission or board deems appropriate.
- (2) Newton Landmark Preservation records.

a) The commission shall keep current and public a list of all properties designated as Newton Landmark

Preservation Sites, or included in the State or National Register of Historic Places and make the same available to the public in form and fashion as the commission or city council deems appropriate.

- b) The commission will provide the commissioner of inspectional services and the director of planning and development with current lists and maps showing Newton Landmark Preservation Sites and Districts for their use in referring applications to the commission. (Ord. No. T-288, 9-9-93; Ord. No. X-228, 9-18-06).

Sec. 22-64. Additional powers and duties of the commission.

The commission shall have the following powers and duties in addition to those otherwise specified herein:

(a) The commission shall have the authority to provide general preservation plans and guidelines to owners of Newton Landmark Preservation Sites regarding maintenance, restoration, and rehabilitation.

(b) The commission shall have the authority to promote public recognition and appreciation for Newton Landmark Preservation Sites. It shall periodically publish a register of designated and potential Newton Landmark Preservation Sites, along with guidelines and preservation programs available at that time.

(c) The commission shall have the authority to initiate solicitation of gifts and contributions to be made to the city to support the activities and purposes of the commission. The commission shall assist the city staff in the preparation of applications for grant funds made by the city to outside funding sources for the purpose of city landmark preservation. (Ord. No. T-288, 9-9-93)

Sec. 22-65. Review authority.

(a) Except as this division may otherwise provide, unless the commission shall first have issued a certificate of appropriateness, a certificate of non-applicability, or a certificate of hardship, no building, structure, exterior architectural feature or landscape of a landmark shall be altered or demolished nor any building or demolition permit issued therefor by the city or any department thereof.

(b) Any person who desires to obtain a certificate from the commission shall file with the commission an application for a certificate of appropriateness, a certificate of non-applicability, or a certificate of hardship, as the case may be, in such form as the commission may reasonably determine, together with such plans, elevations, specifications, materials, or other information the commission deems necessary to enable it to make a determination on the application. When such an application involves the proposed alteration to or demolition of a Newton Landmark Preservation Site that is located within a local Historic District, the commission shall have the option of delegating its review authority to the local Historic District Commission which has the review authority over that local historic district.

(c) The commission shall issue a certificate of appropriateness to the applicant:

(1) if the commission determines that the construction, alteration or demolition for which an application of appropriateness has been filed will be appropriate for or compatible with the preservation or protection of the landmark, or

(2) if prior to the issuance of any disapproval, the commission, as it may, notifies the applicant of the commission's proposed action and includes, as it may, recommendations for changes in the applicant's proposal, which may include recommendations as to appropriateness of design, arrangement, texture, material and similar features, that, if made, would make the application acceptable to the commission and within fourteen days of the receipt of such notice, the applicant files a written modification of his application

in conformity with the recommended changes of the commission.

(d) The commission shall issue a certificate of non-applicability to the applicant if the commission determines that an application for a certificate of appropriateness or for a certificate of non-applicability:

- (1) does not involve any exterior architectural feature or landscape of a landmark, or (2) involves an exterior architectural feature or landscape of a landmark that is not then subject to review by the commission in accordance with the provisions hereof.

(e) If a certificate of hardship has been applied for, or if the commission determines that the construction or alteration for which a certificate of appropriateness has been applied for is inappropriate, the commission shall issue a certificate of hardship to the applicant if the commission determines that:

- (1) owing to conditions especially affecting the building, structure, landscape, or place involved, but not affecting the landmark's general historic qualities, failure to approve an application will involve a substantial hardship, financial or otherwise, to the applicant;
- (2) such application may be approved without substantial derogation from the intent and purpose of this ordinance; and
- (3) the application may be approved without substantial detriment to the public welfare.

(f) The commission shall issue a certificate of appropriateness to the applicant if the commission fails to make a determination on an application within the time specified in paragraph three of section 22-67. (Ord. No. T-288, 9-9-93; Ord. No. X-240, 11-6-06)

Sec. 22-66. Factors to be considered by the commission.

In passing upon matters before it, the commission shall consider, among other things:

(a) *In general:*

- (1) the historical and architectural value, and significance of the building, structure, landscape, or place;
- (2) the general design, arrangement, texture, material, and color of the features involved; and
- (3) the relation of such features to similar features of buildings and structures in the surrounding area.

(b) *In the case of new construction or additions to existing buildings or structures:* the appropriateness of the size, shape, and location of the building or structure, both in relation to the land area upon which the building or structure is situated and to buildings and structures in the vicinity.

(c) *In the case of demolition or removal:*

- (1) whether the demolition or removal of a building or structure of such architectural or historic significance would impair the public interest and the general welfare of the people of the city, town, or state;
- (2) whether the demolition or removal of the building or structure would undermine the purpose and intent of this division and the objectives of local preservation plans;
- (3) whether the building or structure has so deteriorated that preservation or restoration is not structurally or

economically feasible, provided that the owner's self-created hardship or failure to maintain the property in good repair shall not qualify as a basis for the issuance of a certificate of hardship.

The commission shall not make any recommendations or requirements except for the purpose of preventing developments incongruous to the historical or architectural characteristics of a building, structure, landscape or site, or their surroundings.

The commission may impose dimensional and set-back requirements in addition to those required by the applicable ordinance or by-law. (Ord. No. T-288, 9-9-93)

Sec. 22-67. Determination.

The commission shall determine promptly, and in all events within forty-five (45) days after the filing of an application for a certificate of appropriateness, a certificate of non-applicability or a certificate of hardship, as the case may be, whether the application involves any exterior architectural features, or landscapes that are subject to approval by the commission. If the commission determines that such application involves any such features or landscapes, the commission shall hold a public hearing on such application, unless such hearing is dispensed with as hereinafter provided in paragraph four of this section.

The commission shall fix a reasonable time for the hearing on any application and shall give public notice of the time, place, and purposes thereof at least fourteen days before said hearing in such manner as it may determine, and shall give notice by mailing, postage prepaid, a copy of said notice to: (a) the applicant, (b) the owners of all adjoining property and other property deemed by the commission to be materially affected thereby as they appear on the most recent real estate tax list of the board of assessors; (c) the planning board; (d) any person filing a written request for notice of hearings, such request to be renewed yearly in December, and (e) such other persons as the commission shall deem entitled to notice.

As soon as convenient after such public hearing but in any event within sixty days after the filing of the application, or within such further time as the applicant may allow in writing, the commission shall make a determination on the application. If the commission fails to make a determination within such period of time, the commission shall thereupon issue a certificate of appropriateness.

A public hearing on an application need not be held if such a hearing is waived in writing by all persons entitled to notice thereof. In addition, a public hearing on an application may be waived by the commission if the commission determines that the exterior architectural feature, landscape or archeological feature of the landmark is so insubstantial in its effect on the landmark that it may be reviewed by the commission without a public hearing on the application, provided, however, that if the commission dispenses with a public hearing on an application, notice of the application shall be given to the owners of all adjoining property and other property deemed by the commission to be materially affected thereby as above provided, and ten days shall elapse after the mailing of such notice before the commission may act upon such application.

A certificate of appropriateness, a certificate of non-applicability or a certificate of hardship shall be issued upon majority vote of the members of the commission, except in the case of inaction by the commission within the time specified in this section, in which case a certificate of appropriateness shall be automatically issued.

Each certificate of appropriateness, non-applicability or hardship issued by the commission shall be dated and signed by its chairman, vice chairman, secretary, or such other person designated by the commission to sign such certificates on its behalf.

The commission shall file with the city clerk, and with any department of the city having authority to issue building or demolition permits, a copy of notice of all certificates and determinations of disapproval issued by the

commission. (Ord. No. T-288, 9-9-93)

Sec. 22-68. Ordinary maintenance.

Nothing in this division shall be construed to prevent: (a) the ordinary maintenance or repair of any building, structure or landscape; (b) the ordinary maintenance, repair or replacement of any exterior architectural feature of a landmark that, with respect to either (a) or (b), does not involve a change in design or material, or the appearance thereof; if such features have been included in the findings of the Landmark Commission at the time of designation; (c) landscaping with plants, trees or shrubs, provided that such landscaping does not affect any significant landscape feature; (d) meeting of requirements certified by a duly authorized public officer to be necessary for public safety because of an unsafe or dangerous condition; (e) any construction or alteration under a permit duly issued prior to the effective date of the landmark ordinances, except as provided herein. (Ord. No. T-288, 9-9-93)

Sec. 22-69. Administrative review.

There shall be a review procedure whereby any person aggrieved by a determination of the commission may, within twenty days after the filing of the notice of such determination with the city clerk, file a written request with the commission for a review by a person or persons of competence and experience in such matters, designated by the Metropolitan Area Planning Council (MAPC).

The finding of the person or persons making such review shall be filed with the city clerk within forty-five days after the request, and shall be binding on the applicant and the commission, unless a further appeal is sought in the superior court as provided herein. (Ord. No. T-288, 9-9-93)

Sec. 22-70. Judicial review.

Any person aggrieved by a determination of the commission, or by the finding of a person or persons making an administrative review as provided herein, may, within twenty days after the filing of the notice of the aforesaid determination or finding with the city clerk, appeal to the superior court sitting in equity for Middlesex County. The court shall hear all pertinent evidence and shall uphold the determination of the commission if the court finds the decision of the commission to be supported by substantial evidence and within the authority of the commission, or may remand the case for further action by the commission, or make such other decree as justice and equity may require. The burden of proof shall be on the aggrieved person. The remedy provided by this section shall be exclusive, but the parties shall have all other rights of appeal and exception as in other equity cases. Costs shall not be allowed against the party appealing such determination of the commission unless it shall appear to the court that the appellant acted in bad faith or with malice in making the appeal to the court. (Ord. No. T-288, 9-9-93)

Sec. 22-71. Enforcement.

Middlesex Superior Court sitting in equity shall have jurisdiction to enforce the provisions of this division and any regulations enacted hereunder and the determinations, rulings, and regulations issued pursuant thereto and may, upon the petition of the mayor or of the city council or of the commission, restrain by injunction violations thereof; and, without limitation, such court may order the removal of any building, structure, or exterior architectural feature constructed in violation thereof, or the substantial restoration of any building, structure, exterior architectural feature or landscape of a landmark altered or demolished in violation thereof, and may issue such other orders for relief as may be equitable.

Whoever violates any of the provisions of this division shall be punished by a fine of three hundred dollars (\$300.00). Each day during any portion of which a violation continues to exist shall constitute a separate offense. (Ord. No. T-288, 9-9-93)

Sec. 22-72. Advisory review.

The review process set out in section 22-65 shall be advisory only for properties containing from one through four family dwellings which continue to be owned and occupied by the legal owner-occupants of record as of August 9, 1993, unless full review as set out in section 22-65 is voluntarily agreed to by said owner-occupants. Such advisory review shall cease, and the commission shall have authority to impose the full review set out in section 22-65 when and if such occupancy ceases or when legal or equitable ownership is transferred, whether by sale, an agreement to sell, or a transfer in trust, but excluding the grant of a mortgage. (Ord. No. T-288, 9-9-93; Ord. No. U-1, 2-7-94)

Sec. 22-73. Severability.

The provisions of this division shall be severable. If any of its provisions shall be held to be invalid or unconstitutional by any court of competent jurisdiction, the remaining provisions shall continue in full force and effect. (Ord. No. T-288, 9-9-93; Ord. No. T-288, 8-9-93)

Secs. 22-74—22-75. Reserved.

DIVISION 4. CITY-OWNED BUILDINGS

Sec. 22-76. Preservation of city-owned properties subject to funding under the Community Preservation Act.

(a) Purpose and Intent:

The purpose of this section is to encourage (1) the preservation and protection of city-owned buildings, structures and properties (2) the maintenance and improvement of landscapes, grounds and settings of such buildings and structures and (3) compatible development to preclude destruction or damage of such resources

(b) Definitions:

For the purpose of this division, the following words and phrases shall be defined as follows:

Alter/alteration: Rebuilding, reconstructing, restoring, removing, demolishing or similar actions relating to regulated buildings, structures and properties including a change to the exterior paint color or colors.

Building: A combination of materials including a roof forming a shelter for persons, animals or property.

Certificate of Appropriateness: The certificate issued by the commission if it determines that the construction or alteration for which an application for a certificate of appropriateness has been filed will be appropriate for or compatible with the preservation or protection of the city-owned building or structure.

Certificate of hardship: The certificate issued by the commission if it determines that owing to the conditions especially affecting the building or structure involve failure to approve an application will involve a substantial hardship to a city department or agency and that such application may be approved without substantial detriment to the public welfare and without substantial derogation from the intent and purpose of this section.

Certificate of non- applicability: The certificate issued by the commission or its designee if it determines that the construction or alteration for which a certificate of appropriateness or a certificate of non-applicability has been filed does not involve any exterior architectural feature, any interior primary space, or involves an exterior architectural feature which is not subject to review by the commission.

Editor's Note – The referenced map is on file in the office of the City Clerk. A copy of the map appears in the Appendix at the end of this chapter.

Sec. 22-43. Newtonville Historic District; established, boundaries.

(a) There is hereby established an historic district to be known as the Newtonville Historic District, bounded and described as shown on the map entitled “Proposed Newtonville Local Historic District,” prepared by Newton Geographic Information System (GIS), with a date of 12-Aug-2002. (Ord. No. X-29, 9-3-02)

Editor's Note – The referenced map is on file in the office of the City Clerk. A copy of the map appears in the Appendix at the end of this chapter.

Sec. 22-44. Auburndale Historic District; established, boundaries.

(a) There is hereby established an historic district to be known as the Auburndale Historic District, bounded and described as shown on the map entitled “Auburndale Proposed Local Historic District,” prepared by Newton Geographic Information System (GIS), with a date of January 05, 2005. (Ord. No. X-135, 03-21-05)

Editor's Note – The referenced map is on file in the office of the City Clerk. A copy of the map appears in the Appendix at the end of this chapter.

Secs. Reserved 22-45—22-49. Reserved.

DIVISION 2. DEMOLITION DELAY

Sec. 22-50. Demolition of historically significant buildings or structures.

(a) *Intent and Purposes.* This section is adopted in furtherance of the policy set forth in the Newton Comprehensive Plan to assure the preservation and enhancement of the City of Newton's historical and cultural heritage by preserving, rehabilitating or restoring whenever possible, buildings or structures which have distinctive architectural features or historical associations that contribute to the historic fabric of the City.

(b) *Definitions.* For the purposes of this section, the following words and phrases have the following meanings:

Commission: The Newton Historical Commission, or if the regulated building or structure is in a local historic district established pursuant to G.L. c. 40C, the local historic district commission.

Commission staff: The person(s) regularly providing staff services for the commission whom the commission has designated commission staff for the purposes of this ordinance.

Commissioner: The commissioner of inspectional services.

Application: An application to the commissioner for a demolition permit as defined by this ordinance.

Demolition permit: Any permit issued by the commissioner which is required by the State Building Code and which authorizes the total or partial demolition of a building or structure (excluding interior demolition) regardless of whether such permit is called a demolition permit, alteration permit, building permit, etc.

Total demolition: The pulling down, razing or destruction of the entire portion of a building or structure which is above ground regardless of whether another building or structure is constructed within the original footprint of the destroyed building or structure.

Partial demolition: The pulling down, destruction or removal of a substantial portion of the exterior of a building or structure or the removal of architectural elements which define or contribute to the historic character

of the structure.

- (1) Items requiring review by the commission at a hearing. Partial demolition of any architecturally significant features which would alter the massing of the existing structure including, but not limited to the following items.
 - a) Additions or ell's determined to be architecturally significant by commission or commission staff.
 - b) Roofs, including flat roofs, determined to be architecturally significant by commission or commission staff.
 - c) Porches determined to be architecturally significant by commission or commission staff, except open decks, staircases, and entryways, which are excluded from review.
 - d) Removal or envelopment by subsequent additions of 50% or more of any single exterior wall surface. Each wall is calculated by square footage individually.
 - e) Demolition of any architectural detail determined to be architecturally significant by commission or commission staff.
 - i) Brackets
 - ii) Crown molding
 - iii) Porch columns and railings
 - iv) Bay windows
 - v) Dormers
 - vi) Chimneys
- (2) Items requiring review by the commission that may be reviewed and approved by commission staff without a hearing if plans indicate
 - a) Removal or alteration of the roof structure.
 - b) Repair or replacement of existing and original porches with similar materials to match existing.
 - c) Demolition or construction of additions or alterations not visible from a public way.
 - d) Removal or envelopment by subsequent additions of 50% to 100% of any single exterior wall surface. Each wall is calculated by square footage.
- (3) *Items considered to be de minimis and requiring no commission or commission staff review:*
 - a) Open porches and entryways consisting of only a set of stairs, an entrance platform and a roof which are utilitarian in design or do not contribute to the architectural significance or character of the building.
 - b) Demolition or construction of new additions which remove, alter, or envelop 50% or less of a single

exterior wall.

- c) Removal or alteration of less than 50% of the roof structure
- d) Normal maintenance of a building's exterior, including, but not limited to repair or replacement of roof surfaces, repair or replacement of gutters, and repair or replacement of existing doors and windows, including casings and frames, repair or replacement of existing exterior cladding (clapboards, shingles, masonry, etc.).

Historically significant building or structure: Any building or structure which is in whole or in part fifty or more years old and which

- (1) is in any federal or state historic district, or if in any local historic district, is not open to view from a public street, public park or public body of water; or
- (2) is listed on or is within an area listed on the National Register of Historic Places or eligible for such listing, or listed on or is within an area listed on the State Register of Historic Places, or eligible for such listing; or
- (3) has been determined by the commission or its designee to be a historically significant building after a finding that it is:
 - a) importantly associated with one or more historic persons or events, or with the architectural, cultural, political, economic or social history of the City of Newton, the Commonwealth of Massachusetts or the United States of America: or
 - b) historically or architecturally important by reason of period, style, method of building construction or association with a particular architect or builder, either by itself or in the context of a group of buildings or structures; or
 - c) located within one hundred fifty (150) feet of the boundary line of any federal or local historic district and contextually similar to the buildings or structures located in the adjacent federal or local historic district.

Preferably preserved: An historically significant building or structure which the commission has determined should be preserved, rather than totally or partially demolished, in accordance with the standards set forth in subsection (c)(5) below.

(c) *Procedure.*

- (1) No demolition permit for a building or structure which is in whole or in part fifty or more years old shall be issued by the commissioner except in conformity with the provisions of this section, as well as any other applicable law, statute, ordinance or regulation.
- (2) If any applicant and the owner of the building or structure, if different from the applicant seeks to demolish, in whole or in part, a building or structure which is in whole or in part fifty or more years old, the owner of the building or structure shall file a demolition review application with the commission for a determination as to whether the building or structure is historically significant and shall provide the commission with the following information:
 - a) a site plan or a copy of that portion of the tax assessor's map which shows the building or structure to be demolished and the property on which it is located;

- b) photographs of all existing façade elevations of the building or structure to be totally or partially demolished;
 - c) a description of the proposed plans for demolition and the reason(s) therefore.
- (3) Within fifteen (15) days after the commission's receipt of a demolition review application, the commission shall make a determination as to whether the building is or is not historically significant and shall notify, in writing, the commissioner and the applicant of this determination. The commission may delegate the determination that a building or structure is historically significant to commission staff or to a designated commission member. In the event that the commission delegates the determination to the commission staff or to a designated commission member, the commission shall adopt criteria to be followed by the staff or the member in making this determination.

A determination that a building or structure is or is not historically significant made by the commission staff or a designated commission member may be appealed to the full commission by filing a notice of appeal with the commission not later than fifteen (15) days after the written notice that the building or structure is or is not historically significant has been filed with the commissioner. Filing the appeal of the determination shall not stay the effect of such determination. Following a hearing before the commission, which may, but is not required to be conducted in conjunction with the hearing on whether the building or structure is preferably preserved, the commission shall affirm or reverse the determination and file notice of such determination with the commissioner. If the appeal of the determination is made independent of the preferably preserved hearing, the commission shall follow the same procedure for such hearing as that set forth in subsection (c)(5) below. If the commission fails to conduct a hearing on the appeal of said determination or fails to rule on the appeal within forty-five (45) days from the filing of the appeal, the determination that a building or structure is or is not historically significant shall remain unchanged, and the commissioner shall not issue a demolition permit until the procedural requirements of subsection (c)(5) below have been satisfied.

- (4) No demolition permit shall be issued by the commissioner for a building or structure determined to be historically significant until the procedural requirements of subsection (c)(5) of this ordinance have been satisfied. The commissioner may grant the demolition permit if the commissioner:
- a) does not receive written notice within forty-five (45) days after the commission's receipt of a demolition permit application that the building or structure is historically significant; or
 - b) receives written notice from the commission that the building either is not historically significant, or is historically significant, but clearly would not be deemed preferably preserved by the commission.
- (5) When a building or structure is determined to be historically significant, the commission shall hold a public hearing to determine whether the building or structure, or the portion of the building or structure to be demolished, is preferably preserved. The applicant shall provide the commission with the following information for this determination:
- a) in the case of partial demolition involving alteration(s) or addition(s) to a building or structure, (i) proposed plans and elevation drawings for the affected portion of the building or structure; and (ii) a plot plan of the property, if the same is required to obtain a permit under the State Building Code for the proposed alteration(s) or addition(s); and
 - b) if the site of the building or structure to be demolished is to be redeveloped, plans showing the use or development of the site after demolition together with a statement identifying all zoning variances and/or special permits which may be required in order to implement the proposed use or development.

The date the commission receives all the above information shall be stamped on the information received and shall be considered the submission date. Following public notice as set forth in subsection (c)(8) of this ordinance, the commission shall hold a public hearing within forty-five (45) days of the submission date to determine whether the building or structure should be preferably preserved, based on the criteria set forth in this paragraph. If the commission finds that the demolition proposed in the application would result in the demolition of a historically significant building or structure whose loss would be detrimental to the historical or architectural heritage or resources of the City of Newton, then the commission shall find that the building or structure should be preferably preserved.

- (6) Upon a determination that the building or structure which is the subject of an application for a demolition permit is preferably preserved, the commission shall give written notice of the determination to the commissioner. A copy of the commission's determination shall also be sent to the applicant for the demolition permit and to the owner of the building or structure if different from the applicant.
- a) For a building or structure listed in the National Register of Historic Places or determined eligible for listing in the National Register of Historic Places by the Massachusetts Historical Commission no demolition permit shall be issued for a total demolition or a partial demolition of a building or structure until eighteen (18) months after the date of such determination by the commission, unless the commission informs the commissioner prior to the expiration of such eighteen (18) month period that the commission is satisfied that the applicant for the demolition permit and the owner of the building or structure, if different from the applicant, has:
- i) made a bona fide, reasonable and unsuccessful effort to locate a purchaser for the building or structure who is willing to preserve, rehabilitate or restore the building or structure; or,
 - ii) has agreed to accept a demolition permit on specified conditions approved by the commission.
 - iii) If the specified conditions involve approved plans and elevations, then no demolition permit shall be issued by the commissioner unless the applicant provides, as part of his application for a demolition permit, a complete set of plans and elevation drawings which have been signed and stamped by the commission or commission staff.
 - iv) The applicant shall have two (2) years from the date of the expiration of the eighteen (18) month period in which to apply for and obtain a demolition permit. No demolition permit shall be issued for such building or structure after the expiration of this two (2) year period, unless the procedural requirements of subsection (c)(5) hereof have been satisfied.
 - v) In order to encourage applications that preserve, restore, reuse, or rehabilitate historic buildings and structures, no application for a total demolition of a building or structure which has been unfavorably and finally acted upon by the commission shall be acted favorably upon within four months after the date of final unfavorable action unless the said commission finds
 - (a) by a vote of two-thirds (2/3) of those members present, substantial and material changes in said resubmitted application; or,
 - (b) by a majority vote of those members present, that the resubmitted application proposes to preserve the building or structure.
 - vi) Due notice shall be given to parties in interest of the time and place of the proceedings when the resubmitted application will be considered.

- b) For all other buildings and structures not covered under section (6)a) above, no demolition permit shall be issued for a total demolition or a partial demolition of a building or structure found preferably preserved until one (1) year after the date of such determination by the commission, unless the commission informs the commissioner prior to the expiration of such one (1) year period that the commission is satisfied that the applicant for the demolition permit and the owner of the building or structure, if different from the applicant, has:
- i) made a bona fide, reasonable and unsuccessful effort to locate a purchaser for the building or structure who is willing to preserve, rehabilitate or restore the building or structure; or,
 - ii) agreed to accept a demolition permit on specified conditions approved by the commission.
 - iii) If the specified conditions involve approved plans and elevations, then no demolition permit shall be issued by the commissioner unless the applicant provides, as part of his application for a demolition permit, a complete set of plans and elevation drawings which have been signed and stamped by the commission or commission staff.
 - iv) The applicant shall have two (2) years from the date of the expiration of the one (1) year period in which to apply for and obtain a demolition permit. No demolition permit shall be issued for such building or structure after the expiration of this two (2) year period, unless the procedural requirements of subsection (c)(5) hereof have been satisfied.
 - v) In order to encourage applications that preserve, restore, reuse, or rehabilitate historic buildings and structures, no application for a total demolition of a building or structure which has been unfavorably and finally acted upon by the commission shall be acted favorably upon within four months after the date of final unfavorable action unless the said commission finds
 - (a) by a vote of two-thirds (2/3) of those members present, substantial and material changes in said resubmitted application; or,
 - (b) by a majority vote of those members present, that the resubmitted application proposes to preserve the building or structure.
 - vi) Due notice shall be given to parties in interest of the time and place of the proceedings when the resubmitted application will be considered.
- (7) In the event a transfer of ownership of a preferably preserved property occurs during the applicable demolition delay period, the full applicable demolition delay period will restart from the date of the transfer of ownership.
- (8) In the event a transfer of ownership of a preferably preserved property occurs after the applicable demolition delay period expires but prior to the issuance of a demolition permit, no demolition permit shall issue until the new owner complies with the procedures set forth in section 22-50 (c) (5).
- 9) Upon a determination by the commission that a building or structure is not preferably preserved or upon the commission's failure to make any determination within forty-five (45) days of the submission date, the commissioner may grant a demolition permit for the building or structure.
- (10) Public notice of commission hearings shall provide the date, place and time of the hearing and the addresses of the properties to be considered at the hearing. Public notice shall include, at a minimum, posting with the

city clerk and notification to the director of planning and development, to the applicant, to the owners of all abutting property and to other property owners deemed by the commission to be materially affected.

- (11) If the applicant is someone other than the owner or his designated agent a demolition review application cannot be filed until the commission receives written authorization from the owner that the applicant may apply for changes to their property.

(d) *Emergency Demolition.* If a building or structure poses an immediate threat to public health or safety due to its deteriorated condition, the owner of such building or structure may request issuance of an emergency demolition permit from the commissioner. As soon as practicable after the receipt of such request, the commissioner shall arrange to have the property inspected by a board consisting of himself or his designee; the city engineer or his designee; the fire chief or his designee; the chairman of the commission or his designee; and one (1) disinterested person chosen by the commissioner. After inspection of the building or structure and consultation with the other members of the board, the commissioner shall determine whether the condition of the building or structure represents a serious and imminent threat to public health and safety and whether there is any reasonable alternative to the immediate demolition of the building or structure which would protect public health and safety. If the commissioner finds that the condition of the building or structure poses a serious and imminent threat to public health and safety and that there is no reasonable alternative to the immediate demolition of the building or structure, then the commissioner may issue an emergency demolition permit to the owner of the building or structure. Whenever the commissioner issues an emergency demolition permit under the provisions of this section of the ordinance, he shall prepare a written report describing the demolition of the building or structure and the basis of his decision to issue an emergency permit with the commission. Nothing in this section shall be inconsistent with the procedures for the demolition and/or securing of buildings and structures established by M.G.L. c. 143, sections 6-10.

In the event that a board of survey is convened under the provisions of M.G.L. c. 143, section 8 with regard to any historically significant building or structure, the commissioner shall request the chairman of the commission or his designee to accompany the board during its inspection. A copy of the written report prepared as a result of such inspection shall be filed with the commission.

(e) *Non-Compliance.* Anyone who demolishes a historically significant building or structure without first obtaining and complying fully with the provisions of a demolition permit issued in accordance with this section shall be subject to a fine of not more than three hundred dollars (\$300.00) for each day of violation of this ordinance.

In addition, unless a demolition permit issued in accordance with this section was obtained and unless such permit was fully complied with, including full compliance with plans and elevation drawings signed and stamped by the commission, the commissioner may elect to (1) issue a stop work order halting all work on the building or structure until the commission notifies the commissioner in writing that the applicant has appeared before the commission to address such non compliance, and the commission has accepted the applicant's plans to remediate such noncompliance; (2) refuse to issue any certificates of occupancy, temporary or final, until any noncompliance has been remediated; and/or (3) refuse to issue a permit required by the State Building Code pertaining to any property on which an historically significant building or structure has been demolished for a period of two (2) years from the date of demolition, provided that this provision shall not prevent the commissioner from issuing any permit required to insure the safety of persons and property."

The commission may, upon application to and determination by the commission that reuse of the property in accordance with building plans prepared by the owner and submitted to the commission and all relevant agencies will substantially benefit the neighborhood and provide compensation for the loss of the historic elements of the property either through reconstruction of the lost historic elements or significant enhancement of the remaining historic elements of the site or the surrounding neighborhood, waive the fine, in whole or in part, and/or the ban on issuance of a building permit in order to allow the issuance of a building permit for construction or reconstruction of

a building or structure approved by the commission. An owner receiving a waiver of the fine and/or ban on issuance of a building permit under this provision shall execute a binding agreement enforceable against all heirs, assigns and successors in interest with the commission to insure that any reuse of the site undertaken during the two-year ban shall be implemented in accordance with the plans, terms, and conditions approved by the commission. Any reuse of the site undertaken during the two-year ban which fails to comply with the terms of the commission's approval granted under this provision shall also permit reinstatement of the fine for non-compliance with this ordinance.

(f) *Securing Historically Significant Buildings and Structures.* If, following an application for a demolition permit, a building or structure has been determined to be historically significant, and the building or structure is subsequently destroyed by fire or other cause before any determination is made by the commission as to whether the building or structure is preferably preserved, a rebuttable presumption shall arise that the owner voluntarily demolished the building or structure without obtaining a demolition permit in accordance with the provisions of this ordinance. In such cases, the commissioner shall not issue any permit required under the State Building Code pertaining to the property on which the historically significant building or structure was located (except as necessary to secure public safety or health) for a period of two (2) years from the date of destruction of the building or structure, unless the owner can provide evidence satisfactory to the commissioner that he took reasonable steps to secure the building or structure against fire or other loss or that the cause of the destruction was not otherwise due to the owner's negligence.

(g) *Securing Preferably Preserved Buildings and Structures.* If during the period of demolition delay for a building or structure determined to be preferably preserved, such building or structure is destroyed through fire or other cause, the commissioner shall not issue any permit required under the State Building Code pertaining to the property on which the preferably preserved building or structure was located (except as necessary to secure public safety or health) until the end of the period of demolition delay, unless the owner can provide evidence to the commission that he took reasonable steps to secure the building or structure against fire or other loss or that the cause of the destruction was not otherwise due to the owner's negligence.

(h) *Buildings and Structures located in Local Historic Districts.* The provisions of this ordinance shall not apply to any building or structure located in a local historic district established pursuant to M.G.L. c. 40C and subject to regulation by the local historic district commission under the provisions of Sec. 22-40 of the Revised Ordinances.

(i) *Severability.* In case any section, paragraph, or part of this section is declared invalid or unconstitutional by any court of competent jurisdiction, every other section, paragraph, or part of this ordinance shall continue in full force and effect.

(j) *Enforcement.* The commission is authorized to institute any and all actions and proceedings, in law or in equity, in any court of competent jurisdiction, as it deems necessary and appropriate to obtain compliance with the requirements of this section.

(k) *Applicability.*

(1) Notwithstanding the foregoing, this section shall not apply and a demolition permit shall be issued for the reconstruction substantially similar in exterior design of a building structure or exterior architectural feature damaged or destroyed by fire, storm, or other disaster, provided such reconstruction is begun within six (6) months thereafter and is carried forward with due diligence. This exception shall be limited to reconstruction of only that portion of the building or structure damaged by such catastrophic event.

(2) This subsection shall not apply to buildings or structures which have been designated as landmarks pursuant to Sec. 22-60 of the revised ordinances.

(Ord. No. S-230, 12-1-86; Ord. No. S-315, 6-20-88; Ord. No. T-252, 12-7-92; Ord. No. U-19, 6-20-94; Ord. No. V-98, 12-16-96; Ord. No. V-99, 12-16-96; Ord. No. X-205, 5-1-06; Ord. No. Z-22, 04-22-08; Ord. No. Z-76, 02-07-11;

Ord. No. A-74, 04-04-16)

Sec. 22-51. Demolition by Neglect.

(a) Purpose and Intent

It is the intent of this section to preserve from deliberate or inadvertent neglect the exterior features of landmarked buildings and structures, or the interior portions thereof when such maintenance is necessary to prevent deterioration and decay of the exterior of the building or structure.

(b) Definition

“Demolition by neglect” shall mean neglect in maintaining, repairing, or securing a landmark that results in (i) loss of the character of a documented exterior architectural feature of the building or structure that contributes to its status as a landmark; (ii) deterioration of an exterior feature of the building or structure; or (iii) the loss of the structural integrity of the building or structure.

(c) Owner’s Obligations

The owner of a landmark shall preserve such landmark against decay and deterioration through prompt correction of any of the following defects:

- (1) Deteriorated or inadequate foundation, defective or deteriorated flooring or floor supports, deteriorated walls or other vertical structural supports;
- (2) Structural components of ceilings, roofs, floors, ceiling, roof and floor supports or other horizontal structural components which sag, split or buckle due to defective material or deterioration;
- (3) Deteriorated or ineffective waterproofing or weatherproofing of exterior walls, roofs, foundations, or floors, including broken or missing windows or doors, siding, trim, shingles or cladding, or windows left open when weather conditions do not warrant it;
- (4) Defective or insufficient weather protection for exterior wall covering, including lack of paint or weathering due to lack of paint or other protective covering;
- (5) Any fault or defect in the building which renders it structurally unsafe, whether interior or exterior;
- (6) Deterioration of exterior chimney or chimney support system;
- (7) Deterioration of external plaster, stucco, masonry or mortar;
- (8) Deterioration of rainwater drainage systems whether interior or exterior;
- (9) Deterioration of any documented exterior architectural feature which in the judgment of the commission produces a detrimental effect upon the character of the building;
- (10) Failure to adequately heat the premises to avoid freezing of heating and/or plumbing fixtures, or failure to properly drain heating and/or plumbing systems before the advent of freezing temperatures;
- (11) Failure to adhere to any preservation plan or guideline regarding maintenance provided by the commission pursuant to section 22-64(a); or

(12) Deterioration of any other elements which, if not adequately maintained, would eventually cause the building or structure to crack, bulge, buckle, sag, rot, crumble or collapse, in whole or in part.

(d) Any owner who fails to maintain such building or structure in compliance with this section shall be subject to the remedial procedures of subsection (e)(1) as well as the penalties under section 22-71.

(e) (1) Upon receipt of a complaint that an historic landmark is threatened by demolition by neglect, or on the commission's own initiative, the commission shall request the commissioner of inspectional services or his designee to inspect such landmark. If the commissioner of inspectional services concludes that the landmark is threatened by demolition by neglect, he shall make a written report of his findings to the commission.

(2) Upon the receipt of such written finding of the commissioner of inspectional services, the commission shall hold a public hearing after giving such notice as provided under section 22-63(d). If the Commission finds that the landmark is threatened by demolition by neglect, and the owner has not requested and received a hardship exemption under section (f) herein, the Commission may vote to:

a) require the owner to repair all conditions contributing to demolition by neglect by a date certain;

b) secure the building or structure against further deterioration or other loss;

c) provide the owner with a preservation plan and maintenance guidelines as authorized under Sec. 22-64, and require the owner to undertake such plan according to a timeline set by the commission;

d) assess penalties as set forth in section 22-71; and

e) seek such injunctive relief as it deems necessary and appropriate to preserve such landmark in cases where there is imminent danger of the loss of a landmark.

These remedies shall be cumulative and not exclusive.

(3) For purposes of this ordinance, if a landmark threatened by demolition by neglect is located within a local historic district, then reference to "commission" hereunder shall refer to the local historic district commission of the local historic district in which such landmark is located.

(f) Building Permits

The commission shall notify the commissioner of inspectional services or building official in writing of any landmark found to be threatened by demolition by neglect, and shall instruct said commissioner or building official to make a permanent record of such determination in the corresponding property file maintained in the department of inspectional services as required by law. Prior to the issuance of any building permit for the construction, reconstruction, alteration, renovation, repair, removal, demolition, or change of use or occupancy of any landmark, said commissioner or building official shall review the property file and ascertain whether a notice of unremediated violation of this ordinance is on record. To the extent allowed by law, including but not limited to the provisions of the state building code, 780 CMR 111.1 (6th ed.) or its successor, unless the commissioner or building official is satisfied there is no outstanding unremediated violation of this ordinance, he or she shall reject such application for a building permit for such landmark in writing, stating the reasons therefor; provided, however, that he or she shall not reject such application if the work intended to be performed is required by the commission to remediate such violation.

(g) Exemptions

- (1) The owner may request exemption from this ordinance if the owner can prove to the commission that maintenance of the landmark will cause substantial hardship according to the standards set forth in Section 22-40(f)(10); provided, however, that the owner's self-created hardship shall not qualify as a basis for a hardship exemption.
- (2) In situations where, in the commission's view, it is impracticable to immediately repair an architectural feature, or prohibitively expensive to replace it, then the owner shall remove and store such architectural feature safely, until such time as it becomes financially possible to recreate the feature from the original pieces. The owner shall make temporary repairs in its place to protect the structure and/or provide for the safe use of the landmarked premises. (Ord. No. X-179, 12-19-2006)

Secs. 22-52—22-59. Reserved.

DIVISION 3. LANDMARKS

Sec. 22-60. Landmark Preservation—enactment and purpose.

This division is enacted pursuant to the authority derived from section 6 of the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts, and Charter of the City of Newton.

The purpose of this enactment is to promote the educational, cultural, economic and general welfare of the public through the preservation and protection of the distinctive architecture and other characteristics of buildings, structures, landscapes, and places significant in the history and prehistory of the Commonwealth of Massachusetts and the City of Newton and through the maintenance and improvement of settings for such buildings, structures, landscapes, and places and through the encouragement of compatible development and the discouragement of destruction of or damage to such resources. (Ord. T-288, 9-9-93)

Sec. 22-61. Definitions.

For purposes of this section, the following words shall be defined as follows:

Altered: changed in exterior color, otherwise changed, rebuilt, reconstructed, restored, removed, or remodeled.

Building: a combination of materials forming a shelter for persons, animals, or property.

Commission: the Newton Historical Commission or particular Historic District Commission acting under the provisions hereof.

Constructed: built, erected, installed, enlarged, or moved.

Demolished: destroyed or altered in such a substantial manner as to constitute destruction.

Exterior architectural feature: such portion of the exterior of a building or structure as is open to view from a public or private street, way, park, or body of water which is identified for preservation by its designation by the commission as a landmark, including but not limited to the architectural style and general arrangement and setting thereof, the kind, color, and texture of exterior building materials, the color of paint or other materials applied to exterior surfaces and the type and style of windows, doors, lights, signs, and other appurtenant exterior fixtures.

Historic district: any area containing distinctive buildings, structures, landscapes, and places as established in