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**MEMORANDUM**

Date: August 24, 2022  
TO: Zoning Board of Appeals Members  
FROM: Jonah Temple, Deputy City Solicitor  
Jennifer Caira, Deputy Director, Planning & Development Department  
CC: City Council Members  
Mayor Ruthanne Fuller  
SUBJECT: Update on Chapter 40B Safe Harbors

The purpose of this memorandum is to update the Zoning Board of Appeals (“ZBA”) on the most recent calculation of the Chapter 40B statutory safe harbors. Safe harbor status is available to municipalities that have met either the *General Land Area Minimum*, achieved when housing units eligible for inclusion on the state’s Subsidized Housing Inventory (“SHI”) exist on sites comprising 1.5% or more of a municipality’s total land area; or the *Housing Unit Minimum*, achieved when a municipality’s SHI Eligible Housing units exceed 10% of its total housing units.

As an initial note of clarification, SHI Eligible Housing units are often referred to as “affordable units” (including in past versions of this memorandum); however, not all units on the City’s SHI are deed-restricted units affordable to households up to 80% of the Area Median Income (“AMI”). The Massachusetts Department of Housing & Community Development (“DHCD”) Chapter 40B Guidelines provide that if 25% of units in a rental development are affordable up to 80% AMI, or if 20% of units are affordable up to 50% AMI, then all units in the development—including the market rate units—are included on the SHI (e.g. Austin Street, where 33% of the units are affordable at 80% AMI, meaning all 68 units are on the SHI). As a result, the City’s SHI Eligible Housing includes both affordable units and market rate units. Therefore, while the City need only attain 10% SHI Eligible Housing units to reach the Housing Unit Minimum safe harbor, that does not represent the actual percentage of the City’s affordable units. Currently, approximately 5% of the City’s housing stock can be characterized as deed-restricted units affordable to households earning up to 80% AMI.

City staff previously calculated Newton’s progress towards these safe harbors at the end of 2020. Those calculations were reported to the ZBA in a memorandum dated January 7, 2021. At that time, Newton’s Land Area Minimum calculation equaled 1.32% and its Housing Unit Minimum calculation equaled 9.59%.

City staff did not provide a year end calculation for 2021 as we were awaiting the 2020 census data that would provide an updated total number of housing units in Newton. This current calculation is being provided now in anticipation of two 40B projects that are expected to be filed with the ZBA in the first week of September. The updated calculations show that Newton still has not met either safe harbor: the Land Area Minimum calculation (with a 1.5% threshold) is **1.35%** and the Housing Unit Minimum calculation (with a 10% threshold) is **9.80%**.

### **Overview of the Chapter 40B Safe Harbors**

#### A. Background

- Chapter 40B, also known as the Comprehensive Permit Law, is a state law enacted in 1969 to facilitate construction of affordable housing by removing obstacles and streamlining the permitting process for certain development projects. Under Chapter 40B, affordable housing is defined as a housing unit that is affordable to households with annual gross median incomes up to 80% of the AMI. The law provides that, in municipalities with an insufficient supply of affordable housing, a developer of a project that has a minimum percentage of affordable units may apply for a single Comprehensive Permit from the ZBA, rather than seeking separate approval from each local board with jurisdiction over the project. Chapter 40B also gives the ZBA authority to waive zoning and other local permitting requirements for such projects.
- Chapter 40B also allows municipalities to invoke various safe harbors if they are providing their fair share of affordable housing, which act as an exemption from the Chapter 40B framework. If and when the City creates enough affordable housing to meet a safe harbor, the provisions of the Chapter 40B law may be lifted, meaning a decision made by the ZBA concerning a comprehensive permit application—whether it is to deny the permit, approve the permit, or approve it with conditions—will be upheld on appeal as a matter of law.
- Achievement of a safe harbor, however, does not deprive the ZBA of the ability to grant additional comprehensive permits to developers seeking to construct housing. Even if the City has met a safe harbor, comprehensive permit applications may still be submitted to the ZBA and the ZBA must determine whether to invoke the safe harbor within 15 days after opening a public hearing. For example, there may be future 40B projects that the ZBA determines do not necessitate the invocation of a safe harbor even if the City has reached one. Additionally, if the ZBA does invoke a safe harbor, a full public hearing will still proceed and the ZBA may ultimately issue a comprehensive permit.

#### B. SHI Eligibility

- The safe harbor calculations are not static and regularly change. Housing properties are routinely added and removed from the City's list of SHI Eligible Housing units in accordance with DHCD regulations and guidelines. DHCD's regulations and guidelines dictate when units first become eligible for inclusion on the SHI and thus can be counted in the City's safe harbor calculations.

- For 40B projects approved by the ZBA, SHI eligibility begins on the date that the comprehensive permit is issued and filed with the City Clerk. Thereafter, 40B projects that have received approval lose SHI eligibility if a building permit is not issued within one year of receiving local permitting approval—though the project will regain eligibility after a building permit is issued. As an example, the Haywood House expansion received a comprehensive permit on July 26, 2018. At that time the project was SHI eligible and counted in the City’s safe harbor calculations. The project then lost eligibility and was removed from the calculations in July 2019 as a year had passed and the building permit was not yet issued. As a building permit was issued for the project in December 2020, it is once again SHI eligible and the units are again part of the safe harbor calculations.
- For special permit projects approved by the City Council, SHI eligibility does not begin until the project receives approval from DHCD. Under DHCD regulations, affordable units created through the special permit process are called “Local Action Units” (“LAU”) and require approval by DHCD, which is known as “LAU Approval.” The purpose of this approval process is for DHCD to confirm that the Local Action Units are affordable, subject to a long-term affordability deed restriction, subject to a fair housing marketing plan, and subject to ongoing monitoring. In contrast, affordable units created by a Chapter 40B comprehensive permit and approved by the ZBA do not require DHCD LAU Approval because those projects already have approval from a state subsidizing agency before applying for a comprehensive permit. As a result, comprehensive permit projects are immediately SHI eligible while special permit projects must wait until final LAU Approval before any units are SHI eligible. This means that projects such as Riverside that have been issued a special permit but have not yet been approved by DHCD as Local Action Units, cannot be counted yet in the City’s safe harbor calculations. The standard practice for the City is to apply for LAU Approval (jointly with the project developer) sometime after commencement of construction but prior to completion and marketing of any units.
- Given the fluctuation of the number of the City’s SHI Eligible Housing units, it is important to understand that the City’s attainment of safe harbor status is based on the City’s calculation on the date that a comprehensive permit application is filed with the ZBA. The safe harbor calculations are made anew each time a comprehensive permit application is filed and are based on the current state of SHI Eligible Housing units at the time of the filing. The City will again determine its safe harbor status when a future comprehensive permit application is filed. The City also updates its calculations on other occasions to provide the ZBA and the public with an update or when important information becomes available (e.g., upon receipt of new census data on the number of housing units in Newton).

### C. The General Land Area Minimum (1.5%) Safe Harbor

- The 1.5% calculation requires dividing the land area of affordable housing sites that are inventoried or eligible to be inventoried on the City’s SHI (the *numerator*) by the total developable land area in the City that is zoned for residential, commercial or industrial use (the *denominator*). In conducting this calculation, the City is required to follow the prescribed methodology and technical instructions that were enacted by DHCD in 2018.
- In calculating the land area of affordable housing sites (*numerator*), only the proportion of each site that is occupied by SHI Eligible Housing units (including impervious and landscaped

areas directly associated with such units) can be counted. For example, if 15% of all units in a development are affordable up to 80% AMI, such as Washington Place, the City can count 15% of the total acreage of the site (that is directly associated with the housing units) towards the numerator. For rental developments, if at least 25% of units are affordable up to 80% AMI or if at least 20% of units are affordable up to 50% AMI, then the entire acreage of the site directly associated with the housing will count towards the City's 1.5% numerator.

#### D. The Housing Unit Minimum (10%) Safe Harbor

- A second safe harbor available to the City can be achieved when Newton's SHI Eligible Housing units exceed 10% of its total housing units. The 10% calculation requires dividing the total number of housing units that are inventoried or eligible to be inventoried on the City's SHI (the *numerator*) by the total number of year-round housing units in the City (the *denominator*). The total number of housing units used for this calculation is the number reported in the most recent federal (decennial) census.
- At this time, both DHCD and the City are still operating under the 2010 Census for the number of housing units in making this calculation. That number is 32,346 units in Newton. While we do have an updated number of total housing units from the 2020 Census—which is 33,320 units—we are still waiting for the updated number of “year round” housing units, which is the actual figure that must be used for this safe harbor calculation. DHCD has indicated that the updated year round number will not be available until sometime in 2023. Ultimately, Newton's year round number of housing units from the 2020 Census will be somewhere in between the two housing unit numbers we currently have. This memo presents a current calculation based on both numbers, though the legally operable number of housing units remains the 2010 total. City staff will update Newton's 10% calculation after DHCD provides the year round total housing unit figure next year.

#### **Current Safe Harbor Calculations as of Year End December 2020**

##### A. 1.5% Calculation

- The City's current land area percentage of SHI Eligible Housing equals 1.35%.<sup>1</sup>

$$\text{New Calculation} = \frac{104.50 \text{ acres}}{7,713.99 \text{ acres}} = 1.35\%$$

- The City currently has 104.50 acres of SHI Eligible Housing units. A summary of which projects have been added and removed from this calculation in the last year is set forth in the next section. There has been no change to the City's total land area of developable land

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<sup>1</sup> The final required step in calculating the area of each affordable housing site requires calculating the maximum number of residential units that would be permitted at that site under the Newton Zoning Ordinance. The land area devoted to affordable housing must then be further reduced if the total number of units on site is less than the maximum permitted. As this number varies based on the zoning district and building type (and will change if new zoning is adopted as part of Zoning Redesign), and would only further reduce the affordable housing acreage, this final step in the 1.5% calculation has not been undertaken. As the City nears the 1.5% safe harbor, staff will further refine the numerator by completing this calculation.

since the last calculation. This is normally a static number, though it had previously been reduced by the taking and subsequent rezoning of Webster Woods in 2019.

- Based on this calculation, the City needs approximately 11 additional acres of SHI housing in order to reach the 1.5% safe harbor.

#### B. 10% Calculation

- The City's current percentage of SHI Eligible Housing units equals 9.80%.

$$\text{New Calculation} = \frac{3,170 \text{ SHI Eligible Housing units}}{32,346 \text{ total housing units}} = 9.80\%$$

- The City currently has 2,878 housing units officially inventoried on the most recent SHI published by DHCD. In accordance with DHCD regulations, the City is also allowed to count units that are SHI "eligible" but that have not yet been officially inventoried on the SHI. Currently the City has approximately 292 additional eligible units not listed on the published SHI. As a result, the City currently has 3,170 SHI Eligible Housing units.
- There has been no change to the City's total number of housing units. As enumerated on the 2010 Census, Newton has 32,346 total housing units. Based on the total housing unit figure we do have from the 2020 Census of 33,320, the City's 10% calculation would decrease to 9.49%. The ultimate updated number of total year round housing units will be less than that interim 2020 figure, but more than the 2010 figure.
- Based on this calculation, the City needs approximately 65 additional SHI units to reach the 10% safe harbor.

#### C. Summary of Current SHI Eligibility

- The following project has been approved since the last safe harbor calculations and is currently counted as SHI Eligible Housing:
  - > Dunstan East amendment and expansion (comprehensive permit)
- The following previously approved special permit projects do not currently count as SHI Eligible Housing, because they have not received Local Action Approval from DHCD:
  - > Northland
  - > Riverside
  - > 15-21 Lexington Street
  - > 20 Kinmonth Road
  - > 283 Melrose Street
  - > 956 Walnut Street
  - > 39 Herrick Road
  - > Cabot Park Village expansion
  - > 1114 Beacon Street
  - > 149-1151 Walnut Street
  - > 967 Washington Street
  - > 383 Boylston Street

### Looking Forward

- Newton has made significant progress towards achieving the Housing Unit Minimum safe harbor based on the current calculation of 9.80%. In light of the expected development landscape, it is possible that Newton will reach the 10% threshold for this safe harbor sometime in the next six months.
- There are two upcoming 40B applications that, if approved, would likely tip Newton over the 10% threshold. The first is the Northland Charlemont project that proposes 410 residential units on Charlemont Street and Christina Street. The second is the Armory development that proposes 43 residential units at 1135 Washington Street. Both projects have received Project Eligibility approval from their subsidizing agency and will be filing 40B applications with the ZBA in early September. The ZBA's review of these projects will likely take many months and it is not known whether these projects will ultimately be approved and/or modified during the review process. This analysis is simply being provided to offer a rough estimation of what the City's calculations may look like in the future.
- In the same vein, there is likely to be additional movement of the safe harbor calculations in both directions moving forward. As examples, the Dunstan East project may lose SHI eligibility if a building permit is not issued in September and the Northland special permit project will likely achieve SHI eligibility for some or all of its units in the next year as LAU Approval and building permits are issued. SHI eligibility for other previously approved project will also ebb and flow and new projects will also be approved.
- As an outlook summary, the most likely scenario is Newton will achieve the 10% safe harbor at some point in the next year. But as various projects gain or lose SHI eligibility, the City's calculation will fluctuate and at times may dip or crest depending on the date of the calculation. As a result, it is difficult to accurately pinpoint at which point the City will be above the 10% threshold or for how long it would remain above it. The official change to the number of total year round housing units in Newton, which will be reported in 2023, will also impact the calculation. What this means for future development in Newton, and in particular for projects planning to seek a comprehensive permit, is that the ZBA's ability to invoke a safe harbor for any given project remains dependent on the City's exact calculation on the date that a comprehensive permit application is filed with the ZBA. City staff will remain transparent as to this calculation and will continue to provide additional updates.