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## MEMORANDUM

Date: January 31, 2018

TO: City Council Members

FROM: Jennifer Caira, Chief Planner, Current Planning, Planning & Development Department *JRC*  
Jonah Temple, Assistant City Solicitor *JMT*

CC: Mayor Ruthanne Fuller  
Barney Heath, Director, Planning and Development Department  
Ouida Young, Acting City Solicitor  
Zoning Board of Appeals Members

SUBJECT: Chapter 40B, 1.5% Update

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The purpose of this memorandum is to update the City Council on the most recent calculation of the Chapter 40B "safe harbor" available to municipalities that have met the general land area minimum, achieved when low or moderate income housing exists on sites comprising 1.5% or more of a municipality's total land area.

### Overview of Calculation

- The 1.5% calculation is made anew each time a comprehensive permit application is filed. This is not a static calculation and it is expected that affordable housing properties will be routinely added and removed from the City's list of sites eligible to be counted towards the calculation.
- If the City has created its fair share of affordable housing by meeting the 1.5% statutory safe harbor, the provisions of the Chapter 40B law will be lifted. That means the decision made by the Zoning Board of Appeals (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.
- The calculation requires dividing the area of sites of affordable housing that are inventoried or eligible to be inventoried on the state Department of Housing and Community Development

(DHCD) Subsidized Housing Inventory (SHI) by the total developable land area in the City that is zoned for residential, commercial or industrial use.

- For Newton, the denominator of the calculation consists of 7174.9 acres of developable land. This was determined following the Housing Appeals Committee (HAC)'s ruling that there is no basis to exclude golf course acreage from this figure.

### **City Process**

- In anticipation of the filing of a comprehensive permit application for a project located at 236 Auburn Street, in early October 2017, the Planning Department, with assistance from the Law Department, began efforts to determine where the City now stands in terms of the 1.5% safe harbor.
- This is a complex calculation involving legal interpretation of the regulations and their application. Significant interdepartmental time and resources were spent fully updating and auditing the City's list of sites containing affordable housing and measurement of those sites.
- At the ZBA public hearing on the Auburn Street comprehensive permit application on January 23, 2018, the Planning Department, at the request of the Chairman of the ZBA after a motion was made to invoke the safe harbor, presented the City's updated calculation.

### **1.5% Calculation Status as of January 2018**

- The City's current land area percentage of affordable housing equals 1.47%, meaning the City does not currently meet the 1.5% safe harbor.
- As of December 2017, the City has 105.6 acres of affordable housing, compared to 106.69 acres the last time this calculation was updated in 2016—a net loss of 1.1 acres. In order to meet the 1.5% safe harbor, the City will need to have at least 107.7 acres of land dedicated to affordable housing.

### **Reasons why the Calculation has Changed**

- Change in Inventoried Sites on the City's SHI
  - > The SHI list is maintained by DHCD and only updated once every two years. The most recent SHI list, dated August 30, 2017, removed five sites from Newton's inventory of affordable housing that the City can no longer count. Four of these sites were removed by DHCD because they were duplications of confidential group homes maintained by the State that are already accounted for in a separate entry on the SHI. A fifth site was removed because it was sold at market rate, and therefore lost its affordable deed restriction. This resulted in a combined loss of 0.75 acres.



- Change in Uninventoried SHI Eligible Sites

- > The previous calculation presented to the ZBA in 2016 counted the acreage for proposed projects located at 238 Melrose Street and 429 Cherry Street, which were both permitted by special permit. However, because neither project has received a building permit within one year of the special permit issuing, their eligibility for inclusion in the numerator calculation has lapsed. If and when a building permit issues, these properties will once again become eligible to be counted towards the 1.5%. This resulted in a loss of 0.22 acres.
- > Three recently approved projects located at Washington Place (0.4 acres), 400 Langley Road (0.1 acre) and 386-394 Watertown Street (0.1 acre), were added to the numerator calculation for the first time. This resulted in the addition of 0.6 acres.

- Confidential Group Homes

- > The City's SHI list includes about 149 confidential group home units. While the acreage associated with these units are eligible to be counted towards the 1.5%, the City has never definitively known their location. This has long been a significant and cumbersome problem for all municipalities, especially since DHCD, the Department of Mental Health (DMH) and the Department of Developmental Services (DDS) have historically taken the position that the addresses are confidential and have refused to disclose them, even in response to subpoenas.
- > Because of this roadblock, the City has previously attempted to identify the confidential group homes through its own investigative efforts and counted 7.3 acres for such housing as part of the earlier calculations.
- > Recently, this dynamic has changed in a significant way. This past year, the City successfully litigated an action filed in Middlesex Superior Court against the state agencies seeking to enforce its subpoenas for the group home addresses. As a result, the City became the second municipality to attain a court order requiring the agencies to disclose the confidential addresses. The City has since been able to calculate the actual acreage associated with the group homes, which equals 4.7 acres.
- > Of the 7.3 acres that the City previously counted as group home acreage, only 1.1 acres matched the group home addresses reported by the state agencies. Through exhaustive efforts by the Planning Department, it was determined that an additional 1.6 acres that the City previously thought were group homes, while not group homes, are still SHI eligible and thus are still being counted. This means that of the City's previous calculation of 7.3 acres, 4.6 acres have been found to be not eligible for inclusion on the SHI and thus are no longer being counted towards the 1.5%.

- Rounding Methodology

- > In updating this calculation, the Planning Department implemented a rounding methodology that rounds the acreage of each affordable housing site to the nearest tenth.
- > This method, though not previously employed by the City, is based on multiple factors, including language from prior DHCD guidance that instructed land area to be “estimated to the nearest 1/10th of an acre.” The guidance is still followed by HAC, and its decisions are clear that the proper method of calculating the acreage for each site is to round to the nearest 1/10<sup>th</sup>, but that the final percentage calculation cannot be rounded up to reach 1.5%. As a result, the City’s final calculation of 1.47% falls short of the 1.5% safe harbor.

### Looking Forward

- In order to meet the 1.5% safe harbor, the City needs to have at least 107.7 acres of land dedicated to affordable housing. The City’s current calculation, as presented to the ZBA, is that Newton has 105.6 acres of affordable housing.<sup>1</sup>
- There are at least three projects in the pipeline that will contribute to the land area dedicated to affordable housing: 236 Auburn Street (0.4 acres) will be receiving a comprehensive permit shortly, Haywood House (0.6 acres) will be applying for a comprehensive permit in the coming months and Crescent Street (0.7 acres) is a municipal project undergoing site plan approval.
- DHCD recently published proposed guidelines that would govern this general land area minimum calculation once they are enacted. The guidelines would implement a new detailed methodology for calculating the total land area of developable land, which could result in a change to the City’s denominator. The proposed guidelines also clarify how to measure the landscaped and wooded areas located on sites that contain affordable housing, which could alter the measure of some existing sites, specifically YMCA and Arbor Point. It is not known when the proposed guidelines will go into effect.

### For questions, please contact:

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<sup>1</sup> Please note that the HAC previously rejected the City’s measurement of two SHI inventoried affordable housing sites: the YMCA at 276 Church Street was reduced from 6.1 acres to 0.7 acres and Arbor Point at 1940 Washington Street was reduced from 6.8 acres to 3.8 acres. City staff continue to disagree with the extent of the HAC’s acreage reductions and the issue has never been litigated in a court of law. For consistency purposes, the current calculation presented to the ZBA continues to count the full acreage of both sites. However, the potential reduction of the acreage of these sites in the future should be kept in mind when considering the acreage necessary to reach the 1.5% safe harbor.