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## MEMORANDUM

Date: February 15, 2019

TO: Zoning Board of Appeals Members

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

CC: City Council Members  
Mayor Ruthanne Fuller  
Barney Heath, Director, Planning and Development Department  
Alissa Giuliani, City Solicitor

SUBJECT: Update on Chapter 40B Safe Harbors

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The purpose of this memorandum is to update the Zoning Board of Appeals (ZBA) on the most recent calculation of the Chapter 40B “safe harbor” available to municipalities that have met the *General Land Area Minimum*, achieved when affordable housing exists on sites comprising 1.5% or more of a municipality’s total land area, as well as the 10% safe harbor that is met when a municipality’s affordable housing units exceed 10% of its total housing units. The City’s calculation of the 1.5% safe harbor has again changed significantly since the last update done in December 2017 as a result of new Guidelines enacted by the Department of Housing and Community Development (DHCD) governing the calculation. The calculations show that Newton still has not met either threshold and, in fact, is not as close to the 1.5% safe harbor as previously calculated.

### Overview of the 1.5% 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 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 land area of sites of affordable housing that are inventoried or eligible to be inventoried on the City's Subsidized Housing Inventory (SHI) maintained by DHCD (the *numerator*) by the total developable land area in the City that is zoned for residential, commercial or industrial use (the *denominator*).
- In calculating the land area of affordable housing sites (*numerator*), only the proportion of the site area that is occupied by SHI eligible affordable housing units can be counted. For example, if 15% of all units in a development are SHI eligible affordable (such as Washington Place), the City can count 15% of the total acreage of the site towards the numerator. Additionally, DHCD Guidelines also provide that for rental developments, if at least 25% of units are affordable up to 80% AMI, then all units in the development are included on the SHI (e.g.: if a rental development like Washington Place contains 25% affordable units, then the entire acreage of the site would count towards the City's numerator).
- Since the City's last calculation (prepared in December 2017 and explained in a January 31, 2018 Memorandum) DHCD has enacted new Guidelines that set forth detailed technical instructions for calculating the General Land Area Minimum.

### **The New DHCD 1.5% Guidelines**

- The new DHCD Guidelines establish, for the first time, standard methods and data sources for calculating the General Land Area Minimum. The Guidelines set forth detailed technical instructions and specifications on how to perform the calculation using Geographic Information Systems (GIS) software and spatial data provided by MassGIS. The Guidelines also set forth key definitions.
- The Guidelines require that the calculation be prepared by a technical analyst trained in GIS. The analyst is required to utilize digital parcel data and automated GIS tools to calculate the acreage of every affordable housing site and the acreage of all developable land. The Guidelines further require a specific format for tables, spreadsheets and GIS files showing each step of the calculation and maps depicting each affordable housing site.
- The Guidelines provide much needed guidance and explanation on how to calculate the "Directly Associated Area" of each affordable housing parcel. The Guidelines explicitly require that only the portion of each affordable housing parcel that is occupied by affordable units and the impervious and landscaped areas "directly associated" with those units can count towards the numerator calculation. The Guidelines instruct how the parcel data for each site must be edited to remove areas that are not "directly associated." The Guidelines also create a new mechanism for MassGIS to calculate the acreage occupied by group homes and to report that calculation to municipalities while maintaining the confidentiality of the locations.
- The Guidelines also include detailed step-by-step instructions for calculating the City's total developable land area (*denominator*). This new methodology requires the iterative subtraction of various "excluded areas" which must be removed from the total land area through the use of numerous datalayers, geoprocessing tools and spatial data provided by MassGIS, and requires specific formatting of map images showing the results of each step of the calculation.

### The City's Previous 1.5% Calculation

- The City previously calculated in December 2017 that the land area percentage of affordable housing equaled 1.47%. That calculation was based on the City having 105.6 acres of affordable housing (*numerator*) and 7,174.9 acres of developable land (*denominator*).
- The previously calculated numerator of 105.6 acres did not reduce the acreage of individual parcels through the removal of areas not “directly associated” to the affordable units on each parcel. At the time, the City had no guidance on how to make such determinations. The calculation also counted 4.7 acres associated with confidential group homes, which was based on address lists that the Department of Mental Health and Department of Developmental Services produced to the City in response to a court order.
- The previously calculated denominator was based on the City’s original calculation of developable land that was performed by Doug Greenfield, the City’s GIS Administrator, in 2014. The calculation included the acreage of the City’s private golf courses as a result of a prior ruling from the Housing Appeals Committee (HAC) that there was no basis for Newton to exclude golf course acreage from its developable land figure.

### The City's Current 1.5% Calculation

- In connection with the filing of a comprehensive permit application for a project located at 160 Stanton Avenue (Golda Meir House expansion) in October 2018, the City’s GIS Administrator and Planning Department, with assistance from the Law Department, performed the General Land Area Minimum calculation in accordance with the new Guidelines enacted by DHCD. Significant interdepartmental time and resources were spent implementing the technical instructions, which included mapping, measuring and scrutinizing parcel data for every site containing affordable housing, as well as visiting and walking many of the sites.
- The City’s current land area percentage of affordable housing equals 1.27%.<sup>1</sup> This is a significant reduction from the City’s previous calculation of 1.47% from December 2017. As detailed below, the change in the calculation is attributable to the utilization of new methodologies and technical instructions required by the Guidelines.

$$\text{New Calculation} = \frac{98.52 \text{ acres}}{7730.99 \text{ acres}} = 1.27\%$$

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<sup>1</sup> The final step under the new Guidelines 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 calculation has not been undertaken at this time. As the City nears the 1.5% safe harbor, staff will further refine the numerator by completing this calculation.

## Reasons why the 1.5% Calculation Changed

- Change in Affordable Housing Acreage (Numerator)
  - > Under the methodology prescribed by the new Guidelines, the City has 98.52 acres of affordable housing, compared to 105.60 acres the last time this calculation was updated in December 2017—a net loss of 7.08 acres.
  - > There are two explanations for this reduction. First, a handful of parcels were edited to remove land area that was not directly associated with the affordable housing units on the parcels, per the new Guidelines. Examples of this include the YMCA at 276 Church Street (where some of the wooded land and outdoor recreation/track land was removed), Arborpoint at 1940 Washington Street (where the land that the MBTA parking garage occupies was removed) and the Coleman House at 677 Winchester Street (where wooded land was removed). This “carving” of parcels, even after counting the additional new affordable housing projects in the past year, accounts for a reduction of 5.42 acres. Second, through the new mechanism for calculating the acreage of group homes, MassGIS reported to the City that there are 3.04 acres of group homes located in Newton, a reduction of 1.66 acres from the group home acreage previously calculated by the City based on addresses subpoenaed from the state agencies. While DHCD has not been able to fully explain the group home discrepancy, it suggested some of the reduction is due to a group home located in Brookline that was previously reported as a Newton address. The discrepancy may also be due to the fact that the address lists that the City previously relied on were for group homes in existence in 2016.
- Change in the Total Land Area Acreage (Denominator)
  - > Under the methodology prescribed by the new Guidelines, the City has 7,730.99 acres of developable land (known as “*Total Land Area*”), compared to the 7,174.90 acre amount that the City has used since 2014—a net gain of 556.09 acres.
  - > While no technical instructions from DHCD existed when the City originally calculated the denominator in 2014, the City did utilize GIS methods similar to those now required by the Guidelines. However, following DHCD’s new Guidelines and the prescribed standardized step-by-step instructions yields a different result. There are three primary explanations for the increase in developable land calculation. First, the City’s previous calculation excluded floodplains, conservation land and land with conservation restrictions, while the new Guidelines include such land as developable. Second, some of the land area that is excludable from the calculation—such as water bodies, registered wetlands, zoning where development is prohibited, publicly-owned rights-of-way and publicly-owned parcels—has changed, been updated or reclassified in GIS in the five years since the City last calculated its Total Land Area. The GIS data sources have also been updated since the last calculation. Third, the new DHCD Guidelines’ GIS instructions are highly specific as to the order of operations and formatting of queries and, therefore, the particular measuring methodology mandated by the Guidelines, which does not mirror the City’s previous process, produced a different result based on the process.

## Overview of the 10% Calculation

- A second safe harbor available to the City can be achieved when Newton’s affordable housing units exceed 10% of its total housing units. This is known as the “Housing Unit Minimum” or the “10% safe harbor.” The 10% calculation requires dividing the total number of affordable housing units that are inventoried or eligible to be inventoried on the City’s SHI (the *numerator*) by the total number of housing units in the City (the *denominator*).
- In calculating the numerator, DHCD Guidelines provide that if at least 25% of units in a rental development are affordable up to 80% AMI, then all units in the development—including market rate units—are included on the SHI. In calculating the denominator, the total number of housing units is the total number of year-round units as reported in the most recent federal Census. As enumerated in the 2010 Census, Newton has 32,346 total housing units.
- The City currently has 2,416 affordable units inventoried on the most recently published SHI. Based on that number, and the 2010 Census number of 32,346 total housing units, DHCD reports that Newton has an affordable housing percentage of 7.47%. In accordance with DHCD regulations, the City is also allowed to count affordable units that are SHI “eligible” but that have not yet been officially inventoried on the SHI. Currently the City has approximately 276 SHI eligible units not listed on the SHI (e.g.: Austin Street and Washington Place developments; recent 40B projects). Using the City’s total number of SHI eligible affordable housing units of 2,692, the City believes it currently has an affordable housing percentage of 8.3%.
- Both DHCD and the City are operating under the 2010 Census for the number of total housing units (*denominator*) in making this calculation. This number will change when the 2020 Census, which will be underway starting in April 2020, is completed. An updated 10% calculation will be reported once the City receives the results of the 2020 Census, likely in the second half of 2021. It is anticipated that the 2020 Census will report an increase in the City’s total housing units.

## Looking Forward

- Based on the 1.5% calculation under the new DHCD Guidelines, in order to meet the 1.5% safe harbor, the City needs to have 116 acres of land dedicated to SHI eligible affordable housing (less than 80% AMI). In order to achieve this, based on the current Guidelines, approximately 17.5 additional acres of affordable housing would need to be developed in the City.
- There are numerous development projects in the pipeline that will increase the City’s number of affordable housing units and its land area dedicated to those units. Currently, there are pending applications for projects that propose approximately 180 SHI eligible affordable units, which includes 123 affordable units for the Northland project. There are also many potential projects that the City anticipates developers seeking approval for in the near future (such as the Riverside project) that would offer additional SHI eligible affordable units. It is not anticipated, however, that these pipeline projects would bring the City significantly closer to reaching the 1.5% or 10% safe harbors.<sup>2</sup>

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<sup>2</sup> If future pipeline projects were to take the form of large-scale rental developments containing 25% SHI eligible affordable housing units (which would allow the City to count the entire acreage of the development site toward the 1.5% calculation and to count 100% of the development units toward the 10% calculation), it could be possible that such projects would bring the City significantly closer to reaching one or both of the safe harbors.