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MEMORANDUM

DATE: December 6, 2016
TO: Marc C. Laredo, Chairman, Land Use Committee
CC: Land Use Committee Members
FROM: Robert J. Waddick
RE: Response to Memorandum of Objection – Docket #'s 179-16 and 180-16

The following is a point by point response to the Memorandum of Objection from Neighbors for a Better Newtonville, dated September 7, 2016. A copy of that memorandum is attached for your convenience.

A. Zone Change Application, Docket Item #180-16.

Issue: *Docket Item #180-16 does not appear to have an Application.*

Response: With respect to the initiation of a zone change, M.G.L. c 40A, § 5 states the following: "Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by agency or by other methods provided by municipal charter." Changes to Newton's zoning must be made in the manner prescribed by M.G.L. c. 40, § 5, according to Section 7.2.A. of Chapter 30 of Newton's Zoning Ordinance.

There is no separate application form for a zone change. However, the General Permit Application form that was submitted does note that the BU1 and BU2 zones are to be rezoned to MU4. Further, the owner of the land to be affected, Mark Lolich, LLC and Mark Newtonville LLC, submitted a letter to the City Clerk dated May 9, 2016 through their attorney, Stephen Buchbinder. In the May 9, 2016 letter, it was stated that "the petitioner seeks a change of zone from Business 1, Business 2, or unzoned to Mixed Use 4..." The initiation of the change of zone process by the aforementioned letter and the language in the General Permit Application form appear to be in accordance with the provisions M.G.L. c 40A § 5.

By a letter from Attorney Stephen Buchbinder dated October 28, 2016, a request for leave to withdraw the original request for a change of zone (Docket #180-16) and to file in its place a new request for a change of zone was sought. The new filing letter and accompanying documents appear to properly initiate the process for a change of zone, consistent with the provisions M.G.L. c 40A § 5. In any case, the granting of leave to withdraw Docket #180-16 rendered moot the issue raised by the Memorandum of Objection regarding the proper initiation of the original request for a change of zone.

Issue: *Included in #180-16 documents is a plan titled “Proposed Zoning Boundary.” In the title block the plan identifies “Lots 10, 11, 12, 13, 14, 16, 19, 20, 21, & 22, Block 29, Map 201, City of Newton, MA dated 05-06-16 by Control Point Associates, Inc.” as the land to be rezoned. This does not identify Lots 15, 17, 18, 19A, 23, Bailey Place and a portion of Washington Terrace in its Title Block as being included. Also, there is no land in Newton identified by Map number 201.*

Response: The Objection is accurate in that the title block of the plan does not identify Lots 15, 17, 18, 19A and 23. However, the plan does include the area of said lots within the area to be rezoned and the Schedule A filed with the plan lists all of the affected lots by address and SBL number. Bailey Place and Washington Terrace are not identified in the title block, but are clearly shown on the plan. The Memorandum of Objection is correct that Map 201 is an incorrect reference.

While it does not appear that the omissions from the title block of the plan or the incorrect reference to Map 201 were sufficient to defeat the validity of the prior request for a change of zone, the granting of leave to withdraw and the re-filing of the request with complete information, rendered the issues moot.

Issue: *Included in #180-16 documents is a “Surveyor’s Meets and Bounds Description,” dated May 6, 2016, by Control Points Associates, Inc. The document gives a perimeter description but does not include lots 10 through 23 in Sec 21, Block 29, Bailey Place and a portion of Washington Terrace. It includes land not owned or under the control of the developer.*

Response: The “Surveyor’s Metes and Bounds Description” dated May 6, 2016, provides a perimeter description of the area for which a change of zone is requested. A metes and bound description of each lot within the area for which a change of zone is requested is not provided. However, there is no requirement in M.G.L. c. 40A, § 5, or in the Newton Zoning Ordinance that a metes and bounds description of each lot must be provided. It does not appear that all of the lots within the perimeter were owned by the petitioner at the time of the original filing, but the owners of the lots not owned by the petitioner signed the application for special permit/site plan approval. In any case, the granting of leave to withdraw Docket #180-16 rendered moot the issue raised by the Memorandum of Objection regarding the “Surveyor’s Metes and Bounds Description” dated May 6, 2016. A new “Surveyor’s Metes and Bounds Description” dated October 26, 2016 accompanied the request for a change of zone filed on October 28, 2016. The petitioner now owns all of the lots within the perimeter of the area described, with the

exception of the gas station lot, which is under agreement according to the petitioner. The owner of the gas station lot signed the application for special permit/site plan approval which has not been withdrawn.

Issue: *Assuming for the sake of argument that the petitioner has met the minimum requirements for a proper petition for a zone change, the question arises as to what property is being rezoned.*

Response: The land to be rezoned is the land consisting of approximately 2.94 acres shown on the plan entitled “Proposed Zoning Boundary” dated 5-6-16 which accompanied the letter dated May 9, 2016 requesting a change of zone. Although the boundary line shown on the plan encompasses half of Washington Terrace, that portion of Washington Terrace would remain a roadway and not actually be affected by the proposed rezoning. Bailey Place, which is a private way, owned by Mark Lolich, LLC and Mark Newtonville LLC, is part of the land to be rezoned. The lots to be rezoned are also described in the Schedule A which was submitted with the filing letter. Because the square footage of half of Washington Street was included in the area to be rezoned, the 2.94 acre figure shown on the aforementioned plan was overstated. In any case, it appears that the information submitted was adequate to sufficiently identify the land area to which the change of zone being sought would apply.

With its new filing letter dated October 28, 2016, the petitioner provided a new plan and legal description and a list of lots included in the request for a change of zone. The new plan does not include the portion of Washington Street depicted in the prior plan and shows the area to be rezoned as approximately 2.84 acres.

Issue: *The legal notice published by the City of Newton, following the description of lots included as set out in the Applicants “Proposed Zoning Boundary” plan is also defective.*

Response: M.G.L. c. 40A, § 5 provides in pertinent part: “No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.” Even though the legal notice may have omitted certain lot numbers and included an incorrect Map reference, the notice was not misleading. When read in its entirety, the information provided in the notice provided a description of the area involved in the rezoning request. In any case, the prior legal notice regarding the proposed zone change was rendered moot by the granting of leave to withdraw and the re-filing.

B. Bailey Place

Issue: *Baily Place is a Street shown on municipal records since the 1895 City Atlas. Its status as a public or private way is uncertain. There are indications it could be either. Chief among those are the lack of any reference to right of way access to the interior lots in both registered and recorded land.*

Response: The City Clerk is the keeper of records with respect to street acceptances pursuant to Section 6-3 of the Revised Ordinances. According to the records of the City Clerk, Baily Place is

a private street. In addition Bailey Place is depicted on the City's Functional Road Classification Map dated March 23, 2006 as a private street.

The current owner of the land to be rezoned owns all of the land on either side of Bailey Place according to the deed of record at the Middlesex South Registry of Deeds and the records of the Assessors of the City of Newton. In conveying the parcels abutting Bailey Place to the current owner, the grantor did not retain any land abutting Bailey Place or reserve any rights in Bailey Place. Under M.G.L. c 183, § 58,¹ also known as the derelict fee statute, the conveyance of the land abutting each side of Bailey Place included the fee interest to the center of Bailey Place. Since all of the land on either side of Bailey Place was conveyed to Mark Lolich, LLC and Mark Newtonville, LLC, the current owner, Bailey Place is owned in its entirety by said current owner.

Issue: *The deed to Bailey Place is not included in the Petitioner's site purchase. Bailey Place is not owned or under the control of the Petitioner.*

Response: See previous Response. It was not necessary to specifically indicate in the deeds to the current owner that that Bailey Place was included in grant of property. The fee interest in Bailey Place was conveyed to Mark Lolich LLC and Mark Newtonville LLC pursuant to the provisions of M.G.L. c. 183, § 58. Bailey Place is now owned in its entirety by Mark Lolich LLC and Mark Newtonville LLC, the current owners of the land on either side of Bailey Place.

Issue: *There also appears to be a portion of a building across the northerly portion of Bailey Place, shown on the Application for a Special Permit, Docket Item #179-16*

Response: The petitioner's prior application and the refiled application propose a building which will be located on a portion of Bailey Place. Since the private street known as Bailey Place is owned in its entirety by the current owner, and no other party has rights in Bailey Place, nothing prevents the current owner from locating a building on Bailey Place and discontinuing its use as a private street.

C. Washington Terrace

Issue: *I am not aware of the zoning of private ways but I am sure there must be some precedent.*

Response: The original request for a change of zone included a portion of Washington Terrace.

¹ "Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line." M.G.L. c. 183, § 58.

The granting of leave to withdraw Docket #180-16 rendered moot this issue. The refiled request for a change of zone does not include a portion of Washington Terrace. Bailey Place, a private way owned in its entirety by the current owner, is within the area sought to be rezoned. See discussion of Bailey Place above.

D. Size of Lots

Issue: *The Surveyor's description says the parcel to be rezoned is 127,985 square feet of land. The Petitioner says the land of the project is 123,965 (actually 123,956) square feet and the Newton Assessors Records show the land comprises 114,915 square feet of land, 37,561 square feet zoned BU 1 and 77,354 square feet zoned BU 2.*

Response: The original filing for the change of zone included the square footage of one half of Washington Terrace and all of Bailey Place. The Assessors' records do not include the square footage of these private streets. The area for which the special permit was sought includes Bailey Place, but not the Washington Terrace square footage. That appears to explain why there are differences in the square footage calculations.

The surveyor's description which accompanies the refiled request for a change of zone indicates that the parcel to be rezoned is 123,765 square feet or 2.84 acres. The area shown on the plan accompanying the refiled request for a change of zone includes all of Bailey Place but does not include a portion of Washington Terrace. Other than said elimination of a portion of Washington Terrace and the addition of a small panhandle of land at 22 Washington Terrace, the area to be rezoned in the refiled request is the same as in the original filing. In any case, the granting of leave to withdraw rendered moot the issue raised by the Memorandum of Objection regarding "Size of Lots."

E. Site Density

Issue: *Does the City of Newton now allow the same land to be counted twice when calculating density? The Petitioner has counted the land area once to determine the Floor Area Ratio of the proposed business use and the proposed business parking on the site. Then, the same area has been counted again to measure against the required density of 1,000 square feet per residential unit.*

Response: The Zoning Ordinance contains separate calculations for floor area ratio (FAR) and residential density. There is nothing in the Zoning Ordinance that says that commercial space is deducted before the lot area per residential unit is calculated.

The MU 4 district allows for an FAR of 2.5 if a special permit is granted for a five story mixed use residential building. The FAR is calculated by dividing the gross floor area of all of the buildings on the lot, including the residential and commercial uses, by the total lot area. In her Memorandum dated May 12, 2016, the Chief Zoning Code Official calculated the FAR at 1.92 ($238,075 \div 123,956 = 1.92$).

Section 4.2.2.A.2 of the Zoning Ordinance requires a residential density control of 1,000 square feet of lot area per unit in MU 4. The petitioner's proposed lot area per unit of 725 square feet in its original filing ($123,956 \div 171 = 725$) is allowable by special permit. Again, the Chief Zoning Code Official's Memorandum makes note of the proposed 725 square foot lot area per unit proposed, and the requirement for a special permit to allow it.

In summary, there are two separate calculations for FAR and residential density under the Zoning Ordinance. Both use the total lot area in the equation.

Notably, the FAR remains at 1.92 with the square footage of the site reduced to 123,765 in the refiled request for a change of zone ($238,075 \div 123,765 = 1.92$). The petitioner is still seeking a lot area per unit of approximately 725 square feet in the refiled ($123,765 \div 171 = 724$).

F. Open Space

Issue: *The Developer claims 10% open space, whereas the project contains 4.48% open space, less than the required amount.*

Response: The Memorandum of Objection contends that if the roof deck space (3,600 square feet) and the area of Bailey Place (4,100 square feet) are removed from the calculation, that the remaining open space is less than the required 5%. However, the roof deck space and the area of Bailey Place are includable as open space areas pursuant to the definition of open space under section 8-3 of the Zoning Ordinance. Under Section 8-3, the definition of Open Space, Beneficial, includes those areas "not covered by buildings or structures that are available for active or passive recreation, which shall include, ...landscaped areas, including space located at the top of a structure, gardens, playgrounds, walkways, plazas, patios, terraces, and other hardscaped areas." The roof deck and the hardscaped plaza which is proposed for the area of Bailey Place, meet the definition of Open Space, Beneficial. Thus it appears that the challenge to the validity of roughly 7,700 square feet of area as open space is not supported by the definition of Open Space, Beneficial, in the Zoning Ordinance. Moreover, a calculation of 10.7 % open space is included in the Chief Zoning Officials Memorandum dated May 12, 2016.

G. Traffic Experts and Traffic Studies

Issue: *The Memorandum of Objection challenges the accuracy of the VHB Traffic Study and its findings.*

Response: The Memorandum of Objection offers a critique of the VHB Traffic Study and its findings. However, Neighbors for a Better Newtonville did not provide an alternative traffic study in support of its critique. It is important to note that a peer review of the VHB study was conducted for the city by Howard/Stein-Hudson Associates (HSH). In its peer review report dated July 8, 2016, HSH stated that VHB's traffic study "conforms to industry standards and best engineering practices." HSH further concluded that it generally agreed with the methodology

used by VHB and the mitigation proposed by VHB.

The specific criticisms expressed in the Memorandum of Objection relative to the VHB study and the HSH peer review are matters of opinion for which no comment is necessary. The VHB report and the HSH report speak for themselves.

H. Transit Oriented Development

Issue: *Under the Newton Zoning Ordinance a Transit Oriented Development (TOD) requires a minimum of 9 acres (392,040 square feet). The proposed Washington Place project site contains less than 3 acres (114,915 square feet). Also a TOD is not an allowed use in the Mixed Use 4 Zone requested by the Developer. The project is mislabeled and improperly presented.*

Response: The Memorandum of Objection accurately points out that a Transit-Oriented Development as defined by Section 4.2.1(B) of Newton’s Zoning Ordinance requires 9 acres of land. That is because Section 4.2.1(B), which defines the Mixed Use 3/ Transit Oriented Development district, specifically and exclusively describes the Riverside site which is approximately 9 acres.

Although the petitioner described the project as a “transit-oriented development” in its narrative, no specific zoning relief was requested by the petitioner, nor can any be granted by the Council, for a Transit-Oriented Development under Newton’s Zoning Ordinance. The MU4 zone does not require a finding that the proposed development is a “transit-oriented development.” The Chief Zoning Code Official’s Memorandum, which reviewed the provisions of the Newton Zoning Ordinance applicable to the project, doesn’t include any reference to, or even use the words, “transit-oriented development.”

The Commonwealth’s Executive Office of Energy and Environmental Affairs (EEA) has published a “Smart Growth/Energy Tool Kit” to assist local communities with the adoption and implementation of “smart/growth smart/energy measures.” The publication includes the following definition:

“ Transit Oriented Development (TOD): The development of housing, commercial space, services, and job opportunities in close proximity to public transportation. Reduces dependency on cars and time spent in traffic, which protects the environment and can ease traffic congestion, as well as increasing opportunity by linking residents to jobs and services.”

The EEA “Tool Kit” also includes a Model Bylaw to assist communities in the establishment of a Transit-Oriented Development Overlay District. The Model Bylaw provides the following definition:

“Transit-Oriented Development: A development pattern created around a transit facility or station that is characterized by higher density, mixed uses, a safe and attractive pedestrian environment, reduced parking, and a direct

and convenient access to the transit facility.”

The Massachusetts Bay Transportation Authority (“MBTA”) offers yet another definition:

“Transit-oriented development (TOD) is compact, walkable development around transit stations, generally including a mix of uses such as housing, shopping, employment, and recreational facilities—TOD is designed with transit and pedestrians as high priorities, making it possible for visitors and residents to move around without complete dependence on a car.”

The Federal Transit Authority of the United States Department of Transportation describes it as follows:

“Transit-oriented development (TOD) creates compact, mixed use communities Near transit where people enjoy easy access to jobs and services. Well-done TOD connects transit to desirable places to live, work and visit that feature amenities like entertainment venues, parks, retail, restaurants, an improved pedestrian environment and diverse housing choices.”

The National League of Cities, Sustainable Cities Institute, offers this description:

“Transit-oriented development, or TOD, is an approach to development that focuses land uses around a transit station or within a transit corridor. Typically, it is characterized by:

- A mix of uses
- Moderate to high density
- Pedestrian orientation/connectivity
- Transportation choices
- Reduced parking
- High quality design

The rule of thumb is that TOD occurs within one-quarter mile, or a five to seven minute walk, of a transit station.”

And, Wikipedia provides yet another definition:

“A transit-oriented development (TOD) is a mixed-use residential and commercial area designed to maximize access to public transport, and often incorporates features to encourage transit ridership while dissuading the ownership of automobiles.”

While the Washington Place project cannot technically be defined as a Transit-Oriented Development under the Newton Zoning Ordinance, it appears to have features that are common among the various definitions of TODs. In particular, it seems clear that the proposed project will be a compact or dense mix-used development that will include housing and commercial services and will be situated in close proximity to public transit.

I. Site Environmental Contamination

Issue: *Lot 19A, 875 Washington Street, the Sunoco Service Station, is a contaminated site. It is not approved for Residential Use. It is the city's responsibility to make sure that the site gets cleaned up.*

Response: There is an Activity and Use Limitation (AUL) on the gas station property which is on record at the Registry of Deeds. The AUL permits the continued use of the site as a retail gasoline station or other retail use. Other activities and uses are not necessarily prohibited, but in order to conduct other activities and uses on the site a licensed site professional (LSP) must opine that such other uses present no greater risk of harm to health, safety, public welfare or the environment than the uses permitted under the AUL.

The developer will be required to conduct whatever environmental remediation is required by the standards of the Massachusetts Department of Environmental Protection (DEP) in order to conduct uses on the site not currently permitted under the AUL. The environmental remediation of the gas station property that may be required for the uses proposed by the developer for that site, is not the responsibility of the municipality. It is the responsibility of the property owner to comply with the requirements of Massachusetts law and the requirements of the Massachusetts DEP. The developer cannot use the property for any use other than the current uses permitted under the AUL unless an LSP renders an opinion that there is no significant risk of harm to health, safety, public welfare or the environment, associated with a different use. In any case, the environmental issues fall under the purview of the DEP and are not appropriate grounds on which to base a zoning decision.

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Memorandum of Objection to Proceedings

To: Marc C. Laredo, Chair, Land Use Committee
Copy: Land Use Committee

To: Scott Wolf, Chair, Newton Planning Board
Copy: Planning Board members

From: Neighbors for a Better Newtonville

Re: Objection to Proceedings; Newtonville zone change; Docket Items #179-16 & #180-16

Date: September 7, 2016

The following is a list of objections to the continued proceeding of the above reference Docket Items.

A. Zone Change Application, Docket Item #180-16.

Docket Item #180-16 for a Zone Change does not appear to have an Application. Attached to Docket Item #179-16 is a General Permit Application that makes reference to a zone change in a parenthetical expression indicating an additional future action, set out on the line identified by (ZONING DISTRICT: BU1 and BU2 (to be rezoned to MU4).

The PROJECT DESCRIPTION describes a proposal to construct 3 buildings. It does not identify a Zone Change request.

Included in #180-16 documents is a plan titled "Proposed Zoning Boundary". In the title block the plan identifies "Lots 10, 11, 12, 13, 14, 16, 19, 20, 21 & 22, Block 29, Map 201, City of Newton, MA, dated 05-06-16, by Control Point Associates, Inc." as the land to be rezoned. This does not identify Lots 15, 17, 18, 19A, 23, Bailey Place and a portion of Washington Terrace in its Title Block as being included. Also, there is no land in Newton identified by Map number 201.

Included in #180-16 documents is a "Surveyor's Meets and Bounds Description", dated May 6, 2016, by Control Point Associates, Inc. This document gives a perimeter description that does

include lots 10 through 23 in Sec 21, Block 29, Bailey Place and a portion of Washington Terrace. It include land not owned by or under the control of the developer.

The petitioner's written and signed General Permit Application, under Project Location Information does not include Bailey Place and a portion of Washington Terrace.

Assuming, for the sake of argument, that the above meets the minimum requirements for a proper petition for a change of zone, the question arises as to what property is being rezoned.

The legal notice published by the City of Newton, following the description of lots included as set out in the Applicants "Proposed Zoning Boundary" plan is also defective.

B. Bailey Place.

1. Bailey Place is a street shown on municipal records since the 1895 City Atlas. Its status as a public or private way is uncertain. There are indications it could be either. Chief among those are the lack of any reference to right of way access in the deeds to the interior lots in both registered and recorded land.

2. The deed to Bailey Place is not included in the Petitioner's site purchase. Bailey Place is not owned or under the control of the Petitioner.

3. There also appears to be a portion of a building across the northerly portion of Bailey Place, shown on the Application for a Special permit, Docket Item #179-16.

C. Washington Terrace.

Finally, the westerly boundary of the proposed zone change plan and survey appears to run "Along the approximate centerline of Washington Terrace, ... a distance of 282.88 feet ...", according to Control Point Associates, Inc. "Surveyor's Meets and Bounds Description".

I am not aware of Newton's policy concerning the zoning of private ways, but I am sure there must be some precedent.

There are also issues of the rights of others with an interest in the private way to object to its proposed use as access to the project.

The Special Permit Application also raises an interesting question as to use of a way designed to provide access for 9 or 10 lots. Does the owner of some of the lots have the right to grant access to adjacent lots with their own separate and independent access to a public way (Washington Street)? Does the owner of some of the lots have the right to burden the remaining owners with a significant increase in use? What is the language creating Washington Terrace? Does it allow the proposed use?

D. Size of the site. The Surveyor's description says the parcel to be rezoned is 127,985 square feet of land. The Petitioner says the land of the project is 123,965 square feet

and the Newton Assessors Records show the land comprises 114,915 square feet of land, 37,561 square feet zoned BU 1 and 77,354 square feet zoned BU 2.

ITEM	CLAIMED	ACTUAL
Lot Size	123,965 sq. ft.	114,915 sq. ft.

Address	Sec 21, Bk 29 Lot #	Value	Zoning District	Area
241 Walnut Street	10	\$ 950,000.00	BU 2	7,794 sq. ft.
245-261 Walnut Street	11	\$ 2,818,100.00	BU 1	12,788 sq. ft.
848-855 Washington Street	12	\$ 2,052,400.00	BU 1	7,478 sq. ft.
14-18 Bailey Place	13	\$ 234,600.00	BU 2	9,457 sq. ft.
22 Bailey Place	14	\$ 281,600.00	BU 2	6,914 sq. ft.
Bailey Place (Lot 15)	15	\$ 112,700.00	BU 2	3,364 sq. ft.
861-865 Washington Street	16	\$ 1,860,500.00	BU 2	17,072 sq. ft.
857-859 Washington Street	17	\$ 1,163,200.00	BU 1	3,235 sq. ft.
867 Washington Street	18	\$ 722,200.00	BU 1	3,300 sq. ft.
869 Washington Street	19	\$ 391,700.00	BU 2	19,971 sq. ft.
875 Washington Street	19A	\$ 696,200.00	BU 1	10,760 sq. ft.
6-8 Washington Terrace	20	\$ 544,300.00	BU 2	2,345 sq. ft.
10-12 Washington Terrace	21	\$ 588,000.00	BU 2	1,855 sq. ft.
16-18 Washington Terrace	22	\$ 439,800.00	BU 2	4,200 sq. ft.
22 Washington Terrace	23	\$ 474,500.00	BU 2	4,382 sq. ft.
TOTAL		\$13,329,800.00		114,915 sq. ft.
Business Use 1 area				37,561 sq. ft.
Business Use 2 area				77,354 sq. ft.
Total				114,915 sq. ft.

E. Site Density. Does the City of Newton now allow the same land to be counted twice when calculating density? The Petitioner has counted the land area once to determine the Floor Area Ratio of the proposed business use and the proposed business parking on the site. Then, the same area has been counted again to measure against the required density of 1,000 square feet per residential unit.

ITEM	REQUIRED	PROPOSED	ACTUAL
Lot Area per Dwelling Unit	1,000 sq. ft.	725 sq. ft	151 sq. ft.

The proposed density of 725 sq. ft per dwelling unit is achieved by double counting.

The Total Land Area, according to the Newton Assessors Records, is 114,915 square feet of land.

In calculating the adherence to the density requirements of the Newton Zoning Ordinance:

First, 49,325 sq. ft. ground floor area is set aside for retail use.

[PCA PROJECT #: 15063 Cover sheet]

Second, 39,745 sq. ft. \pm is set aside for commercial parking.

[PCA PROJECT #: 15063 Cover sheet]

The remainder of 25,845 sq. ft. \pm is available for Residential Units.

The density calculation for 171 residential units is arrived at by dividing the proposed 171 units into the 25,845 square feet of remaining land area.

The result is 151 sq. ft. per unit, a waiver of 85% of the density requirement.

The Issue is can the land be counted twice for different uses when calculating density requirements? If so, will the double counting calculation apply to every zone or just Mixed Use Zones?

F. Open Space.

The Developer claims 10% open space, whereas the project contains 4.48% open space, less than the required amount.

ITEM	REQUIRED	PROPOSED	ACTUAL
Open Space	5% / 5,746 sq. ft.	10% / 12,396 sq. ft,	4.48%

PCA PROJECT #: 15063, Plan C3.2 describes the proposed open space as follows:

Hardscape *	9,670 sq. ft.
Roof Deck	1,643 sq. ft.
Roof Deck	1,957 sq. ft.
Total	13,270 sq. ft

* included in the Hardscape calculation is a significant portion of Bailey Place
Approximately 138 feet of length by 30 feet width = 4,140 sq. ft

If the roof deck space (3,600 sq. ft.) and Bailey Place (4,140 sq. ft.) are eliminated the remaining open space contributed by the developer is 5,530 sq. ft. that appears from the plans to be mostly space providing access to the buildings [5,530/114,915 = 4.8%].

5,530 sq. ft. of open space is less than the Ordinance requirement of 5%.

G. Traffic Experts and Traffic Study.

A review of the Traffic Impact and Access Study prepared by Vanasse Hangen Brustlin, Inc. leads to the Conclusion that the traffic counts, the projections and the calculations contained in the Traffic Study, as supplemented by their public hearing presentation, do not provide any reasonable hope that the addition of the proposed project to the Village of Newtonville will alleviate existing traffic problems on Walnut Street, Washington Street or Lowell Avenue. It appears that the proposed project will most likely exacerbate existing traffic problems on Walnut Street, Washington Street and Lowell Avenue. It also raises the question as to the sufficiency of the proposed parking plan and allotment.

The VHB Traffic Study would have us believe this project and the extra residents and traffic it causes will improve traffic conditions in Newton and reduce delays. This seems curious and there are a number of questions and issues that suggest otherwise.

- Traffic data were not collected at the places where the project will have its largest negative impacts and only one day was sampled. A larger sample and additional locations are needed to produce a valid assessment of traffic impacts.
- The trip estimates assume all existing trips disappear so the net effect is only the new trips generated by the project. This incorrectly minimizes the project's traffic impact because most if these trips will still occur on Newton streets – and mostly in the same Newtonville area.
- There are many “curious” or improbable results in the intersection delay results that need to be explained and/or corrected.
- The claimed benefits from reduced access points ignore the fact that total exposure is greater because there are more vehicles using the project site. More vehicles interacting with pedestrians is worse even if the number of places where this occurs is fewer.
- These are inconsistencies between the MPO corridor study and the intersection improvements assumed by VHB. Some of the assumed benefits may not be realized.

The Executive Summary says: VHB, Inc. has completed a *detailed traffic assessment* to evaluate the potential impacts associated with the mixed use *transit oriented redevelopment* know as Washington Place to be located at northwest corner of the intersections of Washington Street and Walnut Street in the *Newtonville section* of Newton, Massachusetts.

At the Public Hearing on August 12, 2016, both traffic experts seemed to agree that the proposals to include a bicycle lane on Walnut Street and relieve traffic congestion by adding a 2nd southbound traffic lane on Walnut Street were incompatible.

They also agreed that the Walnut Street southbound traffic queue is 900 feet and would be reduced to 250 feet by adding a second traffic lane and eliminating the bicycle lane. The claim of a 900 foot traffic queue is disputed on the grounds that it is longer than 900 feet. The claim that a 900 foot traffic queue would be reduced to 250 feet by adding a 2nd traffic lane is disputed as mathematically incorrect.

The Traffic Experts also agree that now, before the addition of the Project, “some of the movements” on Washington & Walnut Streets are at a maximum.

H. Transit Oriented Development

Under the Newton Zoning Ordinance a Transit Oriented Development (TOD) requires a minimum of 9 acres (392,040 square feet). The proposed Washington Place project site contains less than 3 acres (114,915 square feet). Also, a TOD is not an allowed use in the Mixed Use 4 Zone requested by the Developer. The project is mislabeled and improperly presented.

I. Site Environmental Contamination

Lot 19A, 875 Washington Street, the Sunoco Service Station, is a contaminated site. It is not approved for Residential Use.

The documents associated with the Sunoco station spill in 1994 are available at the Mass DEP. There has been no information as to a proposal to include the environmental issues/plans to remediate the site. It is the city's responsibility to ensure the site gets cleaned up.

Information is available at <http://public.dep.state.ma.us/SearchableSites2/Search.aspx>

Enter Newton, and Washington as the street, then sort by date. You will see 2 entries for 875 Washington St from 8/18/94 and 9/3/94. Each link has documents which can be downloaded. Below are links to some of the documents. The first one below is about the AUL (Activity Use Limitation) on the site, which states that the DEP considers the site low risk if it is continued to be used as a gas station or for other commercial use which does not disturb the soil. If the owner plans to use the site for an unapproved use, like housing or an underground garage, they need to get it cleaned up. Currently it is not approved for residential use.

Additional information may be available at:

<http://public.dep.state.ma.us/fileviewer/DefaultScanned.aspx?documentid=84971>

<http://public.dep.state.ma.us/fileviewer/Rtn.aspx?rtn=3-0011576>

<http://public.dep.state.ma.us/fileviewer/Rtn.aspx?rtn=3-0011485>

<http://public.dep.state.ma.us/fileviewer/DefaultScanned.aspx?documentid=84966>

CONCLUSION: Some may say that these conflicts are de minimus or inconsequential. I would disagree. I would suggest that the best resolution is for the developer to withdraw and re-file the Petition.

Peter F. Harrington

FACT CHECK REPORT # 1 — NOTICE DEFECTS

To: Newton Special Permit Granting Authority and Newton Planning Board

**Re: Docket Item #180-16, Special Permit Petition to rezone the Orr block to
Mixed Use 4**

Zone Change Application, Docket Item #180-16.

Docket Item #180-16 for a Zone Change does not appear to have an Application. However, attached to Docket Item #179-16 is a General Permit Application that makes reference to a zone change in a parenthetical expression indicating an additional future action, set out on the line identified by (ZONING DISTRICT: BU1 and BU2 (to be rezoned to MU4).

The PROJECT DESCRIPTION describes a proposal to construct 3 buildings. It does not identify a Zone Change request.

Included in #180-16 documents is a plan titled “Proposed Zoning Boundary”. In the title block the plan identifies “Lots 10, 11, 12, 13, 14, 16, 19, 20, 21 & 22, Block 29, Map 201, City of Newton, MA, dated 05-08-16, by Control Point Associates, Inc.” as the land to be rezoned. This does not identify Lots 15, 17, 18, 19A, 23, Bailey Place and a portion of Washington Terrace in its Title Block as being included. Also, there is no land in Newton identified by Map number 201.

Also included in #180-16 documents is a “Surveyor’s Meets and Bounds Description”, dated May 6, 2016, by Control Point Associates, Inc. This document gives a perimeter description that does include lots 10 through 23 in Sec 21, Block 29, Bailey Place and a portion of Washington Terrace.

The petitioner’s written and signed General Permit Application, under Project Location Information does not include Bailey Place and a portion of Washington Terrace.

Assuming, for the sake of argument, that the above meets the minimum requirements for a proper petition for a change of zone, the question arises as to what property is being rezoned.

The legal notice published by the City of Newton, following the description of lots included as set out in the Applicants “Proposed Zoning Boundary” plan is also defective.

**The following is the official Notice of Public Hearing published as required under
The requirements of MGL c. 40A**

**“City of Newton
Legal Notice
Tuesday, June 7, 2016**

“Public hearings will be held on Tuesday, June 7, 2016 at 7:00 PM, second floor, Newton City Hall before the Land Use Committee of the Newton City Council for the purpose of hearing the following petitions at which time all parties interested in the items shall be heard. Notice will be published Tuesday, May 24, 2016 and Tuesday, May 31, 2016 in The Boston Globe and Wednesday, June 1, 2016 in the Newton Tab, with a copy posted on the city’s website at www.newtonma.gov and in a conspicuous place at Newton City Hall.

“#180-16 Special Permit Petition to rezone the Orr block to Mixed Use 4 MARK NEWTONVILLE, LLC. petition for SPECIAL PERMIT/SITE PLAN APPROVAL for a change of zone to MIXED USE 4 for a portion of land located at Walnut Street, Washington Street, Washington Terrace, also identified as Lots 10, 11, 12, 13, 14, 16, 19, 20, 21, 22, Block 29, Map 201 currently zoned Business 1 and Business 2.”

- 1. there is no authority to grant a Zone change by a Special Permit;**
- 2. the description of the site is inaccurate (there is no Map 201);**
- 3. the Notice to change the zone as to Lots 15, 17, 19A, 23, a portion of Washington Terrace and Bailey Place is defective.**

FACT CHECK REPORT # 1A — BAILEY PLACE

- 1. Bailey Place is a street shown on municipal records since the 1895 City Atlas. It's status as a public or private way is uncertain. There are indications it could be either.**
- 2. The deed to Bailey Place is not included in the Petitioner's site purchase. Bailey Place is not owned or under the control of the Petitioner.**
- 3. The Petitioner's Application does not include a request to re-zone Bailey Place.**

FACT CHECK REPORT # 1B — WASHINGTON TERR.

- 1. Washington Terrace is a street shown on municipal records since the 1886 City Atlas as a private way. The first gasoline powered automobile was invented by Karl Benz in 1886.**
- 2. Washington Terrace was created to provide access to the nine lots abutting the private way.**
- 3. There is no evidence that the developer's rights to use the way included the right to turn it into an access point for 346 parking spaces for gasoline powered automobiles.**
- 4. There is no evidence that the developer's rights to use the way included the right to turn it into an access point for land abutting Walnut Street, 450 feet distant.**
- 5. The proposed plans for Washington Terrace do not meet Newton requirements concerning sidewalks, lighting, handicapped access and pedestrian safety.**
- 6. There is no proposed covenant for maintenance of Washington Terrace.**

FACT CHECK REPORT # 2 Lot Size

To: Newton City Council & Newton Special Permit Granting Authority

Docket Item #179-16, Special Permit Petition for Orr Building at Walnut St. and Washington St.

Docket Item #180-16, Special Permit Petition to rezone the Orr block to Mixed Use 4

ITEM	CLAIMED	ACTUAL
Lot Size	123,965 sq. ft.	114,915 sq. ft.

Address	Sec 21, Bk 29 Lot #	Value	Zoning District	Area
241 Walnut Street	10	\$ 950,000.00	BU 2	7,794 sq. ft.
245-261 Walnut Street	11	\$ 2,818,100.00	BU 1	12,788 sq. ft.
848-855 Washington Street	12	\$ 2,052,400.00	BU 1	7,478 sq. ft.
14-18 Bailey Place	13	\$ 234,600.00	BU 2	9,457 sq. ft.
22 Bailey Place	14	\$ 281,600.00	BU 2	6,914 sq. ft.
Bailey Place (Lot 15)	15	\$ 112,700.00	BU 2	3,364 sq. ft.
861-865 Washington Street	16	\$ 1,860,500.00	BU 2	17,072 sq. ft.
857-859 Washington Street	17	\$ 1,163,200.00	BU 1	3,235 sq. ft.
867 Washington Street	18	\$ 722,200.00	BU 1	3,300 sq. ft.
869 Washington Street	19	\$ 391,700.00	BU 2	19,971 sq. ft.
875 Washington Street	19A	\$ 696,200.00	BU 1	10,760 sq. ft.
6-8 Washington Terrace	20	\$ 544,300.00	BU 2	2,345 sq. ft.
10-12 Washington Terrace	21	\$ 588,000.00	BU 2	1,855 sq. ft.
16-18 Washington Terrace	22	\$ 439,800.00	BU 2	4,200 sq. ft.
22 Washington Terrace	23	\$ 474,500.00	BU 2	4,382 sq. ft.
TOTAL		\$13,329,800.00		114,915 sq. ft.
Business Use 1 area				37,561 sq. ft.
Business Use 2 area				77,354 sq. ft.
Total				114,915 sq. ft.

FACT CHECK REPORT # 3 DENSITY

To: Newton City Council & Newton Special Permit Granting Authority

Docket Item #179-16, Special Permit Petition for Orr Building at Walnut St. and Washington St.

Docket Item #180-16, Special Permit Petition to rezone the Orr block to Mixed Use 4

ITEM	REQUIRED	PROPOSED	ACTUAL
Lot Area per Dwelling Unit	1,000 sq. ft.	725 sq. ft	151 sq. ft.

The proposed density of 725 sq. ft per dwelling unit is achieved by double counting.

The Total Land Area, according to the Newton Assessors Records, is 114,915 square feet of land.

In calculating the adherence to the density requirements of the Newton Zoning Ordinance:

First, 49,325 sq. ft. ground floor area is set aside for retail use.

[PCA PROJECT #: 15063 Cover sheet]

Second, 39,745 sq. ft. \pm is set aside for commercial parking.

[PCA PROJECT #: 15063 Cover sheet]

The remainder of 25,845 sq. ft. \pm is available for Residential Units.

The density calculation for 171 residential units is arrived at by dividing the proposed 171 units into the 25,845 square feet of remaining land area.

The result is 151 sq. ft. per unit. A waiver of 85% of the density requirement.

The Issue is: can the land be counted twice for different uses when calculating density requirements?

If so, will the double counting calculation apply to every zone or just Mixed Use Zones?

FACT CHECK REPORT # 4 GROSS FLOOR AREA

To: Newton City Council & Newton Special Permit Granting Authority

Docket Item #179-16, Special Permit Petition for Orr Building at Walnut St. and Washington St.

Docket Item #180-16, Special Permit Petition to rezone the Orr block to Mixed Use 4

ITEM	PROPOSED	PERMITTED UNDER
	by Special Permit	EXISTING ZONING by Special permit
Gross Floor Area	238,075 sq. ft.	211,049 sq. ft.

The site contains 114,915 square feet of land in two zoning districts, BU 1 & BU 2.
The developer can build 114, 915 square feet of space in two stories.

There is 37,561 square feet of land zoned Business Use 1.
There is 77,354 square feet of land zoned Business Use 2.

The allowed Floor Area Ratio (FAR) in Business Use 1, under a Special Permit, is 1.5

The allowed Floor Area Ratio (FAR) in Business Use 2, under a Special Permit, is 2.0

The maximum Floor Area Ratio in a Business Use 1 Zone, under a Special Permit, is 56,345 sq ft (FAR 1.5)

The maximum Floor Area Ratio in a Business Use 2 Zone, under a Special Permit, is 154,708 sq ft (FAR 2.0)

CALCULATION: of maximum FAR permitted under current zoning
BU 1 56,345 sq. ft. + BU 2 154,708 sq. ft. = 211,049. sq. ft

Neighbors for a Better Newtonville
7 Briar Lane, Newtonville

Complicated petitions often contain errors, omissions and misdirection. The following is a three minute explanation of why the Notice of the Petition for a Zone Change is defective.

FACT CHECK REPORT # 5 OPEN SPACE

To: Newton City Council & Newton Special Permit Granting Authority

Docket Item #179-16, Special Permit Petition for Orr Building at Walnut St. and Washington St.

Docket Item #180-16, Special Permit Petition to rezone the Orr block to Mixed Use 4

ITEM	REQUIRED	PROPOSED	ACTUAL
Open Space	5% / 5,746 sq. ft.	10% / 12,396 sq. ft,	??%

PCA PROJECT #: 15063, Plan C3.2 describes the proposed open space as follows:

Hardscape *	9,670 sq. ft.
Roof Deck	1,643 sq. ft.
Roof Deck	1,957 sq. ft.
Total	13.270 sq. ft

* included in the Hardscape calculation is a significant portion of Bailey Place
Approximately 138 feet of length by 30 feet width = 4,140 sq. ft

If the roof deck space (3,600 sq. ft.) and Bailey Place (4,140 sq. ft.) are eliminated the remaining open space contributed by the developer is 5,530 sq. ft. that appears from the plans to be mostly interior access space.

5,530 sq. ft. of open space is less than the Ordinance requirement of 5%.