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Director

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**MEMORANDUM**

**DATE:** April 7, 2017

**TO:** Councilor Ted Hess-Mahan, Chairman  
Members of the Zoning and Planning Committee

**FROM:** Barney Heath, Director, Department of Planning and Development  
James Freas, Deputy Director  
Jane Santosuosso, Principal Planner

**RE:** Zoning Redesign

**CC:** City Council  
Planning and Development Board  
Donnalyn Kahn, City Solicitor  
John Lojek, ISD Commissioner

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As part of the overall Zoning Redesign Project, the Planning Department expanded the purpose of these regular updates to the Zoning and Planning Committee to include general information on Zoning and related topics. This memo is a continuation of that effort and explains the terms “non-conforming” and “non-compliant”, and was written by Jane Santosuosso, Principal Planner and Chief Zoning Code Official.

**Non-Conforming vs. Non-Compliant**

Simple fairness would suggest that a property owner should not be punished when the rules change and their existing property is not consistent with the new rules. Zoning law recognizes this issue of fairness and incorporates the idea of “non-conforming uses or structures” to address it. However, when property owners make changes to their property that are not legally entitled under current zoning, those changes are considered non-compliant. These non-compliant cases, therefore, are generally not provided the same level of protection as non-conforming cases. In Newton, which is a largely built out community, most structures were developed before zoning was even introduced to the City. Therefore, it is very important to understand non-conformity and

non-compliance, which can sometimes be hard to distinguish. In a place like Newton, where a majority of the buildings (an estimated 80%) is non-conforming, the ability for zoning to be a useful tool for the community to envision its future is diminished.

MGL Chapter 40A, Section 6 provides that “a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or bylaw.” Newton’s Zoning Ordinance includes this provision and further, allows that any non-conforming structure or use may be expanded by special permit. Given that most properties in the City are non-conforming as the homes and commercial buildings on them were constructed before the current zoning ordinance, a lot of potential building activity in the City is subject to special permit review. The ultimate shape of that activity is not readily predictable through the zoning ordinance.

A paramount example of the impact of non-conformity is when a structure does not meet the current setback requirement; the structure is therefore non-conforming, which means the property owner can obtain a special permit to further extend that non-conformity. The property owner may use this special permit to further build an addition to their home within the setbacks. Conversely, a home that does meet its setback requirements cannot seek a special permit to build within the setback. The result is a somewhat defunct zoning code that, by compensating for non-conformity, creates even more opportunities for buildings to evade the predictability that zoning aims to achieve.

The remainder of this memo expands on the distinctions between non-conforming and non-compliant structures in a series of case studies. These case studies intend to illustrate the impacts that non-conformity and non-compliance have on a community in order to demonstrate the benefits of a zoning code that reflects the built form of the city.

## **CASE STUDIES**

**A. Nonconforming Structures Definition:** A nonconforming structure is one that does not meet the current dimensional requirements for the zoning district in which it is located, but met them at the time of construction, and contains a use allowed by zoning for that district. These requirements may include setbacks, height, stories or floor area ratio.

### **Case Study A1: Nonconforming Structure**

A single-family dwelling built in 1890 located in the Single Residence 2 zoning district.

<b>Single Residence 2</b>	<b>Required</b>	<b>Existing</b>	<b>Conforming?</b>
<b>Lot Area</b>	10,000 square feet	12,000 square feet	Yes
<b>Frontage</b>	80 feet	120 feet	Yes
<b>Setbacks</b> <ul style="list-style-type: none"><li>• <b>Front</b></li><li>• <b>Side</b></li><li>• <b>Rear</b></li></ul>	25 feet 7.5 feet 15 feet	40 feet 15 feet <b>12 feet</b>	Yes Yes <b>NO</b>
<b>FAR</b>	.36	.33	Yes
<b>Lot Coverage</b>	30%	19%	Yes
<b>Open Space</b>	50%	71%	Yes

The dwelling above has a nonconforming rear setback, where it is situated 12 feet from the rear lot line and 15 feet is required. This nonconformity is legal, as the structure was built before zoning took effect and no setback requirements existed at the time of construction. The use of the structure as a single-family dwelling in a Single Residence 2 zoning district is by right, and the lot meets the requirements of the district. Should the homeowner request to construct an addition to the dwelling that met the dimensional requirements for the district, only a building permit would be required. However, if the applicant wanted to make an addition that extended the nonconforming rear setback laterally, vertically, or further into the setback, a special permit would be required after a finding from the City Council that the extension was in keeping with the dwelling and neighborhood, and not detrimental to abutters and the general neighborhood.

### Case Study A2: Nonconforming Use

A block of shops was constructed in 1939 in what was then zoned the Business district. The corner space housed a general store at the time it was built. In 1942, the space was converted into a diner. The property was rezoned in 1953 to Multi Residence 2, and the space has continued to be used as a diner to present.

Because a restaurant, and all other commercial uses, are not allowed in the MR2 zoning district, but were at the time of inception, they are considered legally nonconforming and may continue to operate. If the diner changed ownership, but continued to operate in the same way, the new owner would not need any special permission from the City to operate. If the diner changed ownership, and the new owner proposed to use the space for a different commercial use, the owner would be required to seek a special permit from the City Council for a finding that the change from one nonconforming use to another was not detrimental to the neighborhood.

### Case Study A3: Nonconforming Lot

A lot was created in 1885 and recorded at the Registry of Deeds, prior to the adoption of zoning. A single-family dwelling was constructed on the lot in 1929 when the lot was zoned "Private Residence". The lot was rezoned to Single Residence 3 in 1953.

Single Residence 3	Required	Existing	Conforming?
<b>Lot Area</b>	7,000 square feet	<b>5,500 square feet</b>	<b>NO</b>
<b>Frontage</b>	70 feet	<b>55 feet</b>	<b>NO</b>
<b>Setbacks</b>			
• <b>Front</b>	25 feet	28 feet	Yes
• <b>Side</b>	7.5 feet	8 feet	Yes
• <b>Rear</b>	15 feet	24 feet	Yes
<b>FAR</b>	.48	.39	Yes
<b>Lot Coverage</b>	30%	24%	Yes
<b>Open Space</b>	50%	62%	Yes

In 1929 when the single-family dwelling was constructed, the only dimensional requirement was a 25 foot setback, which the dwelling met. The dwelling meets all of the required setbacks for the district. Therefore, the structure is conforming.

The property was zoned “Private Residence” at the time of construction and then rezoned to “Single Residence 3” in 1953. Both of these districts allow single-family dwellings by right, therefore the use is conforming.

At the time the lot was created in 1885, there were no lot area or frontage requirements. Provisions were later adopted requiring minimum lot area and frontage, variable upon the zoning district in which the lot is located. In this case, the lot has 5,500 square feet where 7,000 square feet are now required and 55 feet of frontage where 70 feet is required. This lot is considered a legally nonconforming lot, and may be used for any by-right use within a structure which meets all of the dimensional requirements for the district.

**B. Noncompliant Structures Definition:** Structures which do not meet the zoning requirements for the district in which they are located, or were built after the zoning change taking them out of accordance with zoning regulations, are considered noncompliant. A structure may be constructed in compliance with the Building Code but not the Zoning Code, and vice versa, or both. For the purposes of **zoning**, a structure is considered noncompliant if it;

- A) Was built without the benefit of a lawfully issued building permit and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction
- B) Was built with the benefit of a lawfully issued building permit, but not built as permitted and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction
- C) Was built with the benefit of a building permit which should not have been issued and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction

#### Case Study B1: Noncompliant Structure

A property is improved with a single-family dwelling in the Single Residence 2 zoning district. The homeowner builds an attached garage without a building permit.

SR 2	Required	Existing	Post-Construction	Noncompliant?
<b>Lot Area</b>	10,000 square feet	11,000 square feet	11,000 square feet	
<b>Frontage</b>	80 feet	100 feet	100 feet	
<b>Setbacks</b>				
• <b>Front</b>	25 feet	30 feet	30 feet	<b>YES</b>
• <b>Side</b>	7.5 feet	25 feet	<b>6 feet</b>	
• <b>Rear</b>	15 feet	35 feet	20 feet	
<b>FAR</b>	.37	.29	.34	
<b>Lot Coverage</b>	30%	19%	22%	
<b>Open Space</b>	50%	65%	60%	

- A) *Was built without the benefit of a lawfully issued building permit and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction*

Example: The dwelling structure met the setback requirements for the SR2 zoning district prior to construction. The homeowner was not issued a building permit and constructed an addition which violates the side setback requirement. Because the addition created a zoning violation and would never have received a building permit, this structure is now considered noncompliant. To rectify the noncompliance, the homeowner would need a variance from the Zoning Board of Appeals, or would need to alter the addition so-as to meet dimensional standards.

*B) Was built with the benefit of a lawfully issued building permit, but not built as permitted and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction*

Example: The dwelling structure met the setback requirements for the SR2 zoning district prior to construction. The homeowner was issued a building permit for a set of plans showing a garage addition that complied with all the dimensional requirements of the district. The homeowner but did not build according to the approved plans and the addition violated the side setback. Because the addition was not built in accordance with the building permit and created a zoning violation, this structure is now considered noncompliant. To rectify the noncompliance, the homeowner would need a variance from the Zoning Board of Appeals, or would need to alter the addition so-as to meet dimensional standards.

*C) Was built with the benefit of a building permit which should not have been issued and did not, and does not still, comply with some aspect of the district zoning regulations at the time of construction*

Example: The dwelling structure met the setback requirements for the SR2 zoning district prior to construction. The homeowner was issued a building permit in error for a set of plans showing a garage addition which violated the side setback requirement of the district. The permit should not have been issued. The homeowner built the addition in accordance with the approved plans and the addition violated the side setback, as shown. Because the building permit should not have been issued due to the side setback violation, this structure is now considered noncompliant. To rectify the noncompliance, the homeowner would need a variance from the Zoning Board of Appeals, or would need to alter the addition so-as to meet dimensional standards.

**C. Noncompliant Uses Definition:** A noncompliant use is one which is not allowed within the particular zoning district, and did not exist prior to the zoning change prohibiting it. These uses are not protected, and are required to either cease, or seek whatever zoning-related permit is necessary to legitimize it.

#### **Case Study C1: Nonconforming Use #1**

An existing building is located in the Manufacturing district. A micro-brewery sets up shop in the building bottling craft beers. According to the Zoning Code, bottling of alcoholic beverages is prohibited in the Manufacturing district. This use is noncompliant and must seek a use variance from the Zoning Board of Appeals or cease operation.

#### **Case Study C2: Noncompliant Use #2**

A two-family dwelling is located in the Multi Residence 2 zoning district. The homeowner modifies the interior of the structure to create a three-unit multi-family dwelling. In the MR2 zoning district,

single- and two-family dwellings are allowed by right, and multi-family dwellings require a special permit. The homeowner never sought or received a special permit to allow a multi-family dwelling. A three-unit multi-family dwelling created without the benefit of a special permit is noncompliant and requires either a special permit to legitimize the use, or must revert back to a by-right single- or two-family use.

#### **D. Nonconforming Noncompliant Structures – The Act Relative to Nonconforming Structures, Chapter 184 of the Acts of 2016**

Section 7 of the MA Zoning Act offers two statutes of limitations for non-compliant structures. The six year statute of limitations protects a structure (or use) allowed by a building permit, and built and used in accordance with that permit. After existing for six years as permitted, no action can be taken against the permitted structure requiring its removal or modification. The Zoning Act also contains a ten year statute of limitations protecting those structures with zoning violations not governed by a building permit. The ten year statute protects structures only, and only those structures built without a building permit, built in violation of a building permit, or built in violation of the conditions of a special permit or variance.

In August of 2016, the Act Relative to Nonconforming Structures, Chapter 184 of the Acts of 2016 was passed. Previously, structures failing to meet zoning requirements were considered noncompliant with zoning even after the expiration of either the six or ten year limitations period. These noncompliant structures could not be altered, extended or reconstructed without a variance. The Act Relative to Nonconforming Structures provides that noncompliant structures in existence for ten years without the recording of a notice of a lawsuit claiming a zoning violation “shall, for zoning purposes, be deemed to be legally nonconforming structures” and subject to MGL 40A, Section 6 and any local provisions governing nonconformities. Property owners now have the ability to seek a special permit to alter, extend or reconstruct noncompliant structures.

##### **Case Study D1: Nonconforming Noncompliant Structure**

A single-family dwelling is built in 1902. A detached garage is built in 1925 five feet from the side property line, meeting the setback requirement for an accessory structure. Sometime in the 1980s, the homeowner constructs an addition attaching the garage to the house without a building permit. The district requires a 7.5 foot side setback, rendering the dwelling structure noncompliant. It has been more than ten years since construction, and no action to remove the addition attaching the garage to the house has been taken. The homeowner is now seeking a building permit to construct a rear addition. Because the structure is noncompliant due to the garage attachment, the homeowner must seek a special permit to legitimize the existing noncompliance and further extend the structure.