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**Barney S. Heath**  
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## MEMORANDUM

Date: January 4, 2024

TO: Zoning Board of Appeals Members  
Barney Heath, Director of Planning & Development Department  
Alissa Giuliani, City Solicitor

FROM: Jonah Temple, Deputy City Solicitor  
Jennifer Caira, Deputy Director, Planning & Development Department  
Lara Kritzer, Director of Housing and Community Development  
Katie Whewell, Chief Planner for Current Planning

CC: Mayor Ruthanne Fuller  
Jonathan Yeo, Chief Operating Officer  
City Council Members

SUBJECT: Update on Chapter 40B Safe Harbor Status

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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 statutory safe harbors, as of the filing of the Comprehensive Permit application at 78 Crafts Street on December 11, 2023. 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 Executive Office of Housing and Livable Communities (“EOHLC”) 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. Northland Charlemont, where 25% of the units are affordable at 80% AMI,

meaning all 370 units, including market rate units, are counted 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 5.5% of the City's housing stock is actually deed-restricted housing affordable to households earning up to 80% AMI.

City staff previously calculated Newton's progress towards these safe harbors in August 2022. Those calculations were reported to the ZBA in a memorandum dated August 24, 2022. At that time, Newton's Land Area Minimum calculation equaled 1.35% and its Housing Unit Minimum calculation equaled 9.80%.

The August 2022 calculation utilized the 2010 Census data for year-round housing units as the 2020 data was not released until this year. This current calculation utilizes the year-round housing units from the 2020 Census and the recent approval of 370 units from the Northland Charlemont 40B by the ZBA this past October. The updated calculations show that Newton has yet to satisfy either safe harbor threshold: the Land Area Minimum calculation (with a 1.5% threshold) is **1.41%** and the Housing Unit Minimum calculation (with a 10% threshold) is **9.94%**.

### **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 routinely fluctuate. Housing properties are routinely added and removed from the City’s list of SHI Eligible Housing units in accordance with EOHLC regulations and guidelines. EOHLC’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 was once again SHI eligible and the now completed and occupied 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 EOHLC. Under EOHLC regulations, affordable units created through the special permit process are called “Local Action Units” (“LAU”) and require approval by EOHLC, which is known as “LAU Approval.” The purpose of this approval process is for EOHLC 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 EOHLC 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 EOHLC 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, or when there is a change that would result in the City reaching one of the safe harbor thresholds. 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 Housing Unit Minimum (10%) Safe Harbor

- The housing unit minimum 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.
- The Executive Office of Housing and Livable Communities (EOHLC) provided an updated SHI with the 2020 year-round housing units on June 29, 2023. According to the 2020 Census, Newton has 33,116 year-round housing units, an increase of 770 from the 2010 Census.

D. 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 EOHLC 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.

**Current Safe Harbor Calculations as of December 11, 2023**

A. 10% Calculation

- The City’s current percentage of SHI Eligible Housing units equals 9.94%.

$$\text{New Calculation} = \frac{3,292 \text{ SHI Eligible Housing units}}{33,116 \text{ total housing units}} = 9.94\%$$

- The City currently has 2,879 housing units officially inventoried on the most recent SHI published by EOHLC. In accordance with EOHLC 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 416 additional eligible units not listed on the published SHI. As a result, the City currently has 3,292 SHI Eligible Housing units.
- The total year-round housing units has increased by 770 units from 32,346 in the 2010 Census to 33,116 in the 2020 Census, resulting in 9.94% of the City’s housing units being SHI eligible.
- Based on this calculation, the City needs approximately 20 additional SHI units to reach the 10% safe harbor.

B. 1.5% Calculation

- The City’s current land area percentage of SHI Eligible Housing equals 1.41%.<sup>1</sup>

$$\text{New Calculation} = \frac{108.67 \text{ acres}}{7,713.99 \text{ acres}} = 1.41\%$$

- The City currently has 108.67 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 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 7 additional acres of SHI housing in order to reach the 1.5% 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:
  - > Northland Charlemont Comprehensive Permit (160 Charlemont St.) – 370 units (25% affordable)

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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.

- The previously approved comprehensive permit for 292 units at Dunstan East does not currently count as SHI Eligible Housing, because it has been more than one year since it received approval from the ZBA and a building permit has not been issued for construction of the housing. It is anticipated that a building permit will be issued in the very near future, at which time the City will exceed the 10% housing minimum safe harbor.

### **Looking Forward**

- Newton has made significant progress towards achieving the Housing Unit Minimum safe harbor based on the current calculation of 9.94%. Presently, Newton needs 20 more SHI eligible units to achieve safe harbor. There are three 40B applications currently before the ZBA: 198 units proposed at 528 Boylston Street, 16 units proposed at 41 Washington Street, and 307 units proposed at 78 Crafts Street. Additionally, Dunstan East has initiated a building permit application for 292 units.
- In the same vein, there is likely to be additional movement of the safe harbor calculations in both directions moving forward. As examples, the Armory project may lose SHI eligibility if a building permit is not issued in January and the Northland special permit project may achieve SHI eligibility for some or all of its units in the next year if LAU Approval and building permits are issued. SHI eligibility for other previously approved projects 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 month. 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. 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.