



# Zoning & Planning Committee Report

## Part 2

### City of Newton In City Council

**Thursday, October 14, 2021**

Present: Councilors Crossley (Chair), Danberg, Albright, Leary, Ryan, Wright, Krintzman, and Baker

Also Present: Councilors Bowman, Malakie, Downs, Kalis, Lipof, Oliver and Kelley

City Staff: Director of Planning and Development Barney Heath, Deputy Director of Planning and Development Jen Caira, Chief of Long Range Planning Zachary LeMel and Assistant City Solicitor Andrew Lee

Newton Historical Commission: Peter Dimond (Chair), Doug Cornelius, Jennifer Bentley, and Amanda Park

Planning & Development Board: Peter Doeringer (Chair)

New TV

**#180-21      Requesting a review and possible amendments to Section 4.2.5(A)**  
COUNCILORS LAREDO, LUCAS, LIPOF AND MARKIEWICZ requesting review of and possible amendments to Section 4.2.5(A) of the City of Newton Zoning Ordinance to clarify language concerning shadows and blocked views in the Mixed Use 4 district.

**Zoning & Planning Held 8-0 on 09/13/21**

**Action:      Zoning & Planning Held 8-0; Public Hearing Scheduled for November 8, 2021**

**Note:**      Chief of Long Range Planning Zachary LeMel joined the Committee for discussion on this item.

Mr. LeMel presented a summary of Section 4.2.5(A) (PowerPoint attached) on, including intent, existing language, proposed revisions, and expected outcomes.

Mr. LeMel stated that the proposed amendment to the language is not a substantive change. Rather, the amendment would bring the text into alignment with how City Council applies the criteria in an MU4 zone when assessing projects seeking a special permit for building height and/or setback waivers, in particular, to clarify how shadows and blocked views will be assessed relative to other criteria.

At the September 13, 2021, meeting, Committee members requested that staff review the proposed language with ISD to ensure that the proposed revision is clear to them, and would accomplish the goal, or requires additional clarification.

The existing language could be interpreted to mean that any creation of a shadow or blocked view could be considered an adverse effect, as recently suggested during a special permit review. If this were the case, a special permit could only be approved if no shadows or blocked views could be created at all by a proposed building. However, such an interpretation is not consistent with the expressed intent of MU4, past application of standards, or reason.

Proposed amendment language to Section 4.2.5(A).1 Height, 4.2.5A.2 Mixed-Use Residential Incentive and 4.2.5.A.4 Setbacks of the City of Newton Zoning Ordinance

*“Does not create shadows or blocked views that adversely affect its surroundings”.*

Staff believe the expected outcomes from this change to be minimal. Rather, this update is a clarifying change to better align with current practice and with the intent put forward in the mixed-use element of the Comprehensive Plan. As the Special Permit Granting Authority, Council will continue to review whether and to what extent a new building may impact shadows and blocked views, including by using shadow studies, to assess shadow extent, duration, seasonal reach, ground level uses it affects, etc., in evaluating a petition in an MU4 zone.

The Planning Department recommends setting a public hearing for November 8, 2021.

**Committee members comments, suggestions, questions and answers:**

**In reference to attachment A, #4 Setbacks, is it a draft oversight that the following was deleted? It may be necessary to keep because of specific criteria.** The City Council may grant a special permit to waive the following setback requirements by finding the proposed plan does not create shadows or blocked views that adversely affect its surroundings, can better protect the surrounding community from shadows and blocked views, supports pedestrian vitality, and advances encourage the purposes of this district: ~~than strict compliance with the following standards:~~ Mr. LeMel answered that he will discuss this internally and will get back to the Committee before the public hearing.

**(Update: see redlined language in Draft Ordinance provided with public hearing notice, which adds “strict compliance” language)**

**I think it is not a wise policy for City Council to empower itself to determine what is an adverse effect. That one adverse effect is not significant enough compared to the other things that we think would be furthered by a project.** Mr. LeMel said that as we know in Newton, there are many uses existing in residential districts that are not residential. *For example, there could be a parking lot that's zoned residential, and it may make sense to move some mass (in an abutting business district) closer to the parking lot, and away from something else, such as a public park. Of course, the Council is the decider*

*on these things, and I hope would carefully weigh all of the criteria together to make that informed decision.*

**Residential districts and residential uses are appropriate, sensitive and special circumstances that we can craft qualifying amendments to ensure issue is taken care of.**

**It is necessary to balance the good with the bad, pros and cons. No special permit is perfect, it is always a judgement of the Land Use Committee and City Council. This new draft language makes clear we must balance (impacts).**

**In zoning discussions, we are always looking to size buildings for (appropriate) density and balance (the impacts). It is necessary to use all the tools, and not amend language to be too specific.**

**I think the Land Use permitting process has two dimensions. This draft amendment is offering an opportunity to weigh costs and benefits in various contexts and say whether on balance it's a good idea. However, the special permit criteria, I think, says that there must be a *public benefit\**, and must not do certain adverse things. So, I just think it's important to remember that we do not always take a special permit as a cost benefit analysis in total. We have to follow the ordinance criteria each time.**

*(Chair's note: See Section 7.3 Special Permit Review, especially 7.3.3 Grant of Permit, which lists the five general criteria)*

**Public benefits are in the eyes of the beholder; it is often a judgement call.**

Chair Crossley stated she feels the draft language is an improvement and clarifies that impacts of shadows are not to be considered as a standalone item, but rather within the context of a particular project.

Without further discussion, Councilor Danberg made a motion to schedule a public hearing for November 8, 2021. Councilor Leary made a motion to hold this item. Committee members agreed 8-0.

**#149-21      Requesting a discussion with the Planning Department**

COUNCILORS LIPOF, CROSSLEY, RYAN AND ALBRIGHT requesting a discussion with the Planning Department to address concerns relative to the trend of significantly raising grade elevations on lots, using retaining walls, terracing and other means to add soil to conceal a raised basement, which can lead to new buildings that are significantly taller than nearby existing houses in the area, cause denuding of wooded areas and increasing storm water runoff.

**Action:      Zoning & Planning Held 8-0**

**Note:**      Docket items #149-21 and #11-21 were discussed together. Please see report following item #11-21.

**#11-21 Request for Ordinance requiring topographic data prior to building permit issuance**  
COUNCILORS CROSSLEY AND ALBRIGHT requesting an ordinance to require that topographic data be provided on surveys of existing and proposed conditions currently required for new construction and additions, prior to issuing construction permits.

**Action:** **Zoning & Planning Held 8-0**

**Note:** Discussion items #149-21 and #11-21 were discussed together.

Deputy Director of Planning and Development Jen Caira joined the Committee and presented a (PowerPoint attached) on summary of existing regulations related to regulating building height relative to grade elevation, grade change, retaining walls and storm water management, noting recent and ongoing issues, a range of potential solutions and next steps.

See also Planning Memo dated October 8, 2021, attached.

Ms. Caira stated that the next steps include (1) research past building permits to better understand the issues and how prevalent they have been. (2) Work with the Engineering and Inspectional Services Department to develop possible solutions. (3) Coordinate with proposed stormwater ordinance updates and (4) Return to the Committee early in the next term.

In closing, Ms. Caira asked Committee members the following questions: Are we missing any related issues? Which of these issues are of greatest concern: aesthetics, retaining wall safety or stormwater runoff?

**Committee member comments, questions, answers:**

**Before committing to an ordinance amendment, is there anything else necessary to do before advancing into a more comprehensive review that can make the current process succeed?**

**Regarding the question of greatest concern, it may be necessary to address stormwater runoff issues and perhaps amend that section of the ordinance first.**

**Can we separate the requirement for a topographic plan from the rest of the item?** Ms. Caira answered yes, it will be necessary to understand priorities with short-term fixes which can be implemented sooner than the complicated issues. She then stated that she believes that the Draft stormwater ordinance coming from the engineering department requires a topographic survey showing existing conditions. The City can require that the topographic plan be submitted with a building permit application. Most engineering plans do show the existing and proposed grades.

**It is necessary to get the stormwater runoff problem under control.**

**Aesthetics, retaining wall safety and stormwater runoff are all important concerns.**

**Is height calculated using the proposed or existing grade?** Ms. Caira answered no, height is calculated off of the average grade calculation which is the grade elevation around the perimeter of the building, the finished grade.

**Regarding retaining walls and height, it is necessary to address safety concerns.**

**A suggestion was made to include fence/railing requirements for retaining walls over a certain height.** Ms. Caira said that the Planning Department will work closely with Engineering and Inspectional Services Departments to better understand the current rules and to determine if changes are necessary within a jurisdiction and zoning.

**It was noted that MA building code requires safety railings when retaining walls are above a certain height.**

**In some communities the ordinances limit the volume of soils brought to or removed from a property by right. Above a certain amount (volume of soil) a special permit may be required. Please put that on the list of possible solutions to consider. Exemptions include excavating for basements.**

**In terms of limits, can we require a special permit for any wall over 4 feet tall?**

**Councilors comments:**

**It is necessary to that a topographic plan (showing existing and proposed conditions) be required by ordinance in order to properly understand and regulate building height. In the past year, I have been approached by people in five neighborhoods expressing concern that water is now running onto their properties, where they never had this issue before. There are two issues, water and context. Developers are taking advantage of using retaining walls to raise grade elevations, (then using the higher elevation as the basis for determining total building height). It is concerning to have water runoff resulting to multiple adjacent homes because of their own grade raise for the betterment of themselves not the betterment of the neighborhood.**

**It appears (from tonight's presentation) a working plan is now in place for the City to have better control on these issues. It is wrong that developers find this loophole to do what they want to do. The City must react to this and make changes.**

**Upon a permit application, the property owner must be made aware of what the City expects in regard to grading.**

**But, as Chair of Land Use, I think that requiring a special permit for any wall over 4 feet tall would be devastating to the Land Use Committee.**

Ms. Caira asked Councilors to please forward to her any concerning phone calls, addresses and photos of difficult situations caused by retaining walls and grade changes.

Ms. Caira stated that she will research other ordinances as part of a new zoning proposal. The department will review examples, research previous building permits that have been constructed, review what is being built, review changes and grades, speak with current staff, Inspectional Services and Engineering Departments to make sure that there is an understanding of grade change issues and what is driving these issues. The Planning Department will explore other neighboring ordinances including the Wellesley Ordinance. The Department will review all options to determine what is best for Newton.

Chair Crossley asked if the Engineering Department would be involved? Ms. Caira answered yes, Planning wants to understand the current process better, what current regulations exist particularly around retaining walls and determine if changes are necessary. In addition, the stormwater ordinance Drafted for the engineering section of the ordinances is soon to be released from engineering and law. This must also be reviewed carefully to ensure coordination with Chapter 30.

Committee members thanked Ms. Caira for her thorough presentation and diligence.

Without further discussion, Councilor Danberg made a motion to hold docket items #149-21 and #11-21. Committee members agreed 8-0.

The Committee adjourned at 8:50 p.m.

**Respectfully submitted,**

**Deborah J. Crossley, Chair**