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To: Ordinance Committee
From: Iram Farooq, Assistant City Manager for Community Development
Megan Bayer, City Solicitor
Date: January 14, 2025
Subject: Response to Policy Order POR 2024 #163 dated December 19, 2024 and Policy Order POR 2025 #1 dated January 6, 2025 regarding amendments to the Multifamily Housing Zoning Petitions

The Ordinance Committee during its meeting on December 19, 2024 voted in favor of six changes to the Multifamily Housing Zoning Petitions and requested additional information about four related topics. These changes and requests were adopted by the full Council on December 23, 2024 in Policy Order 2024 #163. The Council later adopted Policy Order 2025 #1 on January 6, 2025, which requested further information about two additional topics discussed at the December 19 meeting of the Ordinance Committee. A description of the requested changes to the zoning petitions and additional information are detailed below.

Attached to this response are revised versions of the text of both zoning petitions reflecting the six changes described above. The suggested changes are highlighted in the text and described below. Additional changes in the revised zoning text provide minor clarifications or corrections, and are also highlighted. Also attached is a revised map of proposed residential height limits. We suggest that the Council amend both Petitions by substitution with the revised text.

Changes to the Multifamily Housing Zoning Petitions

1. *Reducing the base zoning height limit from six stories to four stories*

   Incorporated in Petition One, Page 18, Section 5.30 Table of District Dimensional Requirements. See Page 18. The height limit for C-1 districts has been reduced from 6 stories and 75 feet to 4 stories and 45 feet. All other zoning districts remain unchanged from the original petition.

2. *Establishing a two-story density bonus for inclusionary developments*

   Incorporated in Petition One, Page 20, Section 5.30 Table of District Dimensional Requirements and 5.40 Footnote (2). The new Footnote (2) states that the height of buildings that comply with Inclusionary Housing requirements may be increased to six stories and 70 feet.

3. *Adding back contextual 5-foot side and rear setbacks for all developments, with exceptions for townhouses*

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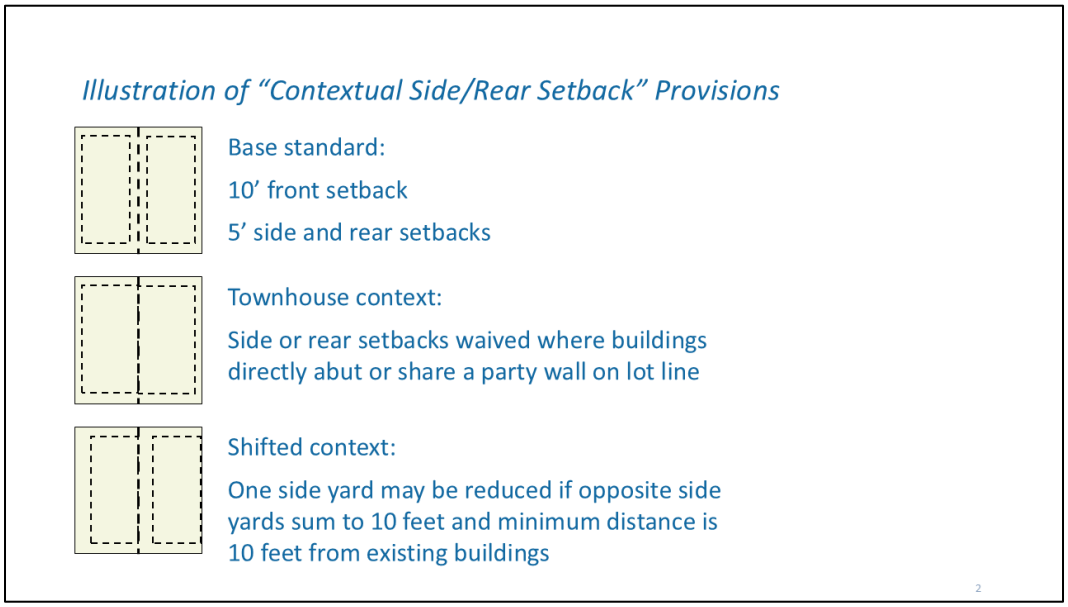
Incorporated in Petition One, Page 18, Section 5.30 Table of District Dimensional Requirements, and Page 20, 5.40 Footnote (4). Minimum side and rear setback requirements have been increased from 0 to 5 feet in all Residential districts.

Footnote (4) describes two "contextual" circumstances in which the required setbacks may be reduced. In the first circumstance, which would apply to townhouse-style development, the side yards for abutting lots may be reduced to zero reciprocally where two buildings directly abut each other or share a party wall along the lot line. In the second circumstance, which would account for development in an area where existing buildings have unequal side yards, the side yard could be reduced on one side with an equivalent increase on the opposite side, so long as a minimum 10-foot separation from existing buildings is maintained. See illustration below.



4. *Requiring a minimum lot size of 5,000 square feet for developments greater than four stories*

   Incorporated in Petition One, Page 20, Section 5.30 Table of District Dimensional Requirements and 5.40 Footnote (2).

5. *Ensuring the Affordable Housing Overlay (AHO) still scales with base zoning, allowing for heights of up to nine stories*

   Incorporated in Petition Two, Page 5, Section 11.207.5.2. The clearest way to achieve this result is to clarify how the incremental height increases change within the Affordable Housing Overlay Building Heights section. The

suggested revision allows up to 9 stories for an AHO project where the underlying zoning district permits less than 75 feet in residential height, and up to 13 stories for an AHO project where the underlying zoning permits 75 feet or more in residential height, except where the heights are increased in an AHO Corridor or AHO Square (permitting up to 12 stories and 15 stories, respectively). Because the original petition would effectively increase the allowable AHO Building Heights to 13 stories in all districts, this added change is intended as a clarification. In order to be as clear as possible, the proposed revision simplifies the text by removing references to lower AHO height limits that would no longer be applicable with the proposed changes to base zoning.

6. *Implementing a regular 5-year review of the Multifamily Zoning Ordinance with an annual update*

   Incorporated in Petition Two, Page 1, as a new Section 1.80. Because this is not an actual zoning requirement and is associated with the effects of the Zoning Ordinance as a whole and not any particular special section, the suggestion is to include it in the Preamble and associate the review with the purpose of zoning, which includes "to encourage housing for persons of all income levels."

   The suggested process would include an Annual Housing Report that summarizes specific changes to the housing stock, including market-rate and affordable homes, and a Five-Year Housing Evaluation that analyzes longer-term trends in housing along with other planning objectives that may be impacted.

<u>Additional Information Requested</u>

1. *Rezoning the corridors and squares;*

   Following a vote of the multifamily zoning petition, CDD will work with City Council to prioritize planning and zoning for key squares and corridors. The following are the status of current planning and zoning initiatives:

   - Central Square Rezoning: Zoning recommendations under development
   - Mass Ave Planning Study: Planning and community process underway.
   - Cambridge Street: Planning process and zoning recommendations completed.

   CDD would appreciate an opportunity at a future Council committee meeting to discuss additional squares and corridors for rezoning consideration and prioritize sequencing for zoning development and adoption.

2. *What legal protections can be provided in local and state law for solar systems on residential properties?*

   State law offers several types of protection for solar access for residential properties.

   G.L. c.40A, §3

   First, in the Zoning Act, G.L. c.40A, §3, there is broad protection of solar. In 1985, Section 3 was amended to make solar a protected use that municipalities cannot outright prohibit. Section 3 states: "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." This section has been reviewed by the courts in cases involving large scale solar energy systems. This section is not relevant here because the Multifamily Zoning Petitions are not adding regulations that prohibit or unreasonably regulate solar energy systems.

   G.L. c.40A, §9B

   Next, Section 9B of the Zoning Act offers two types of protection to solar access and solar energy systems. "Solar access" is defined as the access of a solar energy system to sunlight. The first type of protection is:

   "[z]oning ordinances or by-laws adopted or amended pursuant to section five of this chapter may encourage the use of solar energy systems and protect solar access by regulation of the orientation of streets, lots and buildings, maximum building height limits, minimum building set back requirements, limitations on the type, height and placement of vegetation and other provisions."

   This provision would allow the City Council to adopt regulations, including dimensional regulations, to protect solar access. This could include height or setback regulations that serve the purpose of allowing sunlight on abutting properties for solar access. This section does not prohibit zoning regulations that allow additional height or reduce setbacks that may have the impact of reducing sunlight on abutting properties, but rather provides statutory authorization for zoning regulations that are in place for the purpose of encouraging solar energy systems and protecting solar access.

   The second type of protection is that a municipality could adopt an ordinance/bylaw that allows for a special permit that would allow one property owner to obtain an easement on abutting property for solar access on the applicant's property. This would be applied on a property-by-property

basis when one property owner applies for the special permit that would impose the easement on abutting property. There do not appear to be any cases that have interpreted this section of the statute, and this section may be vulnerable to challenge because the common law rule is that easements must be negotiated by the two property owners.

The two forms of solar protection in Section 9B do not prevent the City from enacting zoning that allows taller buildings and buildings closer together, even though resulting development may impact solar access on abutting properties. If the City wishes to separately enact zoning regulations that provide protection to solar energy systems and solar access on residential properties, Section 9B authorizes such zoning regulations.

Protection of Solar Between Private Parties

In addition to the above zoning protections for solar, there are ways private parties can work together or against one another to protect solar access for residential properties. General Laws c.187, §1A authorizes private landowners to agree to easements to preserve direct sunlight over the land of another for the protection of solar access. The easements can contain conditions such as the dimensions of buildings allowed and restrictions on vegetation or other objects that could obstruct sunlight. If a private landowner wants to preserve direct sunlight on their property they can negotiate and enter into an easement with another property owner for that purpose.

It is also possible that if a private property owner experiences a diminished amount of sunlight on their property as a result of a development on abutting property, and the reduction in sunlight impacts their solar energy system, they may have a basis to bring a nuisance case against the abutting property owner. A nuisance case is based on the premise that one must not use their land in a way that unreasonably impairs the use or enjoyment of another property owner. We do not know whether a court would find that development on one property that blocks sunlight to another property constitutes a private nuisance, but it is possible.

What Could the Multifamily Zoning Petitions do to Protect Solar Access

There have been questions about what the Multifamily Zoning Petitions can do to protect existing solar energy systems on residential properties, and whether a developer can be required to work with an impacted neighbor to avoid impacts to existing solar energy systems. It would not be permissible to have different dimensional regulations in place only for properties that happen to be abutting existing residential solar energy systems. It would

also not be permissible to require property owners who are developing property next to existing residential solar energy systems to work with the abutting property owner to come to some type of agreement concerning solar access. Both of those requirements would likely violate the uniformity provision in zoning because each class or kind of structure or use permitted in a zoning district must be treated uniformly. G.L. c.40A, §4. It is likely a violation of the uniformity provision if some properties have to build smaller multifamily buildings than other properties based only on whether there is an existing solar energy system next door or based on the negotiation they had with the abutting owner. Additionally, a zoning regulation like that would essentially penalize properties that have not yet installed a solar energy system could have unintended consequences.

The Council could consider a separate zoning petition pursuant to G.L. c.40A, §9B that uniformly imposes regulations to encourage the use of solar energy systems and protect solar access. Also, in the current Multifamily Zoning Petitions if the Council is only going to allow multifamily structures between 4 stories and 6 stories in certain instances, such as with inclusionary zoning and on lots that are 5,000 feet or greater, the Council could also consider requiring the structures over 4 stories have some type of bulk plane restriction to protect solar access.

3. *Requiring a minimum lot size of 5,000 square feet for developments greater than four stories unless the development includes 50% affordable units*

It is a change to the fundamental character of the Multifamily Zoning Petitions to require 50% affordable units if a development that is greater than four stories is constructed on a lot that is smaller than 5,000 square feet. This proposal would allow as of right development, i.e. multifamily greater than four stores on a lot less than 5,000 square feet, but only on the condition that it be subject to the City's inclusionary housing requirements. However, this proposal would impose different inclusionary housing requirements than are currently in the Zoning Ordinance. The Zoning Ordinance currently sets a 20% inclusionary requirement. The original Multifamily Zoning Petitions do not change the 20% inclusionary requirement in any way. So, adding a provision to the Multifamily Zoning Petitions that changes the inclusionary requirement, even if only in certain instances, is a change to the fundamental character of the petition. Additionally, in order to withstand a legal challenge, inclusionary housing requirements must have an essential nexus between proposed development and the need for affordable housing, and the contribution must be roughly proportional to the impact the development will have on that public interest. There is no evidence that a 50% inclusionary housing requirement is proportional to the impact market rate development will

have on the need for affordable housing. The Council should have this evidence before making changes to the inclusionary housing requirement.

4. *Ensure that buildings of five or six stories include 40% open space, with at least 50% being permeable; and a consideration of up to 75% permeability*

   If the Council wished to include it, this amendment could be made in alternative version of Footnote (2) described above that establishes criteria for allowing up to 6 stories in Residence C-1 districts. Alternative text is shown below with an additional Paragraph "(c)" included. Because this is not included in the attached revised petition text, the Council would need to amend that revised text by substituting the version below for Section 5.40, Footnote (2).

   (2) The height of buildings or portions of buildings used as Residences may exceed the base height limit, up to a maximum of 6 stories above grade and 70 feet above grade, if all of the following criteria are met:

      (a) The building complies with the Inclusionary Housing Requirements in Section 11.203 of this Zoning Ordinance, regardless of whether it exceeds the size threshold requiring compliance;

      (b) The area of the lot on which the building is located is not less than 5,000 square feet; and

      (c) The Open Space Ratio is increased to a minimum of 40% of the lot area and at least seventy-five percent (75%) of the required Open Space shall meet the definition of Permeable Open Space, notwithstanding Footnote (1) above.

5. *Setting an average maximum unit size of 2,000 square feet per lot area for new construction*

   The current Multifamily Zoning Petitions do not set a maximum or minimum unit size per lot area, so to add such a requirement now would be a change to the fundamental character of the petition. Adding a new dimensional or density requirement is not a clarifying change or a change in scope but is imposition of a new type of requirement that requires re-filing of a petition or filing a new petition so that there can be new notice and a hearing to get public input. The courts have held that "when changes are made to a proposal during the legislative process, whether new notice and hearing are required depends on the degree of similarity between the amendment originally proposed and the one ultimately recommended or adopted. Specifically, new notice and hearing are not required if the changes to the original proposal are 'not of a fundamental character.'" Penn v. Town of Barnstable, 96 Mass. App. Ct. 205, 210–11, review denied sub nom. Penn v. Town of Barnstable, 483 Mass. 1108 (2019); quoting Burlington v. Dunn, 318 Mass. 216, 218, 61 N.E.2d 243 (1945).

There is currently no standard in zoning that establishes a maximum unit size or minimum number of units on a lot. Like all standards in zoning, creating a new standard of this type would have benefits and drawbacks, including unintended consequences. If the Council wanted to pursue this type of standard, CDD staff could present alternatives to be discussed with Council and work on a separate zoning petition.

6. *Whether the City could subsidize the creation of affordable units into the City's inclusionary program in buildings below the current thresholds of the inclusionary zoning ordinance*

   The City regularly subsidizes the creation of affordable housing with funding offered to housing providers through the Cambridge Affordable Housing Trust and funds available through Federal grants.

   One of the stated purposes of the Affordable Housing Trust is to assist in the creation of new affordable housing. The Trust has flexibility in how it can use its funds to create affordable housing. Under terms of the Trust's Amended and Restated Declaration of Trust, Trust funds can be made available to "private, profit or non-profit entities, in the form of gifts, grants, loans, loan guarantees, letters of credit or other forms of credit enhancement, or in such other manner as the [Trust] Board may deem necessary and appropriate to fulfill the purposes of the Trust."

   A developer of a market-rate residential building who is including affordable units in that building that meet the requirements of funding for the Trust could request funding assistance form the Trust. Requests for funding could include funding for voluntary inclusionary units, such as affordable units in developments that are not subject the Inclusionary Housing provisions or additional units beyond those required by zoning.

   The Trust regularly considers requests for funding to create new affordable housing in fully affordable buildings, and could also consider requests to fund affordable units in a mixed-income building. Trust considerations for such a funding request would likely include the amount of funding compared to other current or anticipated funding requests, the level of affordability of the units, other funds leveraged to create new affordable units, and the capacity and experience of the developer in building and/or operating high quality housing.

   Federal funding through the HOME Investment Partnership (HOME) or Community Development Block Grant (CDBG) programs might also be used to fund affordable units in mixed-income buildings. However, as most City

funds for creating new affordable housing now flow through the Trust, it is unlikely that Federal funds would be considered.