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# Memorandum

To: For Public Distribution

From: Benjamin B. Tymann, Esq.

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Re: Northland Newton – Correcting Assertions Made at Right Size 2020 Forum Regarding Chapter 40B

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On Sunday, February 23, 2020, Right Size 2020 sponsored an event that featured attorney Dennis Murphy speaking about Chapter 40B. Murphy made several key assertions about the law and its application to the present situation that are incorrect. Here are the facts:

## One-Year Hiatus

***Dennis Murphy statement:***

If the current Northland Newton proposal does not go forward, Northland would have to wait one year before it could apply for a Ch. 40B comprehensive permit.

***The reality:***

That's entirely incorrect. The one-year "hiatus" the attorney referred to is the "Related Application safe harbor" set forth in the state Department of Housing and Community Development (DHCD) regulations governing Ch. 40B development. But that safe harbor would not apply here because, as the regulations make clear, the first, withdrawn proposal needs to have been either "principally non-residential" or, if it was "principally residential in use, it did not include at least 10%" housing units eligible for inclusion on DHCD's Subsidized Housing Inventory (SHI). *See* 760 CMR 56.03(7). Northland Newton ***is*** principally residential in use ***and*** provides more than 10% SHI-eligible affordable housing units. Therefore the Related Application regulatory safe harbor would not apply, there would be no "hiatus," and no legal barrier would exist to prevent Northland from immediately commencing the Ch. 40B application process.

**"Merger" of three adjoining parcels**

***Dennis Murphy statement:***

A potential future Ch. 40B project could not legally be confined to the boundaries of just one of the three adjoining parcels that presently form the site of Northland Newton and, therefore, any plans to proceed with a 40B on one parcel while leaving the other two parcels open for other future development would be futile. Rather, Attorney Murphy says, the three adjoining parcels would, as a matter of law, "merge" into a single lot which would need to be devoted entirely to the 40B project and would foreclose other future development on any of the parcels.

***The reality:***

The attorney mixes apples and oranges to try to reach a dubious conclusion. Both his conclusion and his analysis are flatly incorrect. While the doctrine of merger can apply in certain zoning contexts, such as whether adjoining parcels under common ownership should be regarded as conforming with a local zoning ordinance, merger has no bearing whatsoever on Ch. 40B projects and no Massachusetts case, statute, or regulation has ever drawn a relationship between the two.

The three parcels in question, owned by three separate entities, would remain as distinct parcels should the referendum prevail. All three could then be proposed for development separately or in combination, or even as subdivided lots, at the owners' option. In such a scenario, state 40B law would require the City Council to simply evaluate the project based on its appropriateness for the tract of land on which it is proposed. "Merger" would never come into play. The City's Law and Planning & Development Departments agree: "In the event the City Council's rezoning of the Northland project is repealed by a referendum …The developer could ultimately choose to pursue multiple 40B projects, as each parcel could contain a separate 40B project. The developer could also subdivide into additional parcels by right as long as each parcel meets the frontage and lot area requirements in the City's zoning ordinance."

**Mixed uses under Ch. 40B**

***Dennis Murphy statement:***

Chapter 40B does not allow non-residential uses to be mixed with housing, unless the non-residential use is extremely minor, such as a laundromat to service the residents of the 40B housing.

***The reality:***

Again, this is wrong and represents a fundamental misunderstanding of the law of Ch. 40B. DHCD regulations expressly allow secondary non-residential uses as part of a 40B project "so long as the non-residential elements of the Project are planned and designed to: (a) complement

the primary residential uses; and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans." *See* 760 CMR 56.02 (definition of "Project").

First, Attorney Murphy has the facts wrong about the Ipswich case he cites. The courts did not confine the non-residential use to a laundromat, but rather allowed a "child care facility that will occupy 3,970 square feet, a bank with a drive-up teller window, and a coffee shop or similar." *Jepsen v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 83-84 (2007). And since the state's highest court issued the *Jepsen* decision a dozen years ago, mixed-use 40B projects have only become more common and accepted. For example, in 2017 a 40B comprehensive permit was granted that, alongside the primary affordable housing component, allowed up to 22,000 square feet of retail uses on the 5-acre parcel. The 40B project in Amherst, called North Square at the Mill District (https://www.northsquareapartments.com/), permits restaurant, coffee shops, bank, and even a dentist's office.

**Economics/Reasonable Return**

***Dennis Murphy statement:***

For 40B projects, "you only get to set aside zoning to the extent it's necessary to make the project economic."

***The reality:***

Wrong. The extent to which a 40B project is "economic," or profitable, is not a matter within the purview of a zoning board or City Council during local permitting. The only time profitability or "reasonable return" legitimately arises is if, after a 40B hearing, the local board approves the application but imposes onerous conditions the developer feels would render the project "uneconomic." If and when that occurs, the developer has the opportunity to strike those conditions on an appeal to the state Housing Appeals Committee (HAC). The idea that a local board can go into a 40B hearing and try to shrink the size of the developer's proposed project in order to achieve an arbitrary profitability standard has the process backwards. The HAC and Massachusetts courts have repeatedly stated that any conditions a local board attaches to its 40B decision must be based on valid health, safety, and environmental concerns – not concerns about the development's economics. *See* Massachusetts Housing Partnership's *Chapter 40B Handbook for Zoning Boards of Appeal* (March 2017), at 24.