APPENDIX A

REPORT OF THE MODERATOR'S COMMITTEE ON ZONING FAR TO THE MAY, 2016 TOWN MEETING

I. Appointment and Charge of the Committee

The Moderator's Committee on Zoning FAR was appointed by the Moderator as a result of the vote referring Article 12 at the November, 2015 Town Meeting to a Moderator's Committee.

The Committee members are Richard Benka (former Selectman, former chair Selectmen's Zoning By-Law Committee ("ZBLC")), chair; Jesse Geller (Chair, Zoning Board of Appeals; ZBLC); Linda Hamlin (Chair, Planning Board; ZBLC); Marian Lazar (Conservation Commission; ZBLC); M.K. Merelice (TMM Pct. 6; ZBLC); and Lee Selwyn (TMM Pct. 13 and the Article 12 petitioner). The Committee has received particularly useful assistance from Michael Yanovitch, Deputy Building Commissioner; Gary McCabe, Chief Assessor; Jed Fehrenbach, GIS Administrator/Developer; and Lara Curtis Hayes, former Senior Planner.

The Committee's charge is:

> The Moderator's Committee on Zoning-FAR was created in response to Warrant Article 12 at the November 2015 Town Meeting. Article 12 sought to modify the definition of "habitable space" in the Zoning By-Law to restrict the construction of out-sized homes. The potential impact of the proposed change on existing homes was noted and alternative approaches were suggested. Town Meeting voted that "the subject matter of Article 12 be referred to a Moderator's Committee with the request that a preliminary report be presented at [the] Spring 2016 Town Meeting with the goal that a new Warrant Article be presented to the Fall 2016 Town Meeting."

This report is submitted in response to Town Meeting's request for a preliminary report at the Spring 2016 Town Meeting. **The Committee would appreciate input from Town Meeting Members and residents as it proceeds with its work toward a potential Warrant Article for the Fall 2016 Town Meeting**. Comments can be emailed to the Committee's chair at rcvben@verizon.net or offered to the Committee at one of its meetings.

II. Background -- The FAR Issue Presented in November 2015 by TM Article 12

A. Definitions. The Brookline Zoning By-Law controls the density and bulk of structures in our neighborhoods through a number of constraints, including minimum lot size and width requirements; front yard, back yard and side yard setbacks; open space and landscaped open space requirements; height limitations and, last but not least, "**Floor Area Ratio**" or **FAR**. The permissible Floor Area Ratio of a structure is essentially defined as the "**Gross Floor Area**" or **GFA** (in square feet) of a building divided by the square footage of a lot. Thus, for example, the permissible FAR in an S-10 Zone (Single Family; minimum lot size of 10,000 square feet) is 0.30, meaning that a house with 3,000 square feet of GFA could be built on a 10,000 square foot lot, or a house with 3,600 square feet of GFA on a 12,000 square foot lot, and so on.

The foregoing is relatively straightforward, but the devil is in the details:

Under Brookline's Zoning By-Law, **Gross Floor Area** includes "the areas of all floors of all principal and accessory buildings whether or not habitable except as excluded." Thus, the spaces on the first and second floors of a typical two-story house would be counted as part of GFA (and thus when measuring FAR) even if they were not "habitable" (e.g., even if they had no windows and were totally unfinished, having no floor boards, no wallboard, no heat, no electricity, no plumbing, etc.). However, a different rule applies to "cellars, basements, attics, [and] penthouses," which are excluded from the calculation of GFA if they are "not habitable."

This takes us to the definition of "**Habitable Space**" in the By-Law. Under the current definition, "Habitable Space" is defined, in relevant part, as "[s]pace in a structure for living, sleeping, eating, or cooking; otherwise used for human occupancy; or finished or built out and meeting the State Building Code requirements for height, light, ventilation and egress for human habitation or occupancy."

As a result of this cascading series of definitions, **"unfinished" basement or attic space (unlike first or second floor space) has not been counted when calculating GFA, even if it meets all State Building Code requirements for habitability.**

B. Allowing Extra GFA Under Section 5.22. In 1985, Town Meeting created exemptions to the otherwise-allowable GFA by adding Section 5.22 to the Zoning By-Law. As explained by the Planning Board to the January, 1985 Town Meeting, the new section allowed exemptions to GFA limits only by special permit and was intended to apply "only to existing residences":

> The section would allow a limited increase in floor area in order to accommodate families who need additional space in an existing dwelling unit or house. … A valid policy of the town would be to provide modest flexibility for Brookline families to enhance the livability of existing units, thus promoting the stabilization of residential neighborhoods in the Town.

Section 5.22, as originally drafted in 1985 and as amended through 2002, allowed increases of floor area only by special permit in various zoning districts for one-unit to four-unit buildings. In S and SC districts up to **30%** of the allowable GFA could be added by the conversion of interior spaces (e.g., attics and basements) from non-habitable to habitable space, or up to **20%** of the allowable GFA could be added by exterior additions. In T, M-05, M-1.0 and M-1.5 districts up to **20%** of the allowable GFA could be added.[1]

Because the exemptions were by special permit, they all required both notice to abutters and approval by the Zoning Board of Appeals. Among other provisions, the special permit process required that "the impact … on abutting properties" be considered, that additional GFA be "located and designed so as to minimize the adverse impact on abutting properties and ways," and that the ZBA find that the "specific site is an appropriate location for such a … structure" and that the "use as developed will not adversely affect the neighborhood." *See* Zoning By-Law §§ 5.22, 9.05. **These pre-2002 exemptions form the basis of Section 5.22.3 of the current Zoning By-Law.**

[1] The pre-2002 By-Law amendments created other exemptions, allowing, for example, a combination of interior conversions and exterior additions up to 30% of FAR if the exterior construction was limited to 35% of the additional floor area, and creating an "escape valve" for additions of less than 350 square feet if the end result was less than 150% of FAR (which could allow a small addition, such as a kitchen expansion, for homes already over 120%). The various pre-2002 options are applicable in various zoning districts and are subject to various conditions.

Then, in **November 2002**, the Department of Planning and Community Development proposed and Town Meeting approved a warrant article that **liberalized** in at least three ways the exemptions for **the conversion of basement and attic space**: (a) the conversion of non-habitable basement and attic space to habitable space was no longer limited to 20% or 30% of the allowable GFA; the **resulting GFA was now capped at 150%** of what would otherwise be permitted; (b) the conversion could be done **"as-of-right,"** that is, without a special permit requiring notice to abutters and findings of no adverse impact on the neighborhood; design review would be required only for required exterior changes; and (c) the new provisions applied to any single- or two-family home **regardless of zoning district**. This exemption **forms the basis of Section 5.22.2 of the current Zoning By-Law.**

A stated purpose was "[t]o be an incentive to retain existing structures that fit the scale of the neighborhood and minimize the demolition of existing homes and the building of new larger homes that are out-of-scale with the neighborhood." November 2002 Combined Reports, Planning Board Report, p. 10-5. The premise was that, since the basements and attics of existing homes were already part of the fabric of the neighborhood, simply "finishing" their interiors would not add to the bulk of the building and therefore create out-of-scale buildings. Moreover, basements in older, existing buildings not designed with an eye to future conversion would be largely underground and would thus not add to visible building bulk, while attics in older buildings likewise would not add excessively to building bulk because they would have been designed to be architecturally pleasing rather than built with the bulk to provide sufficient headroom for later conversion.

It was recognized that the foregoing November 2002 change, if not somehow limited, exacerbated the potential for "gaming" our Zoning By-Law: because unfinished basement and attic spaces are excluded from the calculation of GFA, new single- and two-family residences could be constructed as-of-right with no limit on such unfinished spaces, and then, shortly after receipt of the Certificate of Occupancy, those spaces could be "finished," also as-of-right, under the new Section 5.22 with no further approval from the Board of Appeals. This would therefore amount to the creation of a house that, *de facto,* was 50% greater than the Zoning By-Law otherwise allowed.

The November 2002 warrant article therefore also incorporated a provision designed to limit opportunities for developers to build new oversize houses while providing the desired flexibility to owners of existing homes to make use of basement and attic space: the exemptions in Section 5.22 were expressly limited to homes "**erected and configured prior to the adoption of this section**."

Unfortunately, the Massachusetts **Attorney General struck down the 2002 language limiting exemptions to existing homes** because, according to the Attorney General, it had the impermissible effect of treating homes built prior to 2002 differently from those built after 2002, in violation of the Attorney General's interpretation of State zoning law.

As described by the Advisory Committee in May, 2005, the **Attorney General's ruling created** an "enormous" problem, **the "McMansion loophole."** May 2005 Combined Reports, Advisory Committee Recommendation, p. 11-5. Developers were able to build oversized buildings with large "basement" and "attic" spaces that could be immediately "finished" after the certificate of occupancy was issued, to take advantage of the 50% basement/attic exemption. The problem was exacerbated by the fact that a "basement" under the Brookline Zoning By-Law is defined as any "portion of a building which is partly or completely below grade." Zoning By-Law, § 2.02.1. Thus, even if the vast majority of the "basement" is well above grade with windows and ground level access, it is still considered a

"basement."[2] In addition, there is no limit on the bulk of an "attic," which is simply defined as the "[s]pace between the ceiling beams, or similar structural elements, of the top story of a building and the roof rafters." *Id.* § 2.01.3. Thus, an "attic" or "basement" under the Zoning By-Law could have such elements as eight-foot ceiling heights, full windows, full stairway access, and, in the case of a "basement," ground level access.

The May 2005 Town Meeting responded with a second amendment to §5.22. Under the **May 2005** amendment, the expansion of space for habitable use, including the as-of-right 50% basement/attic exemption, could still be done but **only after ten years had elapsed since the issuance of the original Certificate of Occupancy**. It was thought that if attic or basement space beyond the allowable FAR had to be left vacant for ten years, there would be no incentive for developers of new homes to overbuild additional space.

Although the 2005 amendment was approved by the Attorney General**, the 10-year waiting period has not proven to be the disincentive that was intended**. It failed to close the "McMansion loophole" or otherwise achieve its stated goals of preventing the demolition of smaller homes or the building of new out-of-scale homes that are ready for build outs. "Square footage sells," and the Deputy Building Commissioner estimates that about 90% of new one- and two-family homes are therefore built with "attic" and/or "basement" spaces that could take advantage of the 50% basement/attic expansion, either legally after 10 years or illegally prior to that time.[3] Because the space is shown on plans as "unfinished" and thus excluded from the calculation of GFA, abutters are not able to challenge the inclusion of the space or the resulting bulk of the building, or, indeed, even notified of the plans at the time of initial construction. A number of new houses were identified that were advertised with square footage exceeding the allowable FAR, including one where the developer told Town Meeting Members looking at the property that he would "finish" the attic immediately after the house was sold, and another where a new house was originally designed with "unfinished" space in the "basement" identified as "storage" space, despite the fact that it was largely above grade, had a formal doorway exiting to grade (see illustration), a fireplace, and full-height double windows, and where there was an 1800 square foot "unfinished" "attic" with eleven full-height double windows and 8-foot ceiling clearance.

[2] In contrast, the state Building Code states that a basement is considered a "story above grade plane" if, for example, the floor above the "basement" is more than 6 feet above "grade plane" (basically, the average finished ground level adjoining the building's exterior walls), more than 12 feet above the finished ground level at any point, or more than 6 feet above the finished ground level for more than 50% of the building perimeter. See International Building Code Sec. 202; 780 CMR 202 ("Story Above Grade Plane"). The broad "basement" definition in Brookline's Zoning By-Law follows an outdated definition of "basement" and has not been updated to conform to changes in the International Building Code or the state Building Code.

[3] On-site review by Committee members of new single-family homes built within the last three years indicated that there is not always a visual impact of developable attics or basements or that, particularly on large lots with large setbacks, the building size is not necessarily inconsistent with neighboring properties.

C. The Proposed Article 12 Approach. When Article 12 was proposed at the November 2015 Town Meeting, its stated goal was to stem the demolition of existing FAR-compliant houses and the construction of new out-of-scale houses that effectively capitalize on FAR 50% greater than that shown in the By-Law, thus wasting resources, making Brookline less affordable for young families, and threatening the character of our neighborhoods. Article 12 attempted to limit developers' opportunities to "game" the existing Zoning By-Law.

Article 12 took the approach of redefining "Habitable Space" to include not just space "used" for human occupancy (as in the current definition), but also space "intended for use, now or in the future" or "usable" for human occupancy. It would also have included not just "finished or built out" attic or basement space meeting State Building Code requirements for occupancy (as is now the case), but also attic or basement space that "could without significant alterations to the exterior of the building be modified to meet" such Code requirements, regardless of "whether or not" the space was now "finished or built out."

The Planning Board recognized the problem that Article 12 was designed to address, noting that there have been a number of instances where new homes have been built with unfinished attics and basements, often with windows or dormers and adequate ceiling heights to allow for future conversion, resulting in homes that feel too large for the neighborhood. It noted, however, that Article 12 as drafted would have included unfinished space in the calculated GFA of **all** homes, including existing homes. This would have increased the non-conformity of many existing homes, thereby increasing the number of homeowners who would not be able to take advantage of the existing FAR exemptions allowable under Section 5.22. This, in the view of the Planning Board, would have required homeowners to seek variances in order to expand a kitchen, add a mudroom, or enclose a back deck.[4] The Planning Board also believed that Article 12 would have introduced uncertainty into the zoning process by requiring the Building Commissioner to determine if there was "intent" to modify unfinished space into finished living area in the future.

The Planning Board, Selectmen and Advisory Committee thus recommended referral of Article 12 for further consideration, and suggested some other alternatives to more "directly address" the "root of the problem: exceedingly large new homes." These included modifying the overall allowed FAR in zoning districts; requiring a special permit for attic/basement conversions similar to what is required for exterior additions; requiring design review of new buildings; lowering the allowed 150 percent FAR exemption for attics and basements to 130 percent, in line with what is currently allowed for other interior conversions and what was allowed prior to 2002; increasing the time required prior to

[4] The Committee notes that the Planning Board's analysis may not be legally correct. As interpreted in recent Massachusetts Court of Appeals decisions, state law would allow a non-conformity created by a zoning change (such as an FAR non-conformity) in a one- or two-family structure to be extended (e.g., by expanding a kitchen) as long as the Zoning Board of Appeals, as a special permit granting authority, determined that the extension of the non-conformity was "not substantially more detrimental than the existing non-conforming use to the neighborhood."

In addition, the Planning Board assumed that "any new regulations are required to apply equally to existing and new structures." While that was the apparent conclusion of the Attorney General in striking down the Town's 2002 amendment to Section 5.22, the Committee has discovered that that Attorney General subsequently allowed a 2004 zoning change in the Town of Falmouth that was "date-based," in that it allowed conversions where the number of bedrooms was not increased "above the number in existence in the dwelling as of January 1, 1980" and where the conversion did not "increase the gross floor area of the dwelling, as it existed on January 1, 1980." The Committee intends to further investigate the Falmouth decision.

conversion; and restricting the extent of other existing FAR exceptions, e.g., the provisions of Section 5.22 beyond the basement/attic exemption.[5]

The Planning Board "support[ed] further discussion of the 'McMansion loophole' issue, especially in the context of how much floor area is reasonable on a property, and how the Zoning By-law can best regulate floor area and still offer clear incentives for preserving a home."

The Moderator's Committee on Zoning FAR, as requested by Town Meeting, will continue its work towards Zoning By-Law changes to address these issues, with the goal of a proposed warrant article for the Fall 2016 Town Meeting.

III. The T-District FAR Issue

In the course of the Committee's discussion of FAR issues, Deputy Building Commissioner Michael Yanovitch identified an additional FAR issue that had become a "nightmare" in the Town: the fact that the potential FAR allowed in "T" (2-Family) districts is substantially greater than the actual existing FAR in those districts, allowing substantial "as-of-right" expansions. Moreover, T districts allow two-family and attached single-family houses to be built as of right. There are currently more than 850 single-family houses in T districts. Our Zoning By-Law potentially allows the demolition (or conversion) of many of these houses and the creation, in the place of one single-family house, of either two attached single-family houses or a two-family house at a much higher FAR. These districts have already seen new structures that are inconsistent with the existing neighborhood fabric, and there could be many more in the future.

Specifically, the allowable basic FAR in T-6 districts (minimum lot size of 6,000 square feet for a two-family residence) is 0.75; the allowable basic FAR in T-5 districts (minimum lot size of 5,000 square feet for a two-family residence) is 1.0. These FAR figures do not even include the additional FAR exemptions allowed under Section 5.22 (*see* pp. 2 to 4 above).

The Committee has utilized the Assessor's database to test this issue. The database includes lot area and the Assessor's figures for finished floor area, allowing the calculation of the actual FAR for each property in the Town.[6] The Committee, working with the Assessor's Office and Jed Fehrenbach, the Town's GIS Administrator/Developer, had zoning district information added to the Assessor's database, thus allowing the calculation of the potential GFA for each property (both excluding and including additional expansions permitted under Section 5.22). The potential "build out" in T districts appears to justify the "nightmare" characterization. As shown on the attached table, more than half of the structures in these districts (856 of 1635) are still single-family: there are 697 single-family structures in T-5 districts and 159 single-family structures in T-6 districts, in both of which zoning would allow two-family or attached single-family houses as of right. Of these, 473 (391 in T-5; 82 in

[5] It should be noted that a number of the suggestions (e.g., requiring a special permit for conversions or increasing the required waiting period before conversions) would not, without further By-Law revisions, restrict the ability to add substantial basement and attic bulk at the time of new construction, since basements and attics could still include unlimited "unfinished" space without having it counted as part of GFA. Even if a special permit were required for *conversions*, the additional bulk could have already been added at the time of construction.

[6] The Assessor's figures for FAR are sometimes more or sometimes less than the FAR that would be calculated from a survey of lot size and precise architectural measurements of a structure in connection with the application for a building permit. Nevertheless, the Assessor's figures provide a useful picture of the potential "build out" in T districts.

T-6) are on lots potentially large enough to permit two-family or attached single-family development.[7] The average single-family and even two-family structures are, moreover, only about 40% of the currently allowable FAR including the potential Section 5.22 exemptions. Stated otherwise, our current Zoning By-Law could allow the construction of two-family dwellings or attached single-family dwellings, or the expansion of single-family dwellings, with a **potential density approaching two or two and one-half times the existing density**. The increased physical density could not only have visual impacts on neighborhoods, but could also have impacts on population density, transportation needs, and demands on Town and School services.

Zone and Existing Use[8]	**No. of lots**	**Basic Allowable FAR (without Sec. 5.22 exemptions)**	**Allowable FAR with max. 50% 5.22 exemptions**	**Average Existing FAR**	**Avg. Existing FAR as % of Basic Allowable FAR**	**Avg. Existing FAR as % of Allowable FAR w/ Sec. 5.22**	**No. of current SF lots w/ min. sf for 2-fam. or two attached SF**
T-5 Single-Family	697	1.0	1.5	0.55	55%	37%	391
T-5 Two-Family	480	1.0	1.5	0.61	61%	41%	
T-6 Single-Family	159	0.75	1.125	0.44	59%	39%	82
T-6 Two-Family	192	0.75	1.125	0.51	68%	46%	

Neighborhood concerns are evidenced by the number of actions recently taken, on a piecemeal basis, in T-5 and T-6 neighborhoods: the creation of the Greater Toxteth Neighborhood Conservation District in May, 2014; the downzoning of properties near Meadowbrook Road from T-5 to S-4 in May, 2014; and the earnest attempt to create the Settlement Neighborhood Conservation District in the residential area across from the Heath School in November, 2012. The first two actions, both of which involved substantial effort, have extended some protection to only about 85 out of the more than 1,600 structures in T-5 and T-6 districts.

[7] Some lots might not permit as-of-right two-family or attached single-family development because of other constraints such as lot width. On the other hand, some of the current single-family lots are double or triple the size necessary for such development and could potentially be subdivided.

[8] In addition to the single-family and two-family structures, there are 92 non-conforming three-family and larger structures in T-5 districts, and 15 in T-6 districts, for a total of 1,635 structures in T districts.

Every precinct in Town, with the exception of Precinct 16, contains one or more T districts.[9] Any change in T-district zoning would raise the political questions of neighborhood protection and density vs. the expectations of private property owners. The Planning and Community Development Department or the Selectmen's Zoning By-Law Committee may consider taking up this issue.

IV. Potential Next Steps

A variety of options, including changes to the Zoning By-law, have been discussed by the Committee, including

- Doing nothing; continuing with the status quo
- Adopting Article 12 as originally proposed, so that "habitable space" includes "unfinished" attic and basement space that could be converted to meet Building Code requirements for occupancy
- Requiring a special permit for conversion of attics and basements to habitable space
- Without going as far as Article 12, requiring a special permit and/or design review for the construction of unfinished space where that space, when added to space counted in the GFA, would exceed 100% of the allowable basic FAR, with the special permit process including explicit conditions that the resulting structure be consistent with existing scale, massing and siting of other houses in the neighborhood.
- Deleting the 150% basement/attic exemption provision of Section 5.22.2
- Limiting the 150% exemption provision to basements
- Reducing the basement/attic exemption provision to 130%.
- Amending the definition of "basements" and "attics" in the Zoning By-Law
- Increasing the 10-year waiting period under Section 5.22
- Explicitly "resetting the clock" for the 10-year waiting period under Section 5.22 in the case of substantial teardowns or changes in the number of units, reflecting Building Department policy.
- Reducing the allowable FAR or limiting the application of the Section 5.22 exemptions in various zoning districts, particularly T districts
- Without (or in addition to) changing FAR and FAR exemption provisions, requiring design review or site plan review (e.g., buffers, siting) for new structures in certain zoning districts (e.g., S, SC and T districts), with such review potentially limited to "large residences" over a defined square footage, including unfinished basement and attic space
- Creating new dimensional restrictions, such as lot coverage maximums, a limit to the number of stories (e.g., allowing only a half-story above the first two stories), comparability to neighboring structures in terms of building size, siting and setbacks, and/or building envelope "planes."
- Taking the opportunity to deal with setback issues (e.g., tying the permissible building height to the side-yard setback of a building, such that, for example, if the side-yard setback of a building were 10 feet, the building could be 20 feet high; if the side-yard setback were 20 feet,

[9] F-1.0 districts (which allow as-of-right two-family and three-family dwellings) present the same issue of a high 1.0 allowable FAR compared to the existing density. Individual neighborhoods could be affected by build-out, although the Town-wide magnitude of the issue is much less than in T districts. For example, there are only 13 single-family dwellings in F-1 districts on lots with sufficient square footage (5,000 square feet) for the creation of two-family or three-family dwellings.

the building could be 30 feet high, and so on; and dealing with exceptions to setbacks, such as bays, balconies and so on).[10]

As noted above, the Committee looks forward to suggestions and comments from Town Meeting Members and citizens as it proceeds with its work.

The Moderator's Committee on Zoning FAR

Richard Benka, chair
Jesse Geller
Linda Hamlin
Marian Lazar
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[10] Mr. Yanovitch noted that oversize lots allowing large houses in S-7 districts could pose significant problems, since such districts require only a 7.5 foot side-yard setback.

Proposed Warrant Article 12 for the May 2016 Town Meeting would increase side-yard setbacks in all S and SC districts.