

LAW DEPARTMENT RESPONSES TO QUESTIONS FROM CITY COUNCILORS
FOR MONDAY 5/17 COUNCIL MEETING

1. How much time does the City Council have to act on the current proposed zoning amendment, commonly referred to as the restrictive zoning ordinance?

The City Council must vote to adopt the proposed ordinance within 90 days after the close of the public hearing. As the public hearing was closed on May 10, 2021, the deadline to act on the ordinance is August 9, 2021. In accordance with state law, if the ordinance is passed within this 90 day period, it will apply retroactively to any use or business that had not commenced prior to the publication of the first notice of the public hearing, which was published on April 23, 2021. As the proposed firearms store at 709 Washington Street had not commenced operation by that date, adoption of the restrictive zoning ordinance will apply to that store so long as it is passed within 90 days. A charter objection does not alter the 90-day deadline.

While the restrictive ordinance, if adopted within 90 days, will apply to the proposed firearms store, the store may still be allowed to open prior to such adoption if it is issued the required permits under the state building code. If the City Council fails to vote on the proposed zoning amendment on or before August 9, 2021, the Council cannot act on the item without holding another public hearing. However, if the City Council waits, holds another public hearing, and votes to pass the restrictive zoning ordinance, the effective date would be the date of the publication notice for the new public hearing, not April 23, 2021.

To be clear, the only zoning amendment or ordinance that will have an effective date of April 23, 2021 is the current proposed zoning amendment approved by ZAP on May 14th and before the Full Council on May 17th. The City Council may make minor amendments to the proposal. All other zoning measures considered by the Council, including a ban, will not apply to any use or business that has commenced prior to the publication of the first notice of the public hearing for that specific item. And any general ordinance measure will not take effect until after the date of adoption. Therefore, the Law Department recommends that the City Council act on the restrictive zoning as soon as possible so that the City will have in place strong regulations for firearms businesses while the Council deliberates on other proposed measures.

2. If the current proposed restrictive zoning ordinance is not adopted, but a complete ban of firearm stores is subsequently adopted, will the proposed firearms store at 709 Washington Street be allowed to open?

If the proposed restrictive zoning ordinance is not adopted, firearms stores will continue to be permitted by right in the City until an ordinance is passed regulating such businesses. If the City Council adopts a zoning amendment that completely bans firearm stores, the effective date of the ban would be the date of publication of the first notice of the required public hearing. If a firearms store commences operations before the notice of the public hearing for the proposed ban is first published, the ban would not apply to the operating firearms store. At this time, a public hearing date for the proposed ban has not been assigned and no draft ordinance language for the ban exists.

Given these variables and uncertainties, the Law Department recommends that the City Council act on the proposed restrictive zoning ordinance as soon as possible in order to give the City immediate protection as to the regulation of firearm uses. The longer the delay to enact any firearm zoning increases the risk that it will not apply to firearm uses that may be seeking to open under the current permissive zoning.

Acting on the restrictive zoning now also does not preclude discussion, deliberation, and possible adoption of the proposed zoning ban that has recently been submitted to the City Council.

3. Can the City Council adopt both a ban of firearm uses and the restrictive zoning so that the restrictive zoning will go into place only in the event that the ban is overturned by a legal challenge?

The City Council cannot adopt an alternative zoning ordinance without any effective date. The Law Department also anticipates that any potential legal challenge would attempt to overturn all forms of firearm regulation at the same time. Notwithstanding these points, the Law Department is currently evaluating whether restrictive zoning could co-exist in the zoning ordinance as an extraordinary exception to the ban, rather than as alternative zoning. As the form of the ban has not been discussed, the drafting process for the proposed ban ordinance has not started, and the public hearing has not yet been assigned, discussion of the structure and terms of the ban are premature at this time and can be addressed as the process continues for that separate proposed zoning amendment.

Again, the Law Department recommends that the City Council act on the restrictive zoning now so that the City will have in place strong regulations for firearms businesses while the Council deliberates on a complete ban. As previously noted, enacting the restrictive zoning will not have any impact on the City Council's options regarding a ban on firearms businesses.

4. Why does the restrictive zoning ordinance allow minors between ages 14 and 18 to access firearm stores when accompanied by an adult?

Under state law, minors older than 14 are allowed to purchase and possess certain types of rifles and shotguns with parental consent. The proposed ordinance is meant to be consistent with this requirement. The Law Department has no issue with amending the final language to say that minors must be accompanied by a "parent or guardian" rather than simply an "adult."

5. Does Cambridge ban firearm stores?

In 1986, Cambridge enacted a general ordinance banning the transaction of gun sales. The ordinance exempted persons that were already licensed to sell firearms under state law, but banned the issuance of any additional licenses to sell. The ordinance effectively capped the number of firearm stores operating at the time it was adopted in 1986. The Law Department has drafted a similar proposed general ordinance that caps the number of firearm licenses issued in Newton to one. This proposed Newton ordinance would have a similar effect as the Cambridge ordinance in that it would not allow for the issuance of a firearms dealer license beyond the one current license that was issued to the store at 709 Washington Street so long as that license remains active. Unlike

Cambridge, the Newton general ordinance would allow for the issuance of future firearm dealer licenses, but never more than one active license. The proposed Newton ordinance has been drafted to withstand a legal challenge under the current state of federal and state law—which has progressed significantly since 1986.

6. Is the City Council allowed to go into Executive Session to discuss litigation strategy concerning the proposed restrictive zoning ordinance?

The City Council may enter into executive session under Purpose 3 of the Open Meeting Law “to discuss strategy with respect to . . . litigation if an open meeting may have a detrimental effect on the . . . litigating position of the public body.” M.G.L. c. 30A § 21(a)(3). General discussions with counsel are not an appropriate use of Purpose 3. *Plymouth Dist. Atty. V. Selectmen of Middleborough*, 395 Mass. 629 (1985). While this exemption is not meant as a catchall to discuss potential litigation, it may apply if a lawsuit is “imminently threatened or otherwise demonstrably likely.” *Open Meeting Law Guide*, p. 13 (2020). The City Council must have a defined litigation position to protect to invoke the exception. OML 2019-164; OML 2012-116. The *Open Meeting Law Guide* is clear that public declarations about bringing suit do not necessarily amount to a threat of imminent litigation. *Open Meeting Law Guide*, p. 13.

Here it would be premature to enter into an executive session to discuss legal strategy for a lawsuit that does not yet exist. While the Law Department continues to advise that a complete ban on the sale of guns in the City will likely invite litigation, any discussion about strategy and how to defend against such a lawsuit at this stage would be so theoretical that it would fall outside the bounds of Purpose 3.

7. Why not enact a complete ban of firearm uses in the City if so many people in the public are saying Newton can or should give it a try?

As the Law Department has stated before, any act by local government to completely prohibit the sale and purchase of firearms within the City will be challenged and will likely be found unconstitutional. Our office has reviewed the statutes, federal and state case law, and consulted with experts in firearm regulation at both the state and federal level. Based on our research, our legal analysis and guidance from experts, we stand by our conclusion that a complete ban on the sale of guns in Newton would not withstand a legal challenge.

It is ultimately up to the City Council whether it wants to follow the Law Department’s advice or whether it decides it is “worth the fight.” Some of the significant risks associated with enacting a ban were set forth in City Solicitor Giuliani’s written statement distributed on Thursday, May 13. While there are many reasons that the Law Department counsels against a complete ban, consideration of City staff time and resources is not one of them. The Law Department is fully capable, both in terms of staffing levels and in expertise, of defending any lawsuit that may arise from these efforts to regulate firearm uses in the City.

The Law Department acknowledges that some Newton residents, including those who are lawyers, appear to disagree with the Department’s legal analysis. We also appreciate the passion residents have for fighting against something they do not want in their hometown. Please be assured, that

the advice of the Law Department is based on our research of the law, knowledge of municipal law, and free of any vested interest that could undermine the basis for the City's ultimate action. Our advice is also not informed in any way by who can or will represent the City in a legal challenge. Finally, the Law Department's analysis is consistent with that of national experts in gun regulation at the local level.