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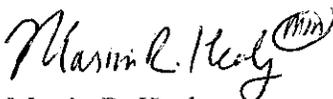
November 27, 2013

Nancy E. Glowa, Esq.  
City Solicitor, City of Cambridge  
City Hall – Law Department  
795 Massachusetts Avenue  
Cambridge, MA 02139**Re: Rejection of the Walker Petition**

Dear Ms. Glowa:

I am writing on behalf of the owners of 33 Cottage Park Avenue in North Cambridge, also known as the Fawcett Oil property and Norberg Greenhouses lot (the "Fawcett Oil Property"), to voice their strenuous objection to the reverse spot zoning petition submitted by John Walker and others (the "Walker Petition"), which is scheduled to be discussed at a Planning Board hearing next week. By letter dated June 12, 2013 ("June 2013 Letter"), I had voiced the Fawcett Oil Property owners' objection to a substantially identical petition (the "Phillips Petition"), which was before the City Council at that time. I attach herewith a copy of my June 2013 Letter. The comments that I made in that letter regarding the Phillips Petition apply with equal force to the Walker Petition. Stated simply, this re-packaged effort to target particular property for disfavorable treatment in response to a specific (approved) development proposal, particularly in the absence of meaningful planning, is illegal and should be rejected.

Sincerely,

  
Martin R. Healy

MRH

Enc.

cc: Robert Fawcett

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**BY HAND AND EMAIL**

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OFFICE OF THE CITY CLERK  
CAMBRIDGE, MASSACHUSETTS

June 13, 2013

Nancy E. Glowa, Esq.  
City Solicitor, City of Cambridge  
City Hall – Law Department  
795 Massachusetts Avenue  
Cambridge, MA 02139

**Re: Rejection of the Phillips Petition**

Dear Ms. Glowa:

Please be advised that this office represents Tyler Court Limited Partnership, owners of 33 Cottage Park Avenue in North Cambridge, sometimes referred to as the Fawcett Oil Property and Norberg Greenhouses lot (the “Fawcett Oil Property”). The Fawcett Oil Property is the single largest property within Special District 2 established by the Cambridge Zoning Ordinance. On May 22, 2013, my clients attended a public hearing on the Phillips Petition held by the Ordinance Committee of the Cambridge City Council. At that hearing, Attorney James Rafferty voiced my clients’ objection to the petition and asserted that the petition constituted illegal reverse spot zoning. At that hearing the Ordinance Committee voted to seek guidance from your office concerning my client’s assertion. This correspondence is intended to set forth the legal basis for my client’s claim.

As explained below, the Phillips Petition is aimed at thwarting proposed development of the Fawcett Oil Property. The Phillips Petition is not based upon any planning studies, and in fact undercuts the zoning determinations made just over one year ago by the City Council when it voted to amend Special District 2. For the reasons set forth below, the Phillips Petition constitutes illegal reverse spot zoning that should be rejected in its current form by the City Council.

**I. The Phillips Petition Is Improperly Targeted At Development of the Fawcett Oil Property**

The history of zoning of the vicinity encompassing the Fawcett Oil Property shows that significant planning has taken place and undergirds the City’s currently existing zoning of the area. All of that planning weighs against the pending Phillips petition.

From the early days of Cambridge zoning, the area in question was industrial and commercial in character along an existing railroad track which was appropriately zoned Industry A-1. The former railroad line is now Linear Park. Following a rigorous planning effort, Special District 2 was created in

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2000 with the intention of encouraging uses in the district compatible with adjacent residential uses. See, *Cambridge Planning Board Report to the City Council* dated October 18, 2011.

By 2011, Special District 2 had largely accomplished its original planning objective of encouraging suitable development within this transition area between non-residential and residential areas, and allowing a gradual transition of developed parcels to residential use. One of the last remaining parcels available for development was the Fawcett Oil Property.

Under the dimensional requirements of Special District 2 that were created by the City Council in 2000, the Fawcett Oil Property could have been developed with a floor area ratio of 0.65, and a minimum lot area per dwelling unit of 1,800 square feet. In 2011, the owners of the Fawcett Oil Property brought forth a proposal to allow a multifamily residential development on their property for 104 dwelling units. Shortly thereafter, the Bishop Petition was filed, seeking to downzone the Fawcett Oil Property and thwart that proposal. Among other things, the Bishop Petition was aimed at reducing the density allowed in the district from a floor area ratio of 0.65 to 0.50, increasing the minimum lot area per dwelling unit from 1,800 square feet to 2,500 square feet, establishing a maximum height of 35 feet for any portion of a building that is 50 feet or less from another district or from the Linear Park, and introducing new visibility requirements for fences within the building setback along Linear Park. The Planning Board recommended against the Bishop Petition because that petition undercut the careful planning completed in support of the original adoption of Special District 2. Nonetheless, on March 5, 2012, the City Council adopted the Bishop Petition as Ordinance Number 1347.

Less than one year after the adoption of the Bishop Petition, the owners of the Fawcett Oil Property filed a special permit application with the Planning Board on February 7, 2013, reducing the density of the proposed residential project from 104 dwelling units to 67 dwelling units, and complying in all respects with the dimensional requirements of Special District 2 as recently amended by the adoption of the Bishop Petition. After conducting two public hearings on the application, the Planning Board voted to issue the requested Special Permit on May 31, 2013.

Meanwhile, a new citizen's petition—the Phillips Petition—was filed after my client's Special Permit application was filed with the Planning Board. The Phillips Petition seeks to further downzone the Fawcett Oil Property and to thwart the proposal contained in the Special Permit application. There is no room for doubt that the Phillips Petition is aimed squarely at the Fawcett Oil Property, and is not a zoning petition of general application. "Given that most lots in [Special District 2] are fully developed or have received permits for new development, the proposed changes would primarily impact the large site north of Linear Park that is owned and operated by the Fawcett Oil Company." *Memorandum of CDD Staff to Planning Board Regarding Phillips, et al. Zoning Petition—Staff Analysis*, dated May 28, 2013, ("CDD Staff Memo") at 1. "The proposed 25-foot setback from adjoining Open Space Districts is apparently included in response to the determination that the side of the Fawcett Oil site adjacent to Linear Park is treated as a side yard . . ." CDD Staff Memo at 2. The Phillips Petition, among other things, would limit the permitted number of dwelling units within a single building to three, except in a

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townhouse where four dwelling units would be permitted. Such a restriction does not exist in any other Zoning District in Cambridge where multi-family housing and townhouse developments are a permitted use.<sup>1</sup> Given the size of the Fawcett Oil Property, this restriction would prevent the site from being developed to the 67 units permitted under the lot area per unit requirements in Special District 2. More significantly, that limitation would eliminate my clients ability to construct the 57 unit building authorized by the Special Permit approved by the Planning Board on May 31, 2013.

Moreover “[t]he proposed requirement that ‘no building . . . within Special District 2 may have access to Brookford Street or Cottage Park Avenue’ would preclude any new access to the Fawcett Oil site . . .” CDD Staff Memo at 3. In this form, the Phillips Petition is not simply an attempt to lure the City Council into abusing its legislative authority under the Massachusetts Zoning Act by deciding which of its citizens has a right to use a public street. The Phillips Petition goes even beyond that—by prohibiting a landowner access to public streets that abut his land! This attempt to prevent, by zoning amendment, access to public streets which abut the Fawcett Oil Property is violative of the property owner’s common law rights, is not contained in any other zoning district in Cambridge,<sup>2</sup> and is a clear indication of illegal reverse spot zoning.

## II. The Phillips Petition Does Not Pass Muster Under Reverse Spot Zoning Caselaw

The concept that spot zoning is illegal has its roots in the statutory requirement of reasonable uniformity. The uniformity requirement, in turn, has its roots in the concept of equal protection under the United States and Massachusetts Constitutions. *See, e.g., SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 107 (1984); *Van Renselaar v. Springfield*, 58 Mass. App. Ct. 104, 108, 787 N.E.2d 1148 (2003), quoting from *Rando v. North Attleborough*, 44 Mass. App. Ct. 603, 606, 692 N.E.2d 544 (1998) (spot zoning “violates the uniformity requirements of G.L. c. 40A, § 4, and “constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions”). In 1975, the uniformity provision changed from requiring that “[d]ue regard shall be paid to the characteristics of different parts of the city or town and the zoning regulations in any city or town shall be the same for zones, districts, or streets having substantially the same character,” to requiring that “[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.” *See*, G. L. c. 40A, § 4.

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<sup>1</sup> A two block area located in Special District 14 in the Riverside neighborhood is subject to Building Size limitations that restrict buildings to no more than six dwelling units. However, in sharp contrast with the Phillips Petition, Special District 14 was created only after completion of the multi-year Riverside Planning Study. Moreover, the Building Size limitation was a significant element of a negotiated agreement with Harvard University and the City Council involving the siting of dormitories and graduate student housing in a residential neighborhood. The two block area within Special District 14 is located approximately three miles from Special District 2.

<sup>2</sup> The only similar restriction is contained in Special District 3 which contains a provision that limits access to Harvey Street. Cambridge Zoning Ordinance, §17.36.3. One critical difference in that district, however, is that no lots in Special District 3 abut Harvey Street and thus do not enjoy common law rights of access to the public way.

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To succeed in a reverse spot zoning claim, the plaintiffs must show that the affected parcel has been singled out for more restrictive treatment than surrounding land which is indistinguishable, thereby “producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner.” *W.R. Grace & Co.-Conn. v. Boston*, 56 Mass. App. Ct. at 570, 779 N.E.2d 141, quoting from *National Amusements, Inc.*, 29 Mass. App. Ct. at 312, 560 N.E.2d 138. The ultimate inquiry in a spot zoning challenge—as in any substantive challenge to a zoning amendment—is whether the amendment is a legitimate exercise of the municipal zoning authority. *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 56 Mass. App. Ct. 559, 565 (2002) (“We view . . . spot zoning arguments as raising essentially a single issue, i.e., whether the amendments were a legitimate exercise of the [town’s] authority under the Zoning Act.”); *Id.* at 569–70 (“[o]nce it is established . . . that the amendments have a substantive relationship to the promotion of the public welfare, the amendments are not, by definition, spot zoning”); *Andrews v. Laverdier*, 68 Mass. App. Ct. 365, 368 (2007) (“The touchstone is whether the enactment falls within the broad police powers of a town to promote the public good and safety.”).

Where an amendment infringes on a landowner’s reasonable investment-backed expectations, courts appear more inclined to scrutinize any zoning rationales advanced by the municipal legislative body in support of the rezoning. *See, e.g., National Amusements, Inc. v. City of Boston*, 29 Mass. App. Ct. 305, 312 (“zone changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable”); *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 294 (1976) (declaring invalid a zoning amendment that rezoned plaintiff’s property from business to residential, where plaintiff had long used its property, which contained a prefabricated steel building, to operate a canteen service business); *Schertzer v. City of Somerville*, 345 Mass. 747, 752 (1963) (holding that a zoning amendment that changed the zone of plaintiffs’ property from business to residential was invalid because plaintiffs had purchased the property for the purpose of expanding their business, and the record reflected that the only plausible reason for the zoning amendment was an improper one, i.e., because nearby landowners simply did not like plaintiffs’ business); *Shapiro v. City of Cambridge*, 340 Mass. 652 (1960) (holding that zoning amendment reclassifying land from a heavy industry district to a light industry district was invalid where the only apparent basis for the amendment was to prevent the establishment of a particular business (a junkyard)); *Murphy v. City of Springfield*, M.L.W. No. F21 (Fenton, J.) (Hampden Land Court) (Misc. Case No. 114481) (Apr. 2, 1987), *aff’d*, 25 Mass. App. Ct. 1121 (1988) (rezoning plaintiff’s land from business to residential was improper where the nearby landowners who submitted the petition for the amendment did so based on “rumors of a proposed business use of the locus”).

Likewise, where the record reflects that the municipality did not engage in any meaningful planning in connection with a zoning amendment, courts have not hesitated to intervene. “Under our cases zone changes which have no root in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable.” *National Amusements, Inc. v. Boston*, 29 Mass. App. Ct. 305, 312 (1990); *see also, Mitchell v. Board of Selectmen of South Hadley*, 346 Mass. 158, 161 (1963) (annulling zoning amendment that changed land

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from a residence district to a business district where there was “nothing in the record to justify a conclusion that the amendment was predicated on a reexamination of the zoning districts and a consequent decision that the area constituted an appropriate commercial area”); *Beal v. Building Commissioner of Springfield*, 353 Mass. 640, 644 (1968) (nullifying zoning amendment the municipality’s planner “testified that . . . [the land] was unique in its fidelity to its residential character,” and “[t]he proposed amendment [was] not part of any general reevaluation or realignment of the zoning plan of the city”); *National Amusements*, 29 Mass. App. Ct. at 310–12 (holding that the illogical nature of the reasons the municipality offered for the zoning amendment, coupled with a complete “absence of analysis of land use planning considerations . . . before the decision to change the zoning was taken,” compelled the conclusion that the only plausible basis for the zoning amendment was an improper one (i.e., “to torpedo a specific development”).

Here, not only is the Phillips Petition aimed directly at thwarting a landowner’s reasonable investment-backed expectations, but also there is no underlying planning study to support the Phillips Petition. In addition, the Phillips Petition is attempting to undo the City Council zoning decision made only months ago. “While it is well established that local bodies have wide latitude to determine the particular location of zoning district boundaries, the criteria applicable to a change of established lines may impose limitations not present when zoning is first adopted.” *Canteen Corp. v. Pittsfield*, 4 Mass. App. Ct. 289, 292 (1976) citing *Shapiro v. Cambridge*, 340 Mass. 652, 658 (1960). The *Canteen* court discussed this problem as follows:

Our view is supported by *Schertzer v. Somerville*, 345 Mass. 747, 189 N.E.2d 555 (1963). In *Schertzer* a parcel of land which had been commercially zoned since the inception of zoning in Somerville was adjacent to both commercial and residential properties. At the behest of owners of the neighboring residences the property was changed from a commercial to a residential classification. The Supreme Judicial Court, in invalidating that rezoning, held that the separation of the parcel from similar adjacent business properties at the instigation of citizens who objected to a particular proposed business use constituted arbitrary and unreasonable action. In the present case the judge found that the area in question directly adjoins an extensive sweep of property exclusively devoted to non-residential purposes which is indistinguishable from the premises. Like *Schertzer*, here the locus had long been zoned for business use. *Canteen Corp. v. Pittsfield*, 4 Mass. App. Ct. 289, 293-294 (1976).

Changes in zoning should be driven by planning principles, not in reaction to proposals by property owners to develop their property in accordance with existing zoning rules. Here, the property owners have sought, not once, but twice, to develop the Fawcett Oil Property under existing zoning rules. It is manifestly unfair to expose landowners to a series of reverse spot zoning petitions aimed at thwarting proposed development of their land.

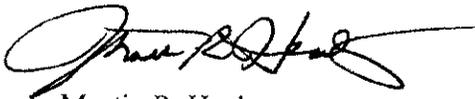
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**III. Conclusion**

On behalf of the owners of the Fawcett Oil Property, for the reasons set forth above, I respectfully request that you advise the City Council to decline to adopt the Phillips Petition. To do otherwise would allow the zoning process in Cambridge to proceed in contravention of the uniformity principles of the Massachusetts Zoning Act and the protections of the United States and Massachusetts constitutions. Should that occur, the owners of the Fawcett Oil Property are prepared to pursue their judicial remedies.

Thank you for allowing me the opportunity to share my analysis of this important legal issue with you.

Sincerely,



Martin R. Healy

MRH

cc: Robert Fawcett  
James J. Rafferty, Esq., Adams & Rafferty