

Teague 2014 Petition

Let's have transparency

confusion

Three timely parts

- 1. Zoning amendment: expiration date**
- 2. Special Permit: discretion to grant or deny**
- 3. Master Plan: must be followed**

General principles

- Municipal law should comply with state law
- Law should be understandable by the public
- ... especially those new to the process

“most citizens who interact with the Planning

Board will not be (and should not be) “regulars”

... the chair may be required to provide guidance to the public repeatedly”, John Hawkinson

Part 1: Expiration Date

- zoning amendment expires 90 days from ...
 - state law → City Council hearing
 - municipal law → Planning Board hearing
- two (2) city solicitor's letters 29 July 2013
- CDD agreed with my fix
- align with state law
- changes only two words
 - does anyone need more?

Part 2: Granting Special Permits

- Section 10.43, sentence #1
 - *Criteria. Special permits ~~will normally~~ may be granted where specific provisions of this Ordinance are met ...*
- M.G.L. Chapter 40A, Section 9
 - *Special permits may be issued only for uses ...*
 - *special permits may be granted for multi-family residential use ...*

Oct 28 Carlone blog post

- *Planning Board*
 - “The criterion is not that you have to do everything on the list; the criterion is that you do the best you can.”
 - “if we find that they meet the criteria, then we are *obligated* to grant the Special Permit”
- *Carlone*
 - “the Board is never ‘*obligated*’ to grant special permit relief just because an applicant/developer satisfies a checklist”
- Legal opinion of my expert: neither is 100% right
- Stop the confusion! ... council can
 - seek independent legal opinion
 - City Solicitor opinion (also CDD’s advice)

My Expert's Opinion

- adopt this amendment: “clarity” & “consistency”
- there is broad discretion to *grant* or *deny*
- ***BUT*** discretion “*not* unlimited”
- Cambridge Zoning Ordinance “quite ambiguous and too broad ... sweeping authority to grant or deny”
- “further amendment or a more comprehensive recodification”

Part 2: Granting Special Permits

- “may” matches state law
 - Special Permit proponent has the advantage
- appears municipal law gives additional advantage to proponent
 - does this wording prejudice the “system”?
 - Planning Board recites “will normally”
 - CDD characterizes “will normally” as a “standard”
 - last sentence of Part 2
 - is this council policy?
 - this question is before the council

Part 3: Master Plan

- new Section 9.18
- *All permits, including, but not limited to, Building Permits, Special Permits, and Variances shall comply with the Master Plan for the City of Cambridge as specified in M.G.L. Chapter 41, Section 81D.*

Part 3: Master Plan

- Development does not have to comply with a Master Plan in Massachusetts
- Recent court decisions right in Cambridge
 - Jose’s Parking lot down-zoning
 - Lesley University “paid for” up-zoning
- Commonsense to follow the plan
 - make the master plan process matter
- state law is silent on compliance
 - does require that city have a master plan
- opportunity for this or alternative language

Part 3: HOW?

- Enforcement by Building Commissioner who already defers zoning analysis to CDD for:
 - Signs
 - Affordable Housing
 - “green” building
 - (add) Master Plan
- Unintended consequences ? still can get a Variance
 - Planning Board reviews Variances before BZA hearings

Part 3: Why?

- Concord Alewife Plan had 2004 baseline
- “plans” for 2024 build out
 - half-way in time now
 - 2.8 million Sq Ft total planned for 2024
 - 3.5 million Sq Ft already
 - 3.1 million Sq Ft coming soon
 - 125% build out in ten years, not 20
 - were goals met? where’s the infrastructure?

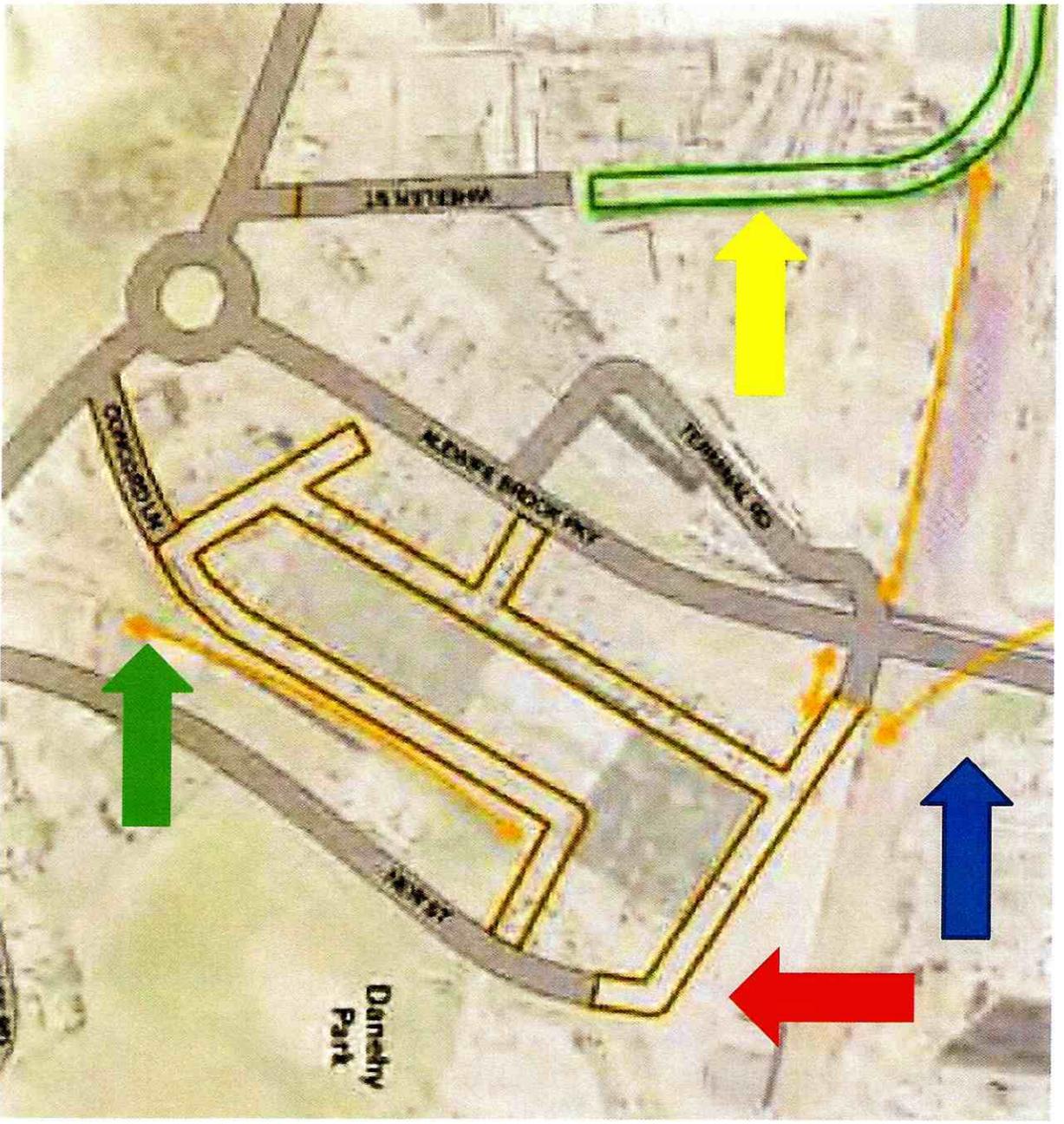
data courtesy of Doug Brown, FPRA

CAP Goals

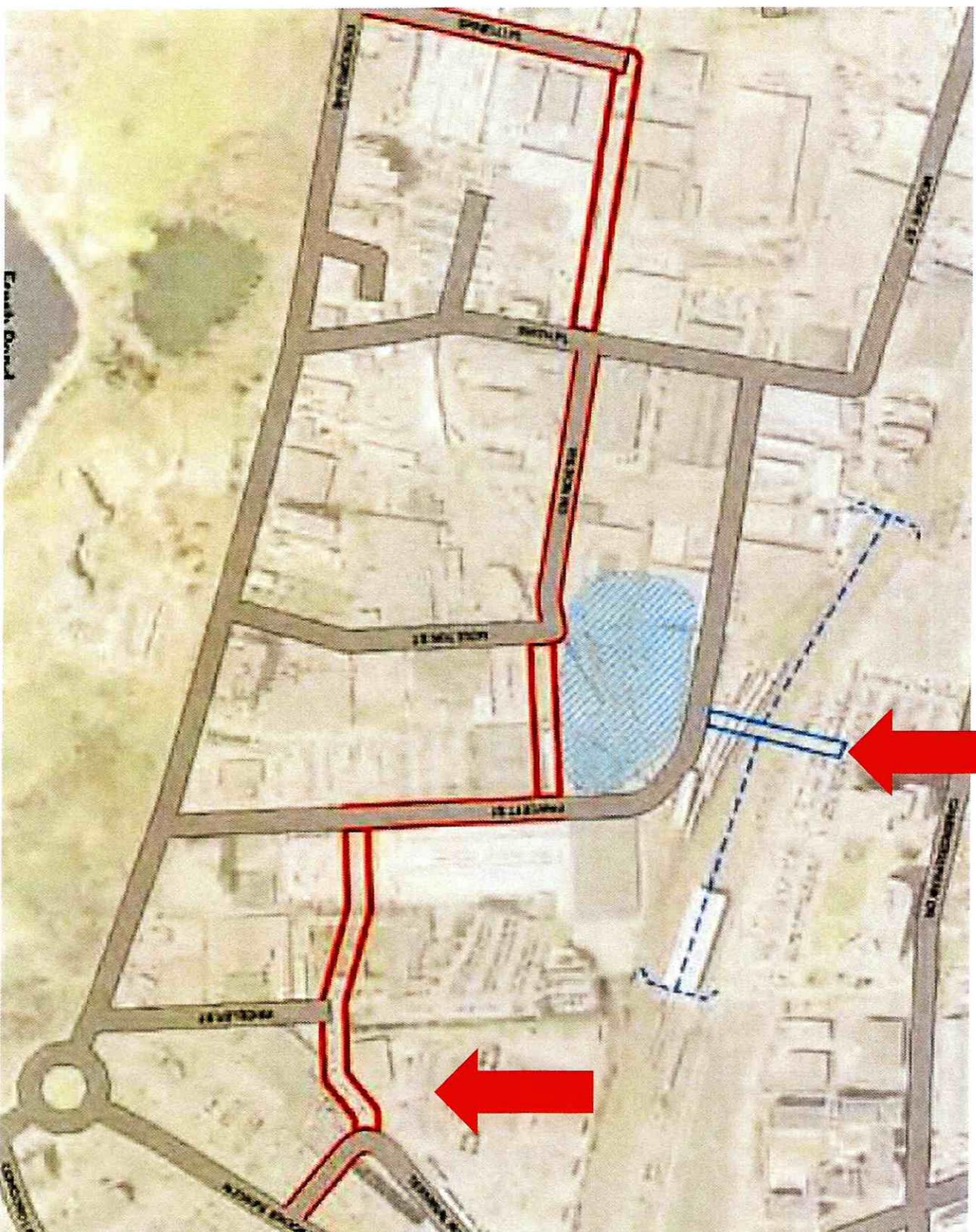
- Break down development into **smaller block sizes**
- Encourage **architectural variation** across the district
- Create **pedestrian-friendly facades** at street level
- Support **environmentally sustainable** design principles
- **Screen parking and loading** activities
- **Improve pedestrian links** to Fresh Pond, Danehy Park, and Alewife Station
- **Encourage mixed-use** development
- Street level facades should **include active uses**
- **Provide public access, public amenities, & community open spaces**
- Design residential development to **include a range of units of various sizes and with various numbers of bedrooms**
- **Improve existing streets** to meet City standards

summary courtesy of Doug Brown, FPRA

CAP "new grid & New St"



CAP "Priority Infrastructure"



Part 3: Why?

- CAP
 - not long ago
 - happening now
 - all the same actors
 - Zoning law was timely changed **BUT**
 - infrastructure not in zoning
 - land not protected
 - 87 New St
 - “incentivize” & “overlays” have been very good for developers **BUT FAILED** the public
- If your contractor built your house without a foundation, you would ...

CDD Memo

- Special Permits: “best to make that change after the plan is completed”
 - only for permits using 19.30
- Building Permits “not within purview” of Building Commissioner
 - but if in ordinance then it is
 - CDD can provide technical assistance
- Variances: “may be reasonable for the [BZA] ... to consider the planning objectives”

Oct 28 Planning Board video

- *that if a project meets criteria, "it gets the special permit. ... If that's not how we're supposed to be deciding these cases, I need to hear that from our appointing authority [the City Manager], from the City Council, and probably from the state ... "*
- *"The End" ... of the confusion*

Nancy E. Glowa
City Solicitor

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CITY OF CAMBRIDGE

Office of the City Solicitor
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Cambridge, Massachusetts 02139

July 29, 2013

Richard C. Rossi
City Manager
City Hall
Cambridge, MA 02139

***Re: Council Order Number O-4 of 4/29/13 Re: Report on Clarifying the
Expiration Date for Zoning Petitions Filed in the City***

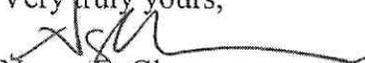
Dear Mr. Rossi:

This is written in response to the above-entitled Council Order, which requests this office "to clarify the expiration date for zoning petitions filed in the City of Cambridge – either 90 days from the date of the first Planning Board meeting or 90 days from the first City Council Ordinance Committee meeting."

The provisions of the Zoning Act, Chapter 40A of the General Laws, and the Cambridge Zoning Ordinance are not identical as to this issue. Chapter 40A, Section 5 provides in the fourth paragraph: "If a city council fails to adopt any proposed ordinance within ninety days after the city council hearing ... , no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided." Section 1.52 of the Zoning Ordinance provides: "Failure of the City Council to take action on a petition for a zoning amendment within ninety (90) days after the Planning Board's hearing on said petition shall render the petition inactive."

Because the provisions of the Zoning Act and the Zoning Ordinance are not identical in this regard, the date of expiration for each zoning petition must be determined by looking at the date of the first Ordinance Committee hearing on the matter and the date of the first Planning Board hearing on the matter, so the City Council's actions with respect to the petition will comply with the provisions of both the Zoning Act and the Zoning Ordinance. Therefore, the City Council should act within 90 days of the earlier of those two dates in order for the petition not to be rendered inactive.

Very truly yours,


Nancy E. Glowa
City Solicitor

BLATMAN, BOBROWSKI & MEAD, LLC

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ADAM J. COSTA
adam@bbmatlaw.com

MEMORANDUM

TO: CHARLES D. TEAGUE

FROM: ADAM J. COSTA, ESQ. 
BLATMAN, BOBROWSKI & MEAD, LLC

SUBJECT: ZONING AMENDMENT, PART 2
DISCRETION IN THE ISSUANCE OF SPECIAL PERMITS

DATE: NOVEMBER 12, 2014

Reference is made to the above-cited matter. In that connection, you have asked that I review a zoning petition (the "Petition") submitted by you and others to the Cambridge City Council, namely the part thereof, i.e. Part 2, pursuing an amendment of Section 10.43 of the City's Zoning Ordinance relative to the issuance of special permits. Said Section presently reads, in relevant part:

Special permits *will normally be* granted where specific provisions of this Ordinance are met, except when particulars of the location or use, not generally true of the district or of the uses permitted in it, would cause granting of such permit to be to the detriment of the public interest. . .

(Emphasis added.) The Petition would amend it so as to state:

Special permits *may be* granted where specific provisions of this Ordinance are met, except when particulars of the location or use, not generally true of the district or of the uses permitted in it, would cause granting of such permit to be to the detriment of the public interest. . .

(Emphasis added.) You have asked for my advice and opinion on the wisdom of the above modification, and for my thoughts on the practical and legal effect(s), if any, of the same. My firm – and, in particular, my colleague Mark Bobrowski – has drafted, amended and recodified over a hundred zoning ordinances and bylaws throughout Massachusetts and beyond.

My opinion is that the aforesaid amendment should be adopted, in that it adds clarity to Section 10.43 of the Zoning Ordinance to the benefit of the members of the Special Permit Granting Authority (SPGA), whomever they may be from time to time, as well as (and more so) to applicants to the Board of Zoning Appeal or Planning Board for a special permit thereunder. It also provides for consistency with G.L. c. 40A, § 9.

To those of us familiar with said Section 9 and with the discretion afforded a SPGA pursuant thereto in either issuing or denying a special permit, stating that relief “may be,” rather than “will normally be,” granted might be a distinction without a difference. But to others, stating that a special permit *will normally be* granted suggests an entitlement to a special permit, i.e. that a proponent is afforded some advantage over those who might be in opposition to the relief sought. The law is well-established in Massachusetts: “Neither the Zoning Enabling Act nor [a] town zoning bylaw [or a city ordinance] gives. . . an absolute right to [a] special permit. . . The board is not compelled to grant the permit. It has discretionary power in acting thereon.” MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 638 (1970). While a zoning ordinance or bylaw must provide adequate standards to guide a SPGA in its decision-making, these standards “need not be of such a detailed nature that they eliminate entirely the element of discretion from the board’s decision.” Id. Stating that a special permit “may be,” instead of “will normally be,” granted is consistent with and underscores the holding in Humble Oil v. Board of Appeals of Amherst, 360 Mass. 604, 605 (1971): “The mere fact that the standards set forth [in a bylaw or ordinance] are complied with does not compel the granting of a special permit. . .”

The SPGA’s discretion is not unlimited, however. Arbitrary or capricious decision-making will not be tolerated if challenged. By stating that a special permit “may be” granted and not that it will “normally be granted,” the Petition does not free the SPGA from the obligation to base its decision on “substantial facts which rightly can move an impartial mind, acting judicially, to the definite conclusion reached.” Shoppers World v. Beacon Terrace Realty, 353 Mass. 63, 67 (1967). Information not part of the record before it cannot be considered. “The board must act fairly and reasonably on the evidence presented to it, keeping in mind the objects and purposes of the [Zoning E]nabling [A]ct and the bylaw [or ordinance].” MacGibbon, 356 Mass. at 638-39. “[R]easons unrelated to the standards of the bylaw [or ordinance] for the exercise of its judgment” cannot form the basis of a grant or denial of relief. Slater v. Board of Appeals of Brookline, 350 Mass. 70, 73 (1966). Even where a special permit is denied, the SPGA ought to specify the reasons for its decision so as to avoid reversal on appeal or, more likely, a remand requiring it to do so.

Do note that the special permit standards found in Section 10.43, e.g. that the “public interest” will be preserved and the “integrity of the district” not impaired, and elsewhere in the Zoning Ordinance, e.g. in Section 19.30, that “on balance the objectives of the City are being served,” are quite ambiguous and too broad, in my opinion. They purport to afford the SPGA sweeping authority *to grant or deny* a special permit, almost on a whim. I am mindful of Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 118 (1955), where a standard that “no permit. . . be granted by the Board of Appeals without considering the effects upon the neighborhood and the City at large” was upheld as sufficient. But I am also cognizant of cases such as Smith v. Board of Appeals of Fall River, 319 Mass. 341 (1946) and Lattuca v. Town of Maynard, 1995 WL 17215786 (Mass. Land Ct.) (1995) (Kilborn, J.), where the courts cautioned against the use of vague standards. The Supreme

Judicial Court in Smith, 319 Mass. at 344, invalidated a City ordinance (and multiple permits that had been issued thereunder) which “opened the door to discrimination not based upon [a] valid difference. . . without furnishing any principles or rules by which the board should be guided, leaving the board with unlimited authority. . .” The City Council should, in my opinion, consider further amendment or a more comprehensive recodification of the Zoning Ordinance to avoid the aforementioned vagaries, and to avoid running afoul of Smith. Although true that a SPGA has the full range of discretion in rendering a decision on a special permit application and, in doing so, may consider the wide-ranging interests of the City and its residents, the board does *not* have unfettered discretion to do as it pleases.

I am hopeful that the foregoing is helpful to you. Should you have additional questions, please do not hesitate to contact me at (978) 371-2163.



CITY OF CAMBRIDGE
COMMUNITY DEVELOPMENT DEPARTMENT

BRIAN MURPHY
Assistant City Manager for
Community Development

IRAM FAROOQ
Deputy Director for
Community Development

To: Planning Board
From: Jeff Roberts, Land Use and Zoning Planner
Date: November 13, 2014
Re: **Teague, at al. Zoning Petition**

Overview

The zoning petition submitted by Charles Teague, et al. addresses some concerns that have been raised over the past year relating mainly to zoning and permitting procedures. Three specific changes are proposed (see attached petition), and each is briefly discussed below.

Where this petition raises specific questions regarding the application of state laws, it would be advisable for the Planning Board or City Council to seek an opinion from the City Solicitor. This memo focuses on planning issues and does not intend to provide legal guidance.

1. Amending the Timeline for Zoning Petition Review

This proposed amendment relates to a slight difference between the zoning amendment procedure set forth in the Cambridge Zoning Ordinance and the zoning amendment requirements set forth in the Massachusetts Zoning Act (M.G.L. Chapter 40A, Section 5), which reads in part (emphasis added):

*If a city council fails to vote to adopt any proposed ordinance within **ninety days after the city council hearing** or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.*

The current text of the Cambridge Zoning Ordinance effectively starts the 90-day review period on the date of the Planning Board hearing rather than the City Council hearing. In practice, to make sure the requirements of both the Cambridge Zoning Ordinance and state law are met, the City has counted the 90-day period beginning on the earlier of the two public hearing dates (Planning Board or City Council). However, this has sometimes resulted in confusion, and amending the Ordinance to be consistent with state law would help avoid such confusion in the future.

2. Amending the General Special Permit Criteria in Section 10.43

The text in Section 10.43 of the Zoning Ordinance stating that special permits “will normally be granted” for projects that conform to zoning standards has been the subject of much discussion in recent cases. The proposed text change to “may be granted” would likely make little practical difference, because most special permits are based on criteria that are specific to the special permits being sought as well as the general criteria. However, the proposal raises some issues regarding the nature of special permits.

Special permits are authorized by Section 9 of the Zoning Act, and there is a long record of judicial case law regarding special permit authority. As noted, specific legal questions should be directed to the City Solicitor. However, some of the basic planning principles that guide the application of special permit powers are discussed below.

- The Zoning Ordinance should clearly state what development may be authorized by special permit and what the reasons are for requiring a special permit. An “open-ended” special permit provision that is based only on the discretion of the granting authority would result in a great degree of uncertainty for property owners and the general public.
- If a special permit is authorized in the Zoning Ordinance, then a property owner has the right to apply for it, and having applied, has the right to a public hearing and a decision within 90 days of the hearing (unless that time is extended by mutual agreement). The granting authority must arrive at a decision on the case, either to grant or deny, and cannot simply decline to issue a permit through inaction (in which case, the special permit would effectively be granted automatically).
- The granting authority must file a written decision that states the reasons for its grant or denial. While the granting authority has discretion, the decision must be rational and based on the facts of the case. Therefore, it is important for the guidance provided in the Ordinance to be as clear as possible, which provides the granting authority with the rational basis for making its decision.

Changing the text of the Ordinance from stating that special permits “will normally be granted” under certain circumstances to stating that they “may be granted” under those same circumstances might not be helpful because it would provide less clarity to the permit granting authority in deciding whether a special permit should be granted or denied. If an alternative standard is desired, it would be preferable for that standard to set expectations that are as clear as possible.

3. Conformance with a Master Plan

This proposed change makes reference to a citywide master plan, which is defined in state law as “a statement, through text, maps, illustrations or other forms of communication, that is designed to provide a basis for decision making regarding the long-term physical development of the municipality” (M.G.L. Chapter 41, Section 81D). Cambridge will begin to undertake a citywide comprehensive planning process in order to refresh its master plan next year. As part of that process, it is reasonable to consider how the master plan will apply to project review and permitting.

While there is no current document titled “Master Plan for the City of Cambridge,” Cambridge’s current master planning framework includes a set of planning studies that address development in the city at

large as well as more focused studies conducted on specific areas or topics. Cambridge's most recent planning studies have been rooted in the Cambridge Growth Policy, *Toward a Sustainable Future*, established by the Planning Board and Community Development Department in 1993. The most recent citywide planning process studying general growth and development was undertaken in 1998-2001 and resulted in comprehensive revisions to the Zoning Ordinance.

Special Permits

One outcome of the 2001 citywide rezoning was the establishment of the Citywide Urban Design Objectives in Section 19.30 of the Ordinance. One of the criteria for any special permit is that the permit granting authority (Planning Board or BZA) must find that the proposal is in overall conformance with those objectives. Section 19.30 also states, "Further indicators of conformance with these policy objectives shall be found in planning documents and plans developed for specific areas of the city or the city as a whole, to the extent that they are not inconsistent with the objectives set forth in this Section 19.30." A new citywide master plan, when it is completed, would be incorporated into the Section 19.30 criteria either implicitly or explicitly. However, if explicit reference is made, it would be best to make that change after the plan is completed, so that it can be referenced more precisely.

Building Permits and Variances

While it is reasonable for special permits to be evaluated in accordance with citywide plans, it may be problematic to apply the same standard to building permits. A citywide master plan, which establishes broad policies and objectives for growth, is not the same as a Zoning Ordinance, which sets forth specific requirements and limitations for buildings and uses. When a building permit is issued, it is based on an administrative determination by the Superintendent of Buildings that the project meets the strict requirements of the Zoning Ordinance and other applicable codes and regulations. It would not be within the purview of the Superintendent of Buildings to make a discretionary finding of whether a proposed development is consistent with a citywide master plan if it otherwise meets the strict requirements of the Ordinance.

Variances are granted based on a different set of findings than special permits. State law provides that variances may be granted where "a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship" because of some unusual condition of the lot that is not generally true of other lots in the district (M.G.L. Chapter 40A, Section 10). Because variances are meant to apply to exceptional circumstances, it might be unreasonable to require that they conform to a general master plan. It may be reasonable for the granting authority (the BZA, in the case of all variances) to consider the planning objectives for the area as a factor in making a decision or imposing conditions on a variance, so long as the decision remains within legal parameters.