

From: Michael Hawley [mjhawley@me.com]
Sent: Saturday, January 10, 2015 7:15 PM
To: City Council
Cc: Lopez, Donna
Subject: written Law Dept opinion needed on the Planning Board's discretion to deny Special Permits

Kindly enter this message into the council record.

Dear Councillors,

You are asked to decide on what looks like a tweak in our City's Zoning language — namely, changing “Special permits *will normally* be granted” to “Special permits *may* be granted.” This obviously gets to the heart of the question as to whether or not the Planning Board can deny a special permit application.

Yet City Solicitor Nancy Glowa has blithely told you that, in effect, it isn't *may* or *will normally* — she testified on Jan 5 that if ordinary criteria are met, the Special Permit Granting Authority (i.e., the Planning Board) *must* grant the permit.

<https://www.youtube.com/watch?v=R56sQWN9EyI&feature=youtu.be>

With respect, Ms. Glowa is wrong. SPGA's have enormous discretion in whether to grant or deny permits. In fact, it's already evident in the existing language (“permits will normally be granted ... *except when particulars of the location or use would cause granting of such permit to be to the detriment of the public interest.*”)

Who are we kidding here? Of course a Planning Board can deny a special permit! All over Massachusetts the case law is clear. Yet our Planning Board has been hiding behind this rubbish for years, stamping out permit after permit over loud public objections and to the sad detriment of our city. This is the antithesis of enlightened planning.

Kindly ask Ms. Glowa to provide her written rebuttal to the letter of Attorney Adam Costa:

<https://www.documentcloud.org/documents/1359906-adam-costa-legal-memo-supplied-by-teague.html>

Kindly also ask that she address Doug Brown's letter on this subject (attached below).

Thus, I urge you to approve the proposed wording change above, and to forcefully remind our Planning Board and City Management that they have considerable discretion in granting or denying permits.

Now, obviously, I am one of five plaintiffs in the 40 Thorndike Courthouse appeal, so my disappointment is glaring. But I continue to be appalled at the lousy legal advice our City Solicitor seems to be dispensing, and the way City officials seem to regard it as quasi-judicial. The fact that we have been forced to appeal is entirely the result of a permitting policy run amok, a policy buoyed by legal advice that is defective. You wouldn't sail a ship with a broken compass. You'd replace the busted compass.

This situation needs to be corrected.

Sincerely,

Michael Hawley
101 Third Street

From: 'Doug Brown' via Fresh Pond Residents Alliance <fresh-pond-residents-alliance@googlegroups.com>

Date: Tue, Jan 6, 2015 at 12:32 PM

Subject: RE: [FreshPond RA] Re: [PSNA] email for MONDAY's city council: Is the Planning Board "obligated" to grant Special Permits?

In responding to Mr. Winter's question asking "What would be the legal basis of denying a permit if the petitioner met all of the specified criteria?", I would offer the following comments.

As others have repeatedly pointed out, the case law in support of Planning Board discretion is long, going back to at least 1955. In addition to the case from 1971 already mentioned below (*Humble Oil v. Board of Appeals of Amherst*), as well as the 6 other cases referenced by Adam Costa in his letter to Mr. Teague, the Massachusetts Land Court has ruled on at least 13 additional occasions that not only are a board's powers discretionary, but that the standards to approve a special permit may be quite rigorous, while the standards to deny a permit need not be similarly rigorous.

(the findings which support the granting of a variance or special permit are rigorous while denial does not require such detailed findings but simply adequate findings and reasons):

- *Schiffone v. Zoning Board of Appeals of Walpole*, 28 Mass. App. Ct. 981 (1990);
- *Gamache v. Acushnet*, 14 Mass. App. Ct. 215 (1982);
- *Cass v. Board of Appeals of Fall River*, 2 Mass. App. Ct. 555 (1974);
- *Wolfson v. Sun Oil Co.*, 357 Mass. 87 (1970);
- *Planning Board of Springfield v. Board of Appeals of Springfield*, 355 Mass. 460 (1969);
- *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158 (1962);
- *Cefalo v. Board of Appeals of Boston*, 332 Mass. 178 (1955);

(a special permit granting authority's power to grant or deny special permits is discretionary and a decision of a special permit granting authority will not be disturbed unless it is based on an untenable ground or is unreasonable, whimsical or capricious):

- *Davis v. Zoning Board of Appeals of Chatham*, 52 Mass. App. Ct. 349 (2001);
- *ACW Realty Management, Inc. v. Planning Board of Westfield*, 40 Mass. App. Ct. 242 (1996);
- *Federman v. Board of Appeals of Marblehead*, 35 Mass. App. Ct. 727 (1994);
- *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass. App. Ct. 101, 105 & n. 11 (1984);

- S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass. App. Ct. 477, 481 (1980);
- Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275, 277 (1969);

In short, the **Massachusetts Land Court has ruled at least 20 separate times** that Planning Boards have wide latitude to use discretion when granting Special Permits. If that weren't enough, the City of Cambridge itself grants to its boards unlimited power to revoke any previously issued permit. Here's the specific City Ordinance:

- **1.20.010 - Issuance conditions—Authority to revoke.**

All licenses and permits issued to any person under any ordinance or order of the City Council or the Board of License Commissioners or any other board or official of the City having power to issue licenses and permits, shall be issued subject to the condition that the same may be revoked at any time, at the option of the department or body from which the same were issued, or at the option of any future department or body.

If, as the City Ordinance says, **any permit can be revoked at any time for any reason**, then I have a hard time believing that the Planning Board is ever truly obligated to grant a Special Permit, even if all the objective criteria listed in the Zoning Ordinance have been met.

-Doug Brown