Nancy E. Glowa
Acting City Solicitor

Arthur J. Goldberg
First Assistant
City Solicitor

Assistant City Solicitors

Vali Buland
Paul S. Kawai
Elizabeth A. Shaw
Samuel A. Aylesworth
Amy L. Witts

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

March 5, 2012

Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Council Order No. 8 of 2/27/12 Re: Report on an Opinion on the Issue of Spot Zoning on the Bishop Petition

Dear Mr. Healy:

The City Council has requested an opinion from this office regarding the question of whether or not the so-called "Bishop Petition" as modified would amount to impermissible spot-zoning.

The petition proposes changes to the existing requirements of the Special District 2 (SD-2) zoning district in North Cambridge, which is primarily located adjacent to Linear Park, along Harvey Street to the south, and at the terminus of Madison and Cottage Park Avenues, Tyler Court, and Magoun, Brookford and Edmonds Streets to the north. Special District 2 was created in 2000 with the intention of encouraging residential uses in a form and density compatible with adjacent residential uses for the area around the Linear Park, which is a park created on top of the former rail line running through that area of the City. Prior to the creation of SD-2, the zoning designation for the area was Industry A-1, which allowed residential and commercial uses at a maximum Floor Area Ratio (FAR) of 1.25 and with a height of 45 feet. Historically, the area had consisted of industrial uses adjacent to the former railroad line.

The current regulations for SD-2 are similar to those for the Residence B district, which is the base zoning underlying SD-2 and is the zoning designation for the abutting residential area, with the following exceptions: in S-D-2, multifamily residential uses are allowed; limited office and retail uses are allowed within existing non-residential buildings; the maximum base FAR is 0.65 (instead of 0.50), and is not reduced for portions of the lot over 5,000 square feet; the minimum lot area per dwelling unit is 1,800 square feet (instead of 2,500), and is not increased for portions of the lot over 5,000 square feet; the maximum height is 40 feet (instead of 35), with a maximum cornice height of 30 feet; there are provisions allowing for flexibility where an existing non-residential building is

converted to residential use (these provisions are now applicable citywide through Section 5.28.2); and there are provisions to allow additional density where an existing commercial building with an FAR greater than 0.65 is demolished to construct new residential buildings.

The Bishop Petition as it has now been modified would reduce the density allowed in SD-2 from an FAR of 0.65 to 0.50, increase the minimum lot area per dwelling unit from 1,800 square feet per dwelling unit to 2,500 square feet per dwelling unit (except that the more restrictive density standards that apply to lots larger than 5,000 square feet in the Residence B district would not apply in SD-2), establish a maximum height of 35 feet for any portion of a building that is 50 feet or less from any Residence B or Open Space district having a height limit of 35 feet or a public way, and impose regulations regarding the allowed materials for fencing along Linear Park.

The petitioners assert that the purpose of the rezoning of SD-2 is to more closely reflect its Residence B base zoning, because recently announced redevelopment projects will essentially complete the conversion from industrial use to residential use. The Petitioners note that the current provisions of Section 17.22 of the Ordinance provide that "[i]t is the intent of this Special District 2 to encourage the establishment of residential uses in the district in a form and density compatible with the adjacent residential neighborhood. However, given the significant presence of nonresidential uses in the district, provision is made for the conversion of those existing nonresidential uses to other nonresidential uses more compatible with the residential neighbors, with the intent that all nonresidential uses will, over time, be replaced with permitted residential use." The petitioners assert that this proposal "would complete the implementation of that change in city policy implemented by Special District 2. The historic commercial and industrial zoning designations in this area reflected a different time and pattern of use that grew up around the railroad. Times have changed and land use patterns have evolved with the replacement of the railroad by the subway covered by our Linear Park."

The Ordinance Committee held two hearings to consider the Petition. At the first hearing on September 7, 2011, staff from the Community Development Department and members of the public presented information and commented on the merits of the petition. Evidence was submitted by proponents of the Petition which identified the substantial concerns of owners of property within the SD-2 and the adjacent Residence B districts as to the impact of the increased density that has resulted from development in the SD-2 district, which they contend does not match that of the surrounding neighborhood and has, over time, resulted in increased traffic and congestion. The proponents of the petition also identified potential benefits of the proposed amendment including protecting the stability of the neighborhood, maintaining economic diversity, minimizing traffic impacts, and the preservation of the amenities of Linear Park. Such concerns, when given careful consideration by the legislative body, are of the type that courts have recognized as forming an appropriate basis for a zoning amendment. The Ordinance Committee also heard from opponents of the petition, including representatives of Fawcett Oil Company whose property would be among those affected by the proposed zoning changes.

Community Development Department staff submitted two memoranda to the Planning Board, dated September 9, 2011 and October 11, 2011 to inform the Planning Board and members of the public about the zoning changes proposed in the Bishop Petition. In the first memorandum, staff noted that although the SD-2 district remains predominantly non-residential, most of the new and proposed development in the district has been for housing, including new construction and conversion of non-residential structures to residential use, and that it would be reasonable to expect that the remaining commercial sites in the district will be redeveloped to housing in the future.

The Planning Board submitted a recommendation to the City Council not to adopt the petition. In its recommendation, the Planning Board recognized the concerns raised by the petition about the larger developments currently permitted in the SD-2 district, but felt that these concerns could be addressed through the Townhouse or Multifamily Special Permit process.

Generally, great deference is allowed to municipalities in zoning matters. The law provides that "[i]f the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body...should be sustained and the reviewing court should not substitute its own judgment." *National Amusements, Inc. v. Boston*, 29 Mass. App. Ct. 305, 309 (1990). As noted in a treatise on Massachusetts zoning law, "[t]he purpose behind the doctrine of illegal spot zoning—which, when it applies, results in the invalidation of the offending zoning regulation—is to prevent municipalities from violating the uniformity provision of G.L. c. 40A, §4 by treating similarly situated properties differently 'without rational planning objectives'." *Massachusetts Zoning Manual,* MCLE, Inc. 4th ed. 2007, §3.3.4., citing *National Amusements, Inc. v. Boston, Id.* at 312. The particular concern addressed by the concept of illegal spot-zoning occurs when a municipality singles out one lot or a small area for different, generally less restrictive (or conversely, for reverse spot zoning, more restrictive) treatment than that applied to similar lots, with the sole purpose being to benefit (or disadvantage) the landowner of the particular lot or small area. *W. R. Grace & Co.-Conn. v. Cambridge City Council*, 56 Mass. App. Ct. 559, 569 (2002).

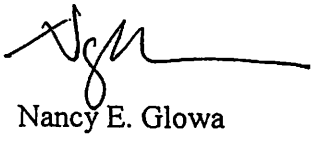
In trying to resolve the issue of whether a particular amendment constitutes invalid spot zoning or reverse spot zoning, the courts consider a number of related factors including the physical characteristics of the land, its location, size, and the nature of adjoining uses, whether the decision is the result of an analysis of land use and planning considerations; National Amusements v. Boston, *supra,* at 310; the benefit and detriment to the property owner and public, the character of the area adjacent to the reclassified land; *Powell on Real Property*, 79C.03[3][b][i]; and whether there has been a rationale set forth for the proposed rezoning. "It often is difficult to draw the line between neighborhoods that should be devoted to different uses, and where there is room for reasonable doubt the judgment of the local authorities should prevail." *Crall v. Leominster*, 362 Mass. 95, 101-102, n. 4 (1972), quoting *Lanner v. Bd. of App. of Tewksbury*, 348 Mass. 220, 228 (1964). In addition, the fact that the owner of a particular lot may experience some economic disadvantage as a result of the zoning amendment does not necessarily lead to a conclusion that the proposed amendment constitutes impermissible reverse spot zoning. *W. R. Grace & Co.-Conn. v. Cambridge City Council*, *supra* at 569 ("the legality of a zoning amendment

turns not on what parcel has been singled out, or even the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act.")

Here, as noted above, the petition proposes to rezone the entire SD-2 district by making changes which, if enacted, will more closely reflect the base Residence B district and be more compatible with the adjacent Residence B district. Evidence was given to the Ordinance Committee which identified the substantial concerns of the owners of property within the SD-2 and Residence B districts as to the future impact that projects built to the current limits of the SD-2 zoning district would have on residents in these districts. The Planning Board acknowledged in its recommendation against adoption of the petition that the allowed density in the SD-2 district is greater than that allowed in the adjacent Residence B district, even though the Board believed that the concerns raised by the petition could be addressed in the special permit process. The above considerations are among those that have been recognized by the courts as forming an appropriate basis for a zoning amendment. The fact that the zoning amendment if adopted does not affect only one parcel but applies to the entire SD-2 district is further support for the conclusion that the proposed amendment would not be viewed by the courts as impermissible reverse spot zoning. Inasmuch as the entire SD-2 district is to be rezoned, a court could conclude that there has not been a singling out of just one lot for different treatment from similar surrounding parcels.

Given the courts' broad deference to municipalities in zoning matters and for the reasons stated above, it is my opinion that there is no basis for concluding on the face of the petition that it constitutes impermissible reverse spot zoning.

Very truly yours,



Nancy E. Glowa

City Council Findings

1. That the City Council find that the rezoning of the Special District 2 District will more closely reflect the base Residence B District that underlies the Special District 2 and that it will be more compatible with the adjacent Residence B District.

2. That the City Council finds that Petitioners and other residents have identified significant concerns as to the future impacts that projects built to the current limits of the Special District 2 zoning district would have on residents in these districts.

3. That the City Council finds that Linear Park is an important amenity for the community and that the proposed changes will protect that amenity for all.