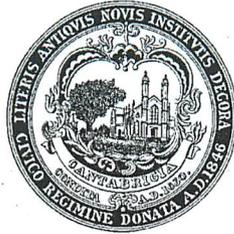


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## CITY OF CAMBRIDGE

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

July 29, 2013

Richard C. Rossi  
City Manager  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

***Re: Council Orders No. 10, 11 and 12 of 6/3/13 Re: Provide a Legal Opinion on the following issues: (1) the expiration date on the Phillips Petition and whether if the petition is refiled would the extension take the special permit decision of the Planning Board out of jeopardy; (2) how many times a petition can be filed on the same zoning petition (serial filings); and (3) whether it is legal to close Cottage Park Avenue and open Brookford Street.***

Dear Mr. Rossi:

The City Council has requested an opinion from this office regarding the following questions: (1) the expiration date of the Phillips Petition ("Petition") and whether the Petition if re-filed would take the special permit decision of the Planning Board (special permit #276 re: 33 Cottage Park Avenue) out of jeopardy; (2) how many times a petition can be filed on the same zoning matter (serial filings), and; (3) whether it is legal to close Cottage Park Avenue and open Brookford Street.

1. The Expiration Date on the Phillips Petition and Whether if the Petition is Refiled Would The Extension Take the Special Permit Decision of the Planning Board Out of Jeopardy.

A. The Expiration Date of the Petition

The Petition was filed with the City Clerk on March 28, 2013 and referred to the Ordinance Committee of the City Council ("Ordinance Committee") on April 1, 2013. The Petition was first advertised on May 2, 2013. The Ordinance Committee held a public hearing on the Petition on May 22, 2013. The Planning Board held its public hearing on the Petition on June 4, 2013. The Planning Board's hearing was continued to July 9, 2013. Pursuant to the provisions of the Cambridge Zoning Ordinance ("Zoning Ordinance"), the

City Council would be required to take action on the Petition by September 3, 2013 which is 90 days after the initial Planning Board hearing, in order for the Petition not to be rendered inactive.<sup>1</sup>

The provisions of the Massachusetts Zoning Act, G.L. Chapter 40A (“Chapter 40A”) are not identical to the Zoning Ordinance in this regard and provide that: “[i]f 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.” G. L. Chapter 40A, Section 5. Thus, under state law, if the Petition is not adopted by the City Council by August 20, 2013, which is 90 days after the Ordinance Committee hearing, the requirement for another Planning Board hearing and subsequent report would be triggered. The prudent course of action would be for the City Council to act on the Petition by August 20, 2013, so that the City Council’s actions with respect to the Petition will comply with both the provisions of Section 1.52 of the Zoning Ordinance and the provisions of G.L. Chapter 40A, Section 5.

B. Whether the Petition if Re-Filed Would Take the Special Permit Decision Out of Jeopardy

The Petition was first advertised on May 2, 2013. On May 31, 2013, the Planning Board issued a Special Permit (the “Special Permit”) to Tyler Court Limited Partnership, owners of 33 Cottage Park Avenue (the “Owners”), for the redevelopment of a site sometimes referred to as the “Fawcett Oil Site.” If the Petition is adopted by the City Council within the time frames set forth above, the Fawcett Oil Site will be subject to the Petition’s new zoning requirements because the Special Permit was issued after the first advertisement of the Petition.<sup>2</sup>

If, however, the Petition in its current form is not adopted by the City Council within the time frames set forth above, but a new petition is filed (“Re-Filed Petition”), the Special Permit would not be subject to the provisions of a Re-Filed Petition provided that the use or construction permitted by the Special Permit is commenced within six months of the date of the issuance of the Special Permit and continued through to completion.<sup>3</sup> The

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<sup>1</sup> Section 1.52 of the Zoning Ordinance provides in relevant part: “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.” Here 90 days falls on Monday, September 2, 2013, a holiday, therefore the City Council would be required to take action by September 3, 2013.

<sup>2</sup> Chapter 40A, § 6, provides in relevant part that “[a] zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five ...”

<sup>3</sup> Chapter 40A, § 6 provides: “[t]he construction or operation under a building permit or special permit shall conform to any subsequent amendment of the ordinance or by-law unless use or construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.” See also, Article 8, § 8.25 of the Ordinance.

Special Permit would not be subject to a Re-Filed Petition's provisions because the Special Permit was issued on May 31, 2013, and the filing and first advertisement of a Re-Filed Petition would not yet have occurred.

2. How Many Times a Petition can Be Filed On the Same Zoning Petition (Serial Filings)

Neither the provisions of Chapter 40A nor the provisions of the Zoning Ordinance limit the number of times a petition to amend the Zoning Ordinance can be filed. However, there are restrictions pertaining to reconsidering a petition that has been unfavorably acted upon by the City Council. For example, a petition to amend the Zoning Ordinance which has been unfavorably acted upon by the City Council cannot be considered again on its merits within two years after the date of the unfavorable action unless the proposed amendment was favorably recommended in the Planning Board's report to the City Council. Withdrawal by the petitioner after a proposed amendment has been advertised for a hearing before the City Council is considered "unfavorable action", and therefore the petition cannot be considered again on its merits within two years unless the proposed amendment was favorably recommended in the Planning Board's report to the City Council.

As stated above, if the City Council fails to take action on a petition within ninety days after the Planning Board's hearing, such inaction would render the petition inactive. A petition that becomes inactive may be considered again within two years, because the City Council's failure to act on the petition is not considered unfavorable action, but another Planning Board hearing would be required prior to City Council action on any such petition.<sup>4</sup>

3. Whether it is Legal to Close Cottage Park Avenue and Open Brookford Street.

A. Cottage Park Avenue Cannot Be Closed to All Vehicular and Pedestrian Traffic Without Violating an Order of the Court

Closing Cottage Park Avenue would violate the Order of the Superior Court issued in Civil Action Number 83-5524, *Robert W. Fawcett & Son Co., Inc. v. City of Cambridge, et al*, (the "Fawcett Lawsuit") which upheld the City's restriction disallowing all truck traffic on Cottage Park Avenue but found that Robert W. Fawcett & Son Co., Inc,

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<sup>4</sup> Article 1.000, § 1.52 of the Ordinance provides: "[n]o proposed amendment to this Ordinance which has been unfavorably acted upon by the City Council shall be considered on its merits within two years after the date of such unfavorable action unless such an amendment is recommended in the report which the Planning Board is required to make to the City Council. The granting of "leave to withdraw" after a proposed amendment has been advertised for a hearing before the City Council shall be considered as constituting unfavorable action. 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. Such failure to act shall not be considered unfavorable action but shall require another Planning Board public hearing, in accordance with the requirements of Section 5, Chapter 40A, G.L., prior to any subsequent City Council action on the petition."

("Fawcett"), as an abutter on Cottage Park Avenue, had a right of access on Cottage Park Avenue as an incident of ownership and, therefore, the City could not restrict all other vehicle and pedestrian traffic to the Fawcett Oil Site.

As background, the Fawcett Oil Site has a common boundary with Cottage Park Avenue, Brookford Street and Tyler Court. All three streets are public ways. Cottage Park Avenue provided the sole vehicular access to the Fawcett Oil Property when Fawcett acquired it in 1969. In or about 1972, following discussions between the City and Fawcett Oil pertaining to complaints about the use of Cottage Park Avenue for Fawcett's business related trucking, the City agreed to extend Tyler Court to the Fawcett Oil Site property line (which required a taking by eminent domain to achieve) and accepted Tyler Court as a public way. In so doing, the City provided Fawcett with an alternative route for truck traffic via Tyler Court. In September 1972, following further discussions with Fawcett, the City erected a chain link fence across the end of Cottage Park Avenue preventing access to the Fawcett Oil Site from Cottage Park Avenue.

In or about 1983, Fawcett filed the Fawcett Lawsuit claiming that the barrier erected by the City was unlawful because it restricted all traffic, not merely truck traffic. The lawsuit asked the Court to order the City to remove the barrier at the end of Cottage Park Avenue. Fawcett claimed that in negotiating with the City regarding its access to Cottage Park Avenue, it had intended only to give up its right to use Cottage Park Avenue for truck traffic but had not intended to give up all access to the Fawcett Oil Site via Cottage Park Avenue. The Court found that the agreement between Fawcett and the City to prohibit truck traffic was an enforceable contract and also found that Fawcett, as an abutter on Cottage Park Avenue, had a right of access on Cottage Park Avenue as an incident of ownership. The Court found that the City could make reasonable regulations with respect to Fawcett's use of Cottage Park Avenue and that restriction of all truck traffic on Cottage Park Avenue was a reasonable regulation necessary for public safety, but that the City's erection of a barrier restricting all vehicular traffic unreasonably regulated Fawcett's access. The Court ordered the City to remove the barrier and to allow pedestrian and automobile access to the Fawcett Oil Site from Cottage Park Avenue.

#### B. Whether it is Legal to Open Brookford Street

It would be lawful for the City Council to provide access to the Fawcett Oil Site from Brookford Street. Brookford Street is a short street that begins at Massachusetts Avenue and terminates at the Fawcett Oil Site. In June 1986, Fawcett applied to the City Council for permission to construct a driveway at Brookford Street. Brookford Street residents however petitioned the City Council to erect a barrier to prevent Fawcett from using Brookford Street for access to the Fawcett Oil Site. Fawcett's access to Brookford Street was also raised as an issue in the Fawcett Lawsuit. The Court concluded that Fawcett did not have a right to access its property from Brookford Street because a building had existed for 55 years preventing Fawcett and its predecessor in title from having access to Brookford Street. The Court found that Fawcett unequivocally manifested its intent to abandon any easement right it might have had to access its property from Brookford Street. The Court, referring to Fawcett's access to Tyler Court ruled that "[w]here (Fawcett) has a reasonable and appropriate access to the public highway system,

the City Council could reasonably regulate the “[e]xtent of (Fawcett’s) access to Brookford Street.” The Court issued an order in the Fawcett Lawsuit stating that plaintiff had no right of vehicular access to Brookford Street from the Fawcett Oil Site. The new Owners of the Fawcett Oil Site could petition the City Council for a curb cut, but the City Council cannot require the new owners to do so, nor would the City Council be required to grant such a curb cut.

Very truly yours,



Nancy E. Glowa  
City Solicitor