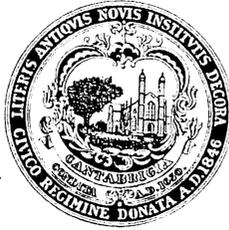


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CITY OF CAMBRIDGE

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

February 12, 2007

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report No. 07-12 Re: Report on Whether the Council Has the Authority to Amend the Map of a Neighborhood Conservation District and if so, What is the Process For Doing so

Dear Mr. Healy:

In response to the above-referenced City Council Order, please be advised of the following. Chapter 2.78, Article III of the Cambridge Municipal Code (the "NCD Ordinance"), which was enacted by the City Council on March 23, 1981, authorized the City Council to designate or amend neighborhood conservation districts ("NCDs") by order, based upon the recommendations of the Cambridge Historical Commission and the findings of an investigation and report conducted by a study committee.

The purposes of Article III are:

to preserve, conserve and protect the beauty and heritage of the City of Cambridge and to improve the quality of its environment through identification, conservation and maintenance of neighborhoods, areas, sites and structures which constitute or reflect distinctive features of the architectural, cultural, political, economic or social history of the City; to resist and restrain environmental influences adverse to this purpose; to foster appropriate use and wider public knowledge and appreciation of such neighborhoods, areas or structures; and by furthering these purposes to promote the public welfare by making the city a more attractive and desirable place in which to live and work.

Prior to the amendment of an NCD, pursuant to the provisions of the NCD Ordinance, the City Manager is to appoint a study committee to investigate, take testimony and report back to the Historical Commission on the historical, architectural and other relevant significance of the proposed NCD. The study committee holds a public hearing, takes public testimony and formulates recommendations to submit to the City Council, the City Manager and the Historical Commission. The Historical Commission then holds a

public hearing on the study committee's recommendations and votes whether to endorse the recommendation and to forward the final report of the study committee to the City Council. Prior to holding its hearing, the Historical Commission is required to provide written notice to every owner of property within the proposed NCD. If the City Council votes to order the amendment, the Council Order must include a statement of the reasons for such amendment and a statement of standards which the NCD is to apply, pursuant to Section 2.78.180 of the NCD Ordinance. The NCD Ordinance also provides that no designation shall become effective until a map setting forth the boundaries of the NCD or change in the boundaries thereof has been filed with the City Council and recorded with the Registry of Deeds for the South District of Middlesex County.

The authority to amend NCD boundaries derives from the NCD Ordinance, as noted above, which was enacted by the City Council under Section 6 of the Home Rule Amendment, and modeled upon the state enabling act for the creation and amendment of Historic Districts, G.L. c. 40C. Under Chapter 40C, an historic district may be established (or amended) in any manner not inconsistent with the provisions of Chapter 40C. Under the NCD Ordinance, the study committee that is appointed by the City Manager is required to investigate and report on the historical, architectural and other relevant significance of the buildings, structures or sites to be included in the NCD before its final report with its recommendations is submitted to the City Council. This is essentially the same as what is required under Chapter 40C. There is no case law construing whether a city council has the authority to order an amendment to an NCD under the NCD Ordinance that varies from the recommendations of the study committee, nor is there any case law interpreting the comparable provisions in Chapter 40C.

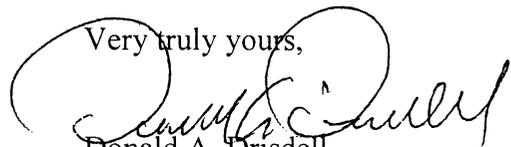
A close analogy is found in G.L. Chapter 40A, which regulates zoning. Under Chapter 40A, a municipality may regulate the use of land, buildings and structures under its police power to promote the health, safety and general welfare of its citizenry, where the interests of the public require such action and where the means employed are reasonably necessary for the accomplishment of that purpose. *Lanner v. Board of Appeals of Tewksbury*, 348 Mass. 220 (1964); see also, *Sturges v. Town of Chilmark*, 380 Mass. 246 (1980). The municipality's power to control its character and land uses is not unlimited, however; while there is wide latitude in the local legislative body to determine the particular location of zoning district boundaries, there must be a substantial relationship to public health, safety, morals or welfare, and particular parcels may not be singled out from the surrounding area for different treatment from the rest of the area. *W.R. Grace & Co. v. Cambridge City Council*, 56 Mass. App. Ct. 559 (2002); *Board of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs*, 363 Mass. 339 (1973); *Rosko v. City of Marlborough*, 355 Mass. 51 (1968); *Muto v. City of Springfield*, 349 Mass. 479 (1965). Chapter 40A, § 4 requires "uniformity" of classification in establishing the boundaries of particular zoning districts to avoid arbitrary and discriminatory action, and prohibits zoning classifications that, without rational planning objectives, fail to treat like properties in a uniform manner. *W.R. Grace & Co. v. Cambridge City Council*, 56 Mass. App. Ct. 559 (2002).

Amendments to a zoning ordinance must adhere to notice and public hearing requirements. Under Chapter 40A, the proposal must indicate "with substantial certainty,

the nature of the business to be acted thereon.” *Coffin v. Lawrence*, 143 Mass. 110, 112 (1886). The purpose of the public meeting is, in part, to obtain public sentiment so that proper revisions can be made. *Doliner v. Town Clerk of Millis*, 343 Mass. 10 (1961). Under the case of *Burlington v. Dunn*, 318 Mass. 216, cert. den., 326 U.S. 739 (1945), the court held that where a town meeting adopted proposals differing from those presented at the first planning board hearing, the bylaw as adopted was nonetheless valid because the amendments were not of a fundamental character and did not change the identity of the proposal before the board, and were designed merely to perfect that proposal.

Given that 1) the authority to establish and amend NCDs derives from Section 6 of the Home Rule Amendment and the NCD Ordinance, which both require promotion of the public welfare and the identification, conservation and maintenance of neighborhoods which constitute or reflect distinctive features of the architectural, cultural, political, economic or social history of the City, and 2) the City’s zoning powers derive from its general police powers and must promote the public welfare and be based upon sound planning principals and uniformity, I believe that the prohibition against singling particular parcels out from a similar area in zoning would likely apply similarly to the City’s authority to establish and amend NCDs. Thus, in general, it would be advisable to adopt or reject the full recommendations of a study committee as submitted to the City Council, based upon a favorable recommendation of the Historical Commission. If the City Council wishes to consider changes to the proposed amendment that differ from the full recommendations, any such changes may not alter the fundamental character and identity of the original proposal, and must have a rational relationship to the objectives of the NCD Ordinance. Even a change which does not alter the fundamental character or identity of the original proposal should be supported by evidence in the record to justify the different treatment of any excluded properties. In general, it would be inadvisable to order an amendment that varies from the study committee’s recommendation in any way that may alter its fundamental character or identity without referring it back to the study committee for further proceedings to investigate and consider the merits of the proposed changes.

It is clear that the NCD Ordinance does not authorize the establishment or amendment to the boundaries of a district without prior written notice to all affected property owners; I therefore believe that there is no authority to amend the boundary of an NCD to include properties to whom such notice was not provided. While an amendment could be changed to exclude properties to whom written notice was provided, any such changes to the original proposal should not be done without referring it back to the study committee unless the City Council establishes clearly on the record that the change does not alter the fundamental character or identity of the original proposal and is based upon the objectives of the NCD Ordinance.

Very truly yours,

 Donald A. Drisdell
 City Solicitor