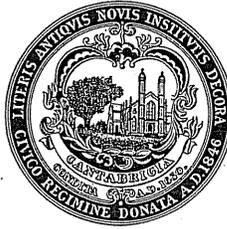


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CITY OF CAMBRIDGE

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

December 5, 2011

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

Re: Awaiting Report No. 11-170 Re: Report on an Opinion on the Issue of Spot Zoning on the Runkel Petition

Dear Mr. Healy:

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

The subject petition proposes rezoning a portion of an existing Residence C1-A district on a parcel located at 41 Bellis Circle, which occupies the northern block of Bellis Circle and is bordered on the north by the commuter railroad tracks, on the south by Bellis Circle and on the east by Sherman Street. The subject parcel would be rezoned from a Residence C1-A zoning designation to a Residence C zoning designation. The petitioners assert (1) that the abutting Bellis Circle neighborhood is currently zoned as Residence B and is comprised of townhouse, single-family and two-family structures that are three stories or lower in height, (2) that there are many families with small children living in the Bellis Circle neighborhood and along adjacent streets, (3) that the narrow streets and heavy traffic on Sherman Street would not support high density development of the type that could be built on the 41 Bellis Circle parcel under its current Residence C1-A designation, (4) that the average existing housing density in the Bellis Circle neighborhood ranges from a Floor Area Ratio ("FAR") of .43 to an FAR of .69, which conforms most closely to the permitted FAR of .5 in a Residence B district and the permitted FAR of .6 in a Residence C district, and (5) that only a few of the existing townhouse units on Bellis Circle exceed the proposed FAR. The effect of this zoning change would be to reduce the permitted density of new development on the portion of the existing C1-A zoning district located at 41 Bellis Circle to the lower density permitted in a Residence C zoning district.

At the Ordinance Committee hearing held on October 13, 2011, staff from the Community Development Department submitted a memorandum which provided data on the characteristics of prior residential projects in the area and the build-out potential of the petition area under various zoning alternatives, including the zoning proposed in the petition. In the memorandum, staff noted that they had analyzed floor area density and dwelling unit density, and that there are a number of other factors to consider in evaluating how well a project fits with the neighborhood context, including building height, yard setbacks, required open space and other design standards. In addition, staff noted that for any significant development projects in Residence B, C, C-1 and C1-A districts, design review by the Planning Board would likely be required under the townhouse or multifamily special permit provisions of the Zoning Ordinance. Staff described the comparison depicted on the chart as relating to projects having a character that fits in to the Bellis Circle neighborhood. Staff indicated that two of the comparison properties have an FAR comparable to that permitted in the Residence C-1 district, but that the number and density of dwelling units is more comparable to the density permitted in a Residence C district, and that the current height limit under the Residence C1-A district is forty-five feet, while the height limit in the Residence C-1, C and B districts is thirty-five feet.

The Planning Board submitted a recommendation not to adopt the zoning petition. In its recommendation, the Planning Board acknowledged the neighbors' concerns about the height and scale of potential future development on Bellis Circle, but indicated that while the current owner of the parcel located at 41 Bellis Circle testified that there are no future plans for redevelopment of parcel, the rezoning proposal nonetheless raises some significant concerns. The Board did not find it appropriate to consider only this site for potential rezoning when there are adjacent sites in the C1-A district that will remain in the C1-A district, and indicated that this would result in a "piecemeal" zoning approach that could impair the uniformity and rationality of the zoning map. The Board recommended that staff should be directed to study the entire Residence C1-A district in this area in consultation with the Board to investigate a rational and uniform zoning approach. The Board also indicated that while a case could be made that the area is "overzoned", in the sense that the currently allowed scale and density of development is greater than what the Board would consider permitting, the Board also believed that a Residence C designation may result in the area being "underzoned" by being too restrictive. The Board indicated that prior developments in the area were designed to a scale that is acceptable to the neighborhood although they are greater in density than what would be allowed under Residence C regulations, suggesting that it might be appropriate to investigate a set of zoning regulations that are less restrictive than those the Residence C district would allow while still addressing concerns about scale and neighborhood character.

As noted in a leading 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 *Nat'l Amusements, Inc. v. Boston*, 29 Mass. App. Ct. 305, 312 (1990)). The particular concern addressed by the concept of illegal spot-zoning occurs when a city

singles out one lot or a small area for different, generally less restrictive, treatment than that applied to similar lots, with the sole purpose being to benefit 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). Courts have also recognized the principle of reverse spot zoning, which singles out a particular lot or small area for different, generally more restrictive treatment than that applied to similar lots, with the sole purpose being to disadvantage that property owner or owners.

In order to constitute spot zoning, it must be established that there was "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot", *Lanner*, 348 Mass. at 229, quoting *Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1944), or conversely, for reverse spot zoning, the singling out must be all for the economic disadvantage of the owner of the lot. That it will incidentally lead to a private advantage, (or for reverse spot zoning, a disadvantage,) is not a legitimate objection to a legislative solution of a public problem. *Id.* Among other considerations to be taken into account are the physical characteristics of the land, its location, size, and the nature of adjoining uses. *National Amusements v. Boston*, 29 Mass. App. Ct. 305, 310 (1990).

In trying to resolve the issue whether a particular amendment constitutes invalid spot zoning or reverse spot zoning, the courts consider a number of related factors including the benefit and detriment to the property owner and public, the size of the classified area, the character of the area adjacent to the reclassified land, and whether the decision is the result of community planning. *Powell on Real Property*, 79C.03[3][b][i]. In Massachusetts, the size of the spot does not determine whether unlawful zoning has occurred. *See, Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1994). *Compare, Cohen v. Lynn*, 333 Mass. 699, 704 (1956). The size of the area to be set aside for a particular purpose is a matter of local judgment. "A municipality may from time to time reexamine the location of a boundary between districts and shift its location as sound zoning principles dictate." *Canteen Corp. v. Pittsfield*, 4 Mass. App. Ct. 289, 292 (1976), quoting *Schertzer v. Somerville*, 345 Mass. 747, 751 (1963).)

In general, any challenge to the validity of a zoning provision will be afforded "[e]very presumption...in favor of the amendment and its validity will be upheld unless it is shown beyond a reasonable doubt that it conflicts with the enabling act." *Vagts v. Superintendent & Inspector of Bldgs. of Cambridge*, 355 Mass. 711, 713 (1969) (quoting *Lanner v. Bd. of Appeal of Tewksbury*, 348 Mass. 220, 228 (1964)). The law further 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." *Nat'l Amusements, Inc. v. Boston*, 29 Mass. App. Ct. at 309.

As the cases cited above indicate, there is generally great deference allowed to municipalities in zoning matters. There has been a particular recognition by the courts that zoning amendments that adjust boundary lines between districts are particularly matters of local concern. "A municipality may from time to time reexamine the location of a boundary between districts and shift its location as sound zoning principles dictate." *Canteen Corp. v.*

Pittsfield, 4. Mass. App. Ct. 289, 292 (1976), quoting *Schertzer v. Somerville*, 345 Mass. 747, 751 (1963). "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. at 101-102, n. 4, quoting *Lanner v. Bd. of App. of Tewksbury*, 348 Mass. at 228. The fact that the lot in question may experience some economic disadvantage as a result of the zoning amendment does not automatically lead to a conclusion that the proposed amendment constitutes impermissible reverse spot-zoning. In order to constitute spot zoning, it must be established that there was "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character." *Lanner*, 348 Mass. at 229, quoting *Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1944).

Here, the parcel in question is in a small zoning district that is on the border with and surrounded by several different zoning districts. As noted above, it is currently in a Residence C1-A district, with the commuter railroad tracks being zoned Industry A-1 to the east and Business A to the west, and the areas to the north and south being zoned Residence B. To the west lies Danehy Park, which is zoned Open Space. Slightly further to the southeast are smaller Residence C-2, C-1 and C-2B districts, to the west a C-1A district, and to the northeast a small Business A-1 district.

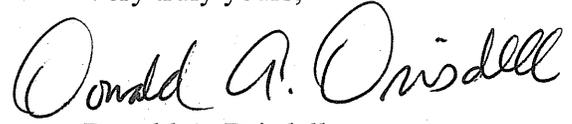
At the hearings before the Ordinance Committee, evidence was given by proponents of the proposed amendment which identified the substantial concerns the owners of property within the Residence B zoning district have as to the impact that a project built to the limits of the Residence C1-A Zoning district would have on residents of Bellis Circle. The proponents of the proposed amendment also identified potential benefits to the Bellis Circle neighborhood that could result from adoption of the proposed amendment. Such considerations are of the type that courts have recognized as forming an appropriate basis for a zoning amendment such as the proposed amendment.

While the Planning Board recommended against adoption of the petition and identified concerns raised by the petition, the Board noted that while the lot in question may currently be "overzoned", an argument can be made that the rezoning might result in "underzoning", which demonstrates that there are a variety of approaches that could be taken with respect to determining the proper zoning designations for this area.

Given the courts' broad deference to municipalities in zoning, and their determination that "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", *W. R. Grace & Co.-Conn. V. Cambridge City Council*, 56 Mass. App. Ct. 559 at 569, a zoning amendment that is in furtherance of the purposes of the Zoning Act should be found by a reviewing court not to have exceeded the City's authority under its police power. Upon review of the provisions of the proposed zoning amendment as summarized 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. The mere fact that the zoning amendment if adopted would affect only one parcel, in and of itself, is not a sufficient basis to conclude that the proposed amendment is impermissible reverse spot-zoning, so long as that is not its sole purpose.

Please let me know if I can be of further assistance in this matter.

Very truly yours,

A handwritten signature in black ink, reading "Donald A. Drisdell". The signature is written in a cursive style with a large, prominent initial "D".

Donald A. Drisdell
City Solicitor