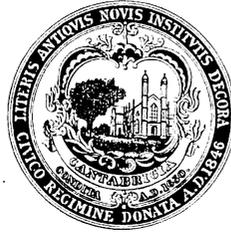


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CITY OF CAMBRIDGE

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

May 2, 2006

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

Re: *City Council Orders O-19 and O-20 dated February 27, 2006*

Dear Mr. Healy:

I am writing in response to City Council Orders O-19 and O-20 from the February 27, 2006 meeting. These orders ask for this office to draft proposed amendments to the Cambridge Zoning Ordinance and to ordinances or regulations relative to the Conservation Commission.

City Council Order O-19 from the February 27, 2006 meeting asks that I "...draft a proposed amendment to the Zoning Ordinance to require petitioners for Special Permits for [sic] the Planning Board to hold a public meeting prior to presentation of the Special Permit application to the Planning Board." Order O-20 from the same meeting requests that I "...draft a proposed amendment to the Zoning Ordinance to permit additional public comment on public projects that, after the first presentation and hearing before the Planning Board, have been significantly altered...." The order further requests that I "...draft a proposed amendment to the relevant ordinance and with regulations governing the Conservation Commission and the Board of Zoning Appeals to provide the same opportunity for comment on significant alterations on projects before these bodies."

I am recommending against the requested ordinance amendments due to concerns about creating conflicts with state statutory requirements.

I. Planning Board and Board of Zoning Appeals.

The City Council has chosen to designate the Planning Board to be the special permit granting authority ("SPGA") for a variety of special permits available in the Zoning Ordinance. Other provisions in the Zoning Ordinance designate the Board of Zoning

Appeals (“BZA”) as the SPGA for certain permits. Once that designation of SPGA has been made, the SPGA must follow the provisions of the Zoning Act, M.G.L. c. 40A, with regard to the procedures and criteria relating to the grant or denial of special permits. Section 9 of the Zoning Act specifically delineates many substantive and procedural requirements relating to special permits, among the most important of which are strict timelines within which the SPGA must act on an application. M.G. L. c. 40A, §9. The statute requires the SPGA to hold a public hearing within 65 days of the application and requires a decision 90 days from the hearing. Certain special permits allowed by the Zoning Ordinance require two public hearings. Failure by the SPGA to comply with these timelines can lead to an applicant having the right to proceed with their project as described in the application without express approval by the SPGA, a so-called “constructive grant”. It is crucial, therefore, that the SPGA manage its docket of special permit cases in careful conformity with the Zoning Act.

I have conferred with the staff at the Community Development Department and I have been advised that when a developer submits an application for a special permit, the Community Development Department advises the applicant to talk with abutters and neighbors about the project before the application’s final submission, particularly when it is a larger project. Names of neighborhood group contacts and mailing lists are supplied upon request.

Any special permit application before the Planning Board requires a public hearing advertised in advance and noticed to abutters, as required by the Zoning Act. M.G.L. c.40A, §11. The Planning Board will typically ask the applicant about their communication with the neighborhood for a project of any significant size or impact. This is not a written requirement, but frequently the Planning Board asks developers to hold a meeting with the neighbors and begin identifying their concerns before returning to the Board for further discussion. At the public hearing, interested parties are afforded an opportunity to speak about the project, pose questions and give their opinion to the Planning Board.

It is often the case that the Planning Board will continue the case of a Special Permit application after hearing from the proponents and opponents to the application. The Board then schedules a time for public deliberation on the application before voting to grant or deny the Special Permit. The Board sometimes asks the project proponent to submit changes to the original project application prior to the Board’s deliberations. When such changes have been substantial, the Planning Board will often take comment from the public a second time, limiting comments to new aspects of the project.

Likewise, although projects involving special permits from the BZA are typically smaller than the projects heard by the Planning Board, much the same approach is taken by BZA staff. Applicants are generally advised by staff that the BZA will be interested in the response of abutters and neighbors and that outreach to the community is advisable prior to the public hearing. Similar advice is given to applicants seeking variances from the BZA. Cases before the BZA are sometimes continued to allow an applicant to respond to concerns identified during the hearing by submitting proposed changes. The BZA, like the

Planning Board, makes every reasonable effort to accommodate further public input in response to changes.

The Planning Board and the BZA need a certain amount of time to discuss and deliberate the special permit cases before them. The courts have repeatedly emphasized the requirement that the deliberations of the SPGA must be contained in the record in order to demonstrate the required findings of fact and determinations of compliance with the statute and ordinance to support the SPGA's grant or denial of the permit. It is legally necessary to close public comment at a hearing to allow for this required deliberation.

The Zoning Act provides that a SPGA "...shall adopt and from time to time amend rules relative to the issuance of [special] permits..." I am concerned that the inclusion in the Zoning Ordinance of provisions dictating the specific sequence of procedure to be followed by the Planning Board and the BZA will likely create conflicts between the statutory responsibilities of the boards and the ordinance provisions.

Both the Planning Board and the BZA operate pursuant to duly adopted rules which they from time to time review and amend. It is my opinion and advice that, to the extent it is desirable to alter current practices, the proper manner in which to accomplish any desired change and avoid conflict with the statute is through review and possible amendment of those rules.

II. Conservation Commission.

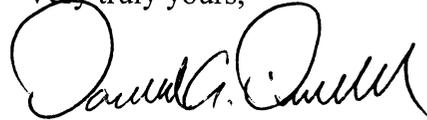
The Wetlands Protection Act ("WPA"), G.L. c. 131, §40, implemented by 310 Code of Massachusetts Regulations ("CMR") 10.00 et seq., sets forth a public review and decision-making process by which certain environmentally sensitive areas are regulated by local conservation commissions and the Massachusetts Department of Environmental Protection ("DEP"). The Cambridge Conservation Commission ("ConCom") is designated to receive and act on applications for work to be done in wetlands within its jurisdiction that may disturb or otherwise have an impact upon those wetlands. G. L. c. 131 §40. The WPA provides that all parties applying for such approval file a notice with both the ConCom and the DEP. The WPA requires that the ConCom make a written determination within twenty-one days of its receipt of the applicant's notice as to whether the work or land thereon is subject to the provisions of the WPA, and further requires the ConCom to hold a public hearing within twenty-one days of receipt of the applicant's notice in compliance with the requirements of the WPA. The ConCom must then issue its denial or grant of an Order of Conditions within twenty-one days of the hearing.

The Legislature has assigned to local conservation commissions the role of making the initial review of applications, for the purposes of bringing local knowledge to bear on local conditions and in order to reduce the administrative burden on the DEP; however, when the local conservation commissions review applications under the WPA, they do so as an arm of the Commonwealth. *Hamilton v. DEQE*, 12 Mass. App. Ct. 359 (1981). The WPA reserves to the DEP the power to make final decisions on applications involving the specific concerns and to preserve thereby statewide interest in protection of wetlands. *Id.* Local conservation commissions have no authority to adopt rules and regulations in order

to discharge their obligations under the WPA. *Opinion of the Attorney General*, June 23, 1975, p. 168. In order to fully comply with the procedural requirements of the WPA and to provide ample notice to all concerned, the ConCom requires that submissions must be filed ten business days prior to the public hearing, so that the document(s) can be: 1) reviewed for completeness, 2) distributed to the ConCom, 3) advertised properly, and 4) made available for public review, which is in keeping with the ConCom's obligation to review applications pursuant to the requirements of and consistent with the prescribed criteria of the WPA.

The statutorily prescribed timelines under the Wetland Protection Act are even more restrictive than those for the review of special permits under the Zoning Act. Given those timelines and the limited authority of local conservation commissions under the WPA, I am concerned that any proposed procedural amendments to the ConCom's permit reviewing process would conflict with the WPA, and I therefore recommend against any proposed alterations of existing procedures.

Very truly yours,

A handwritten signature in black ink, appearing to read "Donald A. Drisdell". The signature is written in a cursive style with a large initial "D" and "A".

Donald A. Drisdell