



City of Cambridge

Executive Department

YI-AN HUANG
City Manager

CMA 2023 #63
IN CITY COUNCIL
February 27, 2023

In response to Awaiting Report Item Number 23-1, regarding a legal Opinion on whether the Barrett, et al. petition would need to be refiled should there be a Letter of Commitment attached to the rezoning, and whether the Barrett, et al. petition constitutes "spot zoning," please find the attached response from City Solicitor Nancy E. Glowa.



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CITY OF CAMBRIDGE

Office of the City Solicitor
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February 27, 2023

Yi-An Huang
City Manager
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Re: Response to Council Order No. O-2 of 1/9/2023 re: legal Opinion whether the Barrett, et al. petition would need to be refiled should there be a Letter of Commitment attached to the rezoning, and whether the Barrett, et al. petition constitutes "spot zoning"

Dear Mr. Huang:

I am writing in response to Council Order No. O-2 of 1/9/2023, which requests that the City Solicitor provide a legal opinion to the Council regarding the Barrett, et al. Petition.

The Barrett, et al. Petition is a zoning petition brought by at least ten (10) registered voters that seeks to rezone an area in North Cambridge, which is bounded by Massachusetts Avenue, Cedar Street and Alberta Terrace, and consists of two lots (the "Property"). The Barrett, et al. Petition permits increased height and density for residential uses. For more information about the zoning changes proposed in the Barrett, et al. Petition, see the Community Development Department (CDD) Memo dated December 13, 2022, submitted to the Planning Board (the "CDD Memo"). I will address the City Council's questions below.

1. Whether the Barrett, et al. petition would need to be refiled should there be a Letter of Commitment attached to the rezoning.

The Barrett, et al. Petition seeks to rezone the Property, but it is not a so-called contract zoning petition. So-called contract zoning is the practice of a developer offering certain mitigation measures or public benefits if a municipality rezones property. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 53 (2003). Here, the Barrett, et al. Petition does not include a letter of commitment or other form of offer of commitments that a developer is making to the City if the Property is rezoned. However, the City Council has inquired whether the Barrett, et al. Petition would need to be refiled and a new hearing held if the developer of the Property offered a letter of commitment at this time. As explained further below, if the developer of the

Property voluntarily offers mitigation measures or benefits to the City if the City Council rezones the Property, that alone would not be a change to the fundamental character of the zoning petition so it would not require new notice and hearing on the zoning petition.

The courts have held that “when changes are made to a proposal during the legislative process, whether new notice and hearing are required depends on the degree of similarity between the amendment originally proposed and the one ultimately recommended or adopted. Specifically, new notice and hearing are not required if the changes to the original proposal are ‘not of a fundamental character.’” Penn v. Town of Barnstable, 96 Mass. App. Ct. 205, 210–11, review denied sub nom. Penn v. Town of Barnstable, 483 Mass. 1108 (2019); quoting Burlington v. Dunn, 318 Mass. 216, 218, 61 N.E.2d 243 (1945).

Although a letter of commitment is incorporated into a zoning amendment and compliance with a letter of commitment is required as a condition of a zoning amendment, any voluntarily offered commitments or public benefits are not looked at by a court when a court is considering the validity of a zoning amendment. Therefore, when looking at whether there has been a change to the fundamental character of a zoning amendment, a court would likely only look at the actual zoning text and not the addition, subtraction or changes to any commitments or public benefits offered.

The Court has held that “the proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare” and an otherwise valid zoning enactments will not be invalidated if it may be prompted or encouraged by public benefit voluntarily offered. Durand, 440 Mass. 45, 57. This is so because the court “defer[s] to legislative findings and choices without regard to motive.” Id. Therefore, because the addition of a letter of commitment would not invalidate an otherwise valid zoning amendment, and what is relevant is the actual zoning change, the addition of a letter of commitment is not a change in the fundamental character that requires new notice and hearing on the zoning petition.

2. **Whether the Barrett, et al. petition constitutes "spot zoning."**

The City Council has requested an opinion as to whether the Barrett, et al. Petition constitutes illegal spot zoning because the Barrett, et al. Petition seeks to rezone the Property, which is a discrete area along Massachusetts Avenue in North Cambridge that consists of two lots. For the reasons set forth below, the Barrett, et al. Petition if adopted could be vulnerable to challenge and possibly found to constitute illegal spot zoning.

Illegal spot-zoning occurs when a municipality 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). In trying to resolve the issue of whether a particular amendment constitutes invalid 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, and whether the decision is the result of an analysis of land use and

planning considerations. National Amusements, Inc., v. Boston, 29 Mass.App.Ct. 305, 310 (1990).

The Appeals Court has held that “under our cases zone changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development [in the case of reverse spot zoning, or to allow a specific development in the case of spot zoning] on a specific parcel are considered arbitrary and unreasonable. The vice is the singling out of a particular parcel for different treatment from that of the surrounding area, producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner.” Id. at 312.

Just as was explained above in relation to so-called contract zoning, generally the possible motives that may have inspired legislative action are not relevant as long as a zoning amendment is otherwise valid. Durand, *supra*. As long as a zoning amendment is consistent with well-considered planning considerations and the public welfare, it will likely be upheld if challenged as spot zoning.

Here, as explained in the CDD Memo, the Barrett, et al. Petition would allow for increased height, increased FAR for residential uses, decreased minimum lot area per dwelling unit, no required setbacks, and no required open space at the Property, which would allow for larger residential developments at the Property. Also as explained in the CDD Memo there have been a number of zoning changes that have affected the Property over the years, but the previous planning study that formed the basis for the current zoning is over 35 years old. Also, the CDD Memo states that “[i]ncreasing the zoning capacity for housing in a mixed-use area is generally consistent with the *Envision Cambridge* planning recommendations. However, *Envision Cambridge* also calls for area-specific planning in order to decide what zoning standards should be implemented.”

Therefore, if adopted the Barrett, et al. Petition could be vulnerable to challenge because there has not been a planning study that covers the Property for over 35 years, the rezoning would thus not likely be determined to be the result of a planning study, and therefore, an argument could be made that it is not consistent with well-considered planning considerations. If challenged, however, we would defend the zoning amendment on the basis that it is consistent with the City’s stated goal of increasing housing development and the City’s plans and studies that support increasing housing production within the City. In addition, municipal ordinances, including zoning ordinances, are presumed to be valid unless and until struck down by a court of competent jurisdiction.

We will be available at the February 28th Ordinance Committee meeting to answer any further questions.

Very truly yours,


Nancy E. Glowa
City Solicitor