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April 7, 2021

Louis A. DePasquale
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

***Re: Alewife Overlay Development Zoning Petition – Response to Ordinance
Committee’s Legal Questions from March 9, 2022***

Dear Mr. DePasquale,

At the Ordinance Committee’s March 9, 2022 hearing on the Alewife Overlay Development Zoning Petition (the “Petition”), the Ordinance Committee requested a legal opinion addressing the following questions: (1) is it legally defensible for the Petition to only apply to office and laboratory uses; and (2) is it possible to amend the Petition to exempt certain office or laboratory development projects that are already in the planning phase. As will be addressed in more detail below, the Petition as written, which imposes a moratorium on only office and laboratory uses, is legally defensible, although we recommend amending the Petition with the alternative text proposed by the Community Development Department. However, if the Petition were to exempt certain office or laboratory development projects that are already in the planning phase, the Petition could be subject to challenge.

1. Is it legally defensible for the Petition to only apply to office and laboratory uses?

The Petition seeks to amend the Zoning Ordinance by inserting a new Section 20.94.3 to temporarily prohibit office or laboratory uses as listed in Table 4.34 within the Alewife Zoning Overlay Districts 1-6 (the “Districts”) until December 31, 2023, or until such time as new Alewife Districts Zoning is enacted by the City Council, whichever is sooner. Although framed somewhat differently than a traditional zoning moratorium, which traditionally imposes a moratorium on the issuance of building permits for a certain use(s), the Petition is in essence a zoning moratorium. The City’s zoning powers include the ability to “impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning

studies [or a rezoning process].” Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980); W.R. Grace & Co. v. Cambridge City Council, 56 Mass.App.Ct. 559 (2002). A zoning moratorium is reasonable when it is limited in time and scope, is rationally related to a demonstrable municipal concern, and during the time period the municipality is studying the concern and proposing a solution. Id.

Therefore, it is permissible for a zoning moratorium to only apply to certain uses within a zoning district, such as office and laboratory uses, as long as the limitation on the development of those uses is limited in time, related to a demonstrable concern, and during the time period the municipality is studying and addressing that concern. Here, the Petition is limited in time and is related to the need to develop new zoning for the Districts that incorporates the recently completed Alewife District Plan and other recent planning reports. As stated in the Policy Order that initiated the Petition, the Alewife District Plan includes some office and laboratory development, but promotes a wide range of developments. Additionally, as stated in that Policy Order, the City has a need for housing, public infrastructure, open space, and public safety facilities in the Districts. A moratorium on new office and laboratory uses in the Districts is related to addressing those concerns. Therefore, the Petition appears to be a permissible zoning moratorium.

2. Is it possible to exempt certain office and laboratory development projects that are already in the planning phase from the Petition?

When the Zoning Ordinance is amended, certain projects are not subject to the amended provisions of the Zoning Ordinance, pursuant to G.L. c.40A, §6. Amendments to the Zoning Ordinance do not apply to “a building or special permit issued before the first publication of notice of the public hearing on such ordinance [] required by section five.” However, for a project that has not yet received a building permit or special permit before the first publication of the notice for the public hearing, the amended Zoning Ordinance, even a proposed moratorium amendment such as this, will apply. Here, the first public hearing was the March 8, 2022 Planning Board hearing and notice for that hearing was published on February 17, 2022. Accordingly, any project with a building or special permit before that date would not be subject to the Petition if adopted. However, there are no statutory protections available for projects that are still in various stages of the planning phase, including projects that have applied for, but have not yet received, a building or special permit before the publication of the notice.

The Ordinance Committee requested an opinion as to whether it is possible to exempt from the Petition if adopted certain development projects that are in the planning phase but do not have a building or special permit. In my opinion, it is not advisable to do so. If such projects are exempted or “carved-out” from the Petition, the Petition may be subject to challenge. A zoning moratorium must be rationally related to a demonstrable municipal concern. The Petition may no longer be rationally related to the need to develop new zoning for the Districts that incorporates the recently completed Alewife District Plan and addresses the need for the development of a wide range of uses if some new office and laboratory projects can proceed during the moratorium period, but not others.

Additionally, treating one lot, or a small area, with a proposed office or laboratory development differently than other lots within the Districts could be subject to challenge as spot zoning. "Spot zoning occurs 'where one lot or a small area has been singled out for treatment less onerous than that imposed upon nearby, indistinguishable properties.'" W.R. Grace & Co. v. Cambridge City Council, *supra* at 569 (internal citations omitted). Such an exemption of certain projects could also be subject to challenge as violating the principle of uniformity. "It is unlawful to invoke the zoning power solely to confer an economic benefit (or impose an economic detriment) upon the owner of a comparatively small area within a zoning district when the remaining parcels of that district are treated differently." *Id.* Therefore, the Petition could be vulnerable to a challenge if it excluded certain properties that would be the sites of proposed office or laboratory use that had started the planning process, while temporarily prohibiting new office or laboratory uses everywhere else in the Districts.

Lastly, exempting certain development projects that are in the planning phase from the Petition if adopted would be a change to the fundamental character of the Petition, and therefore there would need to be new notice and new Planning Board and Ordinance Committee hearings if the Petition were amended to exclude certain properties from the reach of the proposed zoning moratorium amendment.

I will be available to discuss these matters further with the Ordinance Committee at the April 7th hearing.

Very truly yours,



Nancy E. Glowa
City Solicitor