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May 16, 2022

To the Honorable, the City Council:

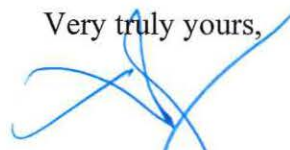
I am writing to follow up on a question that Councilor McGovern raised at the Monday May 9th City Council meeting concerning the Alewife Overlay Development Zoning Petition (the "Petition"). Councilor McGovern stated at the meeting that there are a couple of projects in the Alewife Zoning Overlay Districts that have received a special permit, but only after the date of advertisement of the Planning Board hearing on the Petition. He stated further that he had heard that even if new zoning is adopted for the Alewife Zoning Overlay Districts, those projects would be allowed to proceed with their development pursuant to their special permits, and that any new zoning adopted for the Alewife Zoning Overlay Districts would not apply to those projects. Councilor McGovern asked me to opine on the question that if that is true, why should the Council not exempt those projects from the Petition and let them proceed with development pursuant to their special permits now? When I answered Councilor McGovern's question on the floor, I misspoke and said that a zoning amendment to the Alewife Zoning Overlay Districts would apply to those projects. However, when I referred to a zoning amendment, I was referring to the Petition, and since those projects did not have their special permits by the date of advertisement of the hearing, the Petition if adopted would apply to them. I did not understand in the moment that Councilor McGovern was asking about what would happen with subsequent zoning amendments that may be adopted after the moratorium period set forth in the Petition expires.

Accordingly, I will now more fully address Council McGovern's question. 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." G.L. c.40A, § 6. Accordingly, the Petition, if adopted, will apply to projects that received a special permit after the date of advertisement of the Planning Board hearing on the Petition. However, any future zoning amendments that had not been advertised before issuance of a special permit for such projects will not apply. So, for a project that received its special permit after the date of advertisement of the Planning Board hearing on the Petition, that project would be able to proceed with the project as permitted by the special permit once the moratorium period has expired. (There is one caveat to this, which is that a special permit expires after two years if construction was not commenced in that time, except for an extension for good cause. G.L. c.40A, § 9; Zoning Ordinance Section 10.46.)

Therefore, it is possible that there are some projects that will be subject to the Petition if adopted but that already have a special permit, so they will not be subject to subsequent zoning amendments that may be adopted after the moratorium period set forth in the Petition expires. However, as set forth in my legal opinions dated April 7th and May 9th, if those few properties that are the sites of proposed projects are explicitly exempted from the Petition, the Petition 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, 56 Mass. App. Ct. 559 at 569 (2002) (internal citations omitted). Although those few projects may move forward as permitted by their special permits after the moratorium period expires, we have no way of knowing if they actually will proceed with their projects as presently permitted, or if they will seek to amend their projects, or if the properties will be used for an entirely different purpose. Exempting any such projects from the Petition and allowing them to proceed with development now could be found to be singling out those properties for different treatment and conferring an economic benefit on them, which would be impermissible and subject to challenge as spot zoning.

I am available to answer any additional questions the Council may have.

Very truly yours,



Nancy E. Glowa
City Solicitor