



City of Cambridge

Executive Department

YI-AN HUANG
City Manager

CMA 2024 #217
IN CITY COUNCIL
September 30, 2024

To the Honorable, the City Council:

In regard to Awaiting Report No. 24-52, which the Council requested that the City Manager work with the appropriate Departments to evaluate the legal feasibility of the following proposals and analyze how much housing could be created under the following proposals:

- A proposal that would “offer[] the proposed zoning relief only to projects that either contain more than 9 units or that are larger than 10,000 square feet through a conditional upzoning ...”;
- A proposal that would “allow 9-10 stories on main corridors, 15 to 25 stories in the squares, 6 stories citywide except in residential A and B districts, 4 stories in residential A and B districts with anything taller requiring a special permit process and planning board review ...”;
- A proposal that would “adjust[] our Inclusionary Zoning requirements down from 20% for 10 units or more to 10% for projects of 10 to 80 units and 15% for anything above 80 units.”

Please find attached response from Megan B. Bayer, City Solicitor.

Very truly yours,

Yi-An Huang
City Manager



Megan B. Bayer
City Solicitor

Elliott J. Veloso
First Assistant City Solicitor



Assistant City Solicitors
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CITY OF CAMBRIDGE

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

September 26, 2024

Yi-An Huang
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: *Response to Awaiting Report No. 24-52 of September 16, 2024 Requesting a Report of the Legal Feasibility of Certain Possible Amendments to the Multifamily Zoning Petitions*

Dear Mr. Huang,

In Awaiting Report No. 24-52, the Council requests that the City Manager work with the appropriate Departments to evaluate the legal feasibility of the following proposals and analyze how much housing could be created under the following proposals:

- A proposal that would “offer[] the proposed zoning relief only to projects that either contain more than 9 units or that are larger than 10,000 square feet through a conditional upzoning ...”;
- A proposal that would “allow 9-10 stories on main corridors, 15 to 25 stories in the squares, 6 stories citywide except in residential A and B districts, 4 stories in residential A and B districts with anything taller requiring a special permit process and planning board review ...”;
- A proposal that would “adjust[] our Inclusionary Zoning requirements down from 20% for 10 units or more to 10% for projects of 10 to 80 units and 15% for anything above 80 units.”

At the September 23, 2024 Council meeting, the Council asked if the above proposals were offered as amendments to the Multifamily Zoning Petitions, would they be legally permissible, or would they require that the Petitions be refiled with new notice and new hearings. As explained further below, my opinion is:

- An amendment that would allow 6 stories for residential buildings that are subject to the Inclusionary Zoning requirements, and 4 stories for all other residential buildings is **not** a change to the fundamental character of the proposed Multifamily Zoning Petitions, and therefore would be permissible;
- An amendment that would allow more height than what was originally included in the Petitions **is** a change to the fundamental character of the proposed Multifamily Zoning Petitions; and
- An amendment that would alter the requirements of the Inclusionary Zoning requirements **is** a change to the fundamental character of the proposed Multifamily Zoning Petitions.

Also, the opinions described above and below may change depending on what any actual proposed amendments are because it is fact specific analysis of whether or not an amendment is a change to the fundamental character of a zoning petition.

A. Legal Standard for Amendments to Zoning Petitions

The Zoning Act, G.L. c.40A, §5, ¶2, requires that notice of the public hearings on a petition include “the time and place of [the] public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected.” 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).

The purpose of the notice requirement is to ensure that current views of local residents are taken into account by a city council when it considers a proposed amendment to a zoning ordinance. Gricus v. Superintendent & Inspector of Buildings of Cambridge, 345 Mass. 687 (1963). The notice gives residents an opportunity to know what zoning amendment will be considered by the Council and gives residents an opportunity to offer input in that process if they choose to do so. If the fundamental character of a zoning petition changes after advertisement, but before the Council votes, the purpose of the notice requirement is thwarted because residents have not had an opportunity to offer input on the fundamentally amended petition.

The Massachusetts Appeals Court has held that changes that clarified elements of an initial zoning petition were not changes to the fundamental character of the petition. Penn, 96 Mass. App. Ct. at 211-212. In that case, the original petition allowed for the as-of-right operation of commercial parking lots through the creation of an overlay district, and the amendments clarified certain elements of the original petition and thus were “amendments that merely facilitated enforcement” of the zoning proposed in the original petition. Id. Changes that “were designed merely to perfect that proposal” do not change the fundamental character. Burlington v. Dunn, 318 Mass. at 219 (1945).

B. Can the Council Amend the language of the Proposed Multifamily Zoning Petitions Before the Council Votes to Accept the Proposed Petitions as City Council Zoning Petitions?

At this time the proposed Multifamily Zoning Petitions were drafted by staff and submitted to the Council through the City Manager, but were the subject of a Charter Right at the September 23, 2024 Council meeting. Therefore, at the September 30, 2024 Council meeting, the Council can vote to accept them as City Council Zoning Petitions, which starts the zoning amendment process pursuant to G.L. c.40A, §5. Before that vote happens, the Council can make any amendments to the language of the proposed Multifamily Zoning Petitions with no limitations.

After the Council votes to accept the proposed Multifamily Zoning Petitions as City Council Zoning Petitions, new notice and hearing is required if the Council makes changes that constitute a change to the fundamental character of the Petitions.

C. The Proposed Amendments

1. An Amendment That Would Allow 6 Stories for Residential Buildings That are Subject to the Inclusionary Zoning Requirements, and 4 Stories for All Other Residential Buildings

The proposed Multifamily Zoning Petitions amend zoning district standards so that housing up to 6 stories is permissible in all zoning districts. If the Council amends the Petitions to allow less than 6 stories, but more stories than are currently allowed as-of-right, a Court likely would not find that to be a change to the fundamental character of the Petitions. The change is within the scope of the original Petitions because the public was on notice that the Council was considering increasing the permissible height of housing up to 6 stories, but reducing the number of additional stories is a clarification of how much additional height the Council wants to allow, without exceeding the upper limit set forth in the Petitions. Likewise, a change that would continue to allow 6 stories for housing that is subject to Inclusionary Zoning, and 4 stories for all other housing is likely not a change to the fundamental character of the Petition because it is within the scope of the original Petitions.

2. An Amendment That Would Allow 9-10 Stories on Main Corridors, 15 to 25 Stories in the Squares, 6 Stories Citywide Except in Residential A and B Districts, 4 Stories in Residential A and B Districts with Anything Taller Requiring a Special Permit Process and Planning Board Review

The above proposed amendments allow for additional stories beyond what is in the proposed Multifamily Zoning Petitions. These proposed changes are more than mere changes to perfect a proposal and exceed the scope of the proposed Multifamily Zoning Petitions. If these changes were made after notice of the hearings had been advertised and the hearings had been held, the public would not have known that the Council was considering additional height and would not have had an opportunity to be heard on the issue of the additional height. Therefore, a

Court likely would find that these changes are changes to the fundamental character of the Petitions.

3. An Amendment That Would Alter the Requirements of the Inclusionary Zoning Provisions of the Zoning Ordinance

The final proposed amendment would alter the percentage of units in a development that shall be Affordable Dwelling Units, pursuant to the Inclusionary Housing Provisions of the Zoning Ordinance. The proposed Multifamily Zoning Petitions do not address the Inclusionary Housing requirements in any way. Amending the Petitions to make changes to the Inclusionary Housing requirements would be a change to the fundamental character of the Petition.

Very truly yours,

A handwritten signature in black ink that reads "Megan B. Bayer". The signature is written in a cursive, flowing style.

Megan B. Bayer
City Solicitor

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