

City of Cambridge

Louis A. DePasquale • City Manager



Executive Department

Lisa C. Peterson • Deputy City Manager

January 30, 2017

To the Honorable, the City Council:

Please find attached a response to Awaiting Report Item Number 16-110, regarding the Central Square Restoration Zoning Petition, received from Assistant City Manager for Community Development Iram Farooq as well as a Legal Opinion received from City Solicitor Nancy Glowa.

Very truly yours,

A handwritten signature in dark ink that reads "Louis A. DePasquale".

Louis A. DePasquale
City Manager

LAD/mec
Attachment(s)



CITY OF CAMBRIDGE
COMMUNITY DEVELOPMENT DEPARTMENT

2.10.a

IRAM FAROOQ
Assistant City Manager for
Community Development

SANDRA CLARKE
Deputy Director
Chief of Administration

To: Louis A. DePasquale
From: Iram Farooq, Assistant City Manager for Community Development
Date: January 25, 2017
Re: Central Square Restoration Zoning Petition

The Ordinance Committee held a hearing on the Central Square Restoration Zoning Petition (Sater, et al.) Petition on December 1, 2016. The Planning Board also held a hearing November 29, 2016, and communicated a positive recommendation to the City Council with some suggested changes. This report provides:

- A. Zoning text responding to the Planning Board's recommended changes
- B. Response to issues raised in Policy Order O-6 dated December 19, 2016 regarding the Central Square Restoration Petition

A. Planning Board's Recommended Changes: Zoning Text

The Planning Board recommended two modifications to the petition. The first minor modification is to add "lighting" to the list of considerations in granting a special permit to exclude rooftop spaces from Gross Floor Area calculations. The petitioners were supportive of this addition. Thus, the paragraph would read as follows, with the addition underlined:

6. FAR Exemption for Rooftop Spaces

Notwithstanding any other provisions of this Zoning Ordinance, the Gross Floor Area of open-air spaces on the roofs of buildings, such as roof gardens, terraces, walk ways, including open or enclosed egresses, covered staircase head-houses, or observation spaces shall be exempted from Gross Floor Area and FAR limitations upon the granting of a special permit by the Planning Board. In granting the special permit, the Planning Board may place further requirements on the design or operational aspects of spaces exempted pursuant to this Paragraph, including hours of operation, range of activities permitted, signage, sound mitigation, lighting, or other measures to ensure that the use of the space is consistent with the intent of this Section.

The other recommended modification is to utilize the recommended parking ratios set forth in the Central Square ("C2") Plan, which were determined by CDD and the Traffic, Parking & Transportation Department based on real expectations of parking demand. This established both maximum and minimum parking ratios.

344 Broadway
Cambridge, MA 02139
Voice: 617 349-4600
Fax: 617 349-4669
TTY: 617 349-4621
www.cambridgema.gov

Attachment: Sater C Sq Zoning Pet CDD Memo 01-30-17 (CMA 2017 #31 : AR Response RE: Central Square Restoration Zoning Petition)

Since the petition proposes an “in lieu of” payment mechanism to further reduce parking below the minimum requirements, greater clarity on the minimum parking calculation would be helpful. Therefore, the Board’s recommendation could be accomplished with the following modifications to the zoning petition language, shown with additions underlined and deletions in strikethrough:

20.304.6 ~~Waiver of Parking and Loading Requirements.~~ The provisions set forth in Article 6.000 shall apply except as modified by the provisions set forth below.

1. Maximum Parking. Where any of the following listed uses are established in the Central Square Overlay District as of August 1, 2016, the accessory off-street parking for such uses shall be limited by the maximum rates set forth below. For uses not listed below, any maximum rate set forth in Article 6.000 shall apply. ~~When applying such a rate results in a maximum allowed number of parking spaces that is less than the minimum number of parking spaces required by Section 6.36 or other provisions of this Section, then the minimum required number of parking spaces shall be waived so that the maximum limitation may be met.~~ Exceeding the maximum allowed parking shall require a waiver of maximum parking under the general provisions of Article 6.000.
 - (a) Residential Uses (6.36.1), excluding Hotel and Motel (i-2 and i-3): ~~0.5~~ 0.75 space per dwelling unit ~~maximum~~
 - (b) Hotel or Motel Uses (6.36.1 i-2 or i-3): 0.25 space per sleeping room ~~maximum~~
 - (c) Office Uses (6.36.4), excluding Technical Office (f): ~~4 space per 500~~ 0.90 space per 1,000 square feet ~~maximum~~
 - (d) Technical Office Uses (6.36.4 f): ~~4 space per 800~~ 0.80 space per 1,000 square feet ~~maximum~~
 - (e) Retail and Consumer Service Establishments (6.36.5): 0.50 space per 1,000 square feet
2. Minimum Parking and Loading. The minimum parking and loading requirements as specified in Section 6.36 Schedule of Parking and Loading Requirements shall ~~be modified in the following ways~~ apply except as set forth below:
 - (a) For Residential Uses (6.36.1), excluding Hotel and Motel (i-2 and i-3), the minimum required parking ratio shall be 0.50 space per dwelling unit.
 - (b) Where the minimum number of parking spaces derived from the requirements of Article 6.000 is greater than the maximum number of parking spaces derived from Paragraph 1 above, the minimum required number of parking spaces shall be reduced to the greatest number that conforms to the maximum requirements derived from Paragraph 1 above.

3. Waiver of Parking and Loading Requirements. Uses in the Central Square Overlay District which meet the following requirements shall be exempt from the parking and loading requirements as specified in Section 6.36 - Schedule of Parking and Loading Requirements and the minimum requirements set forth in Paragraph 2 above.
 - (a) The use is contained within a structure or portion of a structure in existence on or before June 1, 1940 or if constructed later is identified as a National Register or contributing building; or
 - (b) The use is contained in a new structure or new addition to a structure identified in (1.) above, after the issuance of a special permit by the Planning Board provided:
 - (i) The total development authorized on the site is reduced to ninety (90) percent of the maximum permitted on the lot; or a cash contribution is made to the Central Square Improvement Fund to be established by the City of Cambridge in an amount equal to the per square foot permit cost of construction of the parking spaces not provided (Calculation of parking space square footage to be determined by Article 6 Section 6.42 "regular" off-street parking space width and depth only), said contribution to be used by the City of Cambridge for one or more of the following ~~capital~~ improvements in the Central Square Overlay District:
 - (1) Provision of public parking, preferably for short term users;
 - (2) Programming, events, and infrastructure that contribute to the Cultural District established in Central Square;
 - (3) Improvements to public parks, or restoration of historic structures, monuments and other features owned by the City of Cambridge or other public agency or a nonprofit organization;
 - (4) Improvements to public pedestrian and bicycle facilities such as sidewalks, crosswalks, dedicated cycling paths and bicycle parking.

The Central Square Advisory Committee shall receive and make comments on any proposal for the expenditure of such cash contributions. The funds shall not be used for ordinary maintenance activities normally undertaken by the City of Cambridge. The value of the cash contribution shall be determined by the Community Development Department assuming equivalent structured parking spaces and using generally accepted cost estimation methods customarily used by architects and engineers or using actual construction costs for comparable contemporary parking construction in Cambridge.
 - (ii) The subject lot is sufficiently small in size as to contribute to a development pattern of diverse, small scale, new structures and the retention of existing structures (for lots exceeding 10,000 square feet a specific finding shall be made that this objective has been met).

- (iii) The Planning Board shall specifically find that an exemption from parking and loading requirements will result in a building design that is more appropriate to its location and the fabric of its neighborhood and that it is in conformance with the objectives and criteria contained in Central Square Development Guidelines.
- (iv) No National Register or contributing building is demolished or so altered as to terminate or preclude its designation as a National Register or contributing building; and
- (v) No National Register or contributing building has been demolished or altered so as to terminate or preclude its designation within the five (5) years preceding the application.

B. Responses to Issues Raised in Policy Order O-6 dated December 19, 2016

Policy Order O-6 regarding the Central Square Restoration Zoning Petition requesting additional information on the following topics:

1. The legality of the petition as initially submitted.
2. The city's overall plan for Central Square including, but not limited to, the future use of City and private parking lots; opportunities for mixed-use, affordable housing, below market rate retail and/or office space; bike, pedestrian and parking systems.
3. Laboratory zoning definition that includes pharmaceutical and wet lab uses, and its potential impact on an area that intends to expand housing opportunities and where none exists at this time.
4. How a formula business model can be achieved.
5. How does Harvard Square's "in lieu of" parking payment system work and what improvements have been financed to date?
6. Summary of the existing Central Square zoning in chart form, compared to Harvard Square.
7. Study of three vacant sites to ensure that this zoning can work on larger sites.

Information on these items is provided below.

1. Legality of the Petition as Initially Submitted

Please see the legal opinion from City Solicitor Nancy E. Glowa regarding this issue, which is being submitted together with this memorandum.

2. Overall Planning for Central Square

The City conducted a planning study of Central Square (C2 Plan) as part of the "K2C2" initiative completed in 2013. That study was managed by CDD, working with a committee of community stakeholders including residential, business and institutional representatives, and with the support of a consultant team led by Goody Clancy. The final report of that study can be found at the link below:

<http://www.cambridgema.gov/CDD/Projects/Planning/K2C2>

The C2 Plan was the result of a long-range planning initiative focusing on land use and development, public space, housing, economic development, environmental sustainability and transportation over

about a 20-year time horizon. The following set of overarching goals were established for Central Square:

- a. **PUBLIC PLACES TO BUILD COMMUNITY**
Enrich the Square's public realm to invite community interaction at many levels from meeting a friend to citywide festivals.
- b. **RETAIL, CULTURAL AND NON-PROFIT DIVERSITY**
Celebrate the mix of old and new, venerable and funky, culture and business and other sources of diverse activities that make the Square a great Main Street and Cultural District.
- c. **INCREASE HOUSING STOCK AND PROMOTE RESIDENTIAL DIVERSITY**
Support a diverse community through more and varied housing choices.
- d. **CONNECTING PEOPLE TO THE SQUARE**
Enrich neighborhood walkability and livability with safe, green streets and improved access choices.
- e. **A SUSTAINABLE FUTURE FOR CENTRAL SQUARE**
Enhance the Central Square environment by making "green" development choices.

Key recommendations emerging from these goals included zoning changes that would increase the capacity for new housing in Central Square in a way is compatible with historic patterns of development, and would incentivize small-scale retail and other community-oriented uses at the ground floor. As noted by the Planning Board, many elements of these Central Square zoning recommendations are incorporated into the zoning petition currently before the council, though some modifications have been made to gain greater neighborhood support.

Municipal Parking Lots

The future use of the municipal surface parking lots in Central Square was also a topic of discussion during the study process. The final recommendations of the C2 Plan noted that further discussion would be needed among all community stakeholders to weigh competing priorities for the use of those sites, but suggested the following list of public benefits that might form a basis for evaluating what alternative future uses are desirable:

- a. Creative, new public space that fosters community and supports arts and programming — outdoor (e.g. plaza, park) or indoor (public room/gathering space, public market, possible uses such as relocated Central Square library).
- b. Mixed income housing — including a significant component affordable to middle income and low/moderate income residents, including 2-3 bedroom units designed for families.
- c. Affordable retail and non-profit space especially focused on arts and culture.
- d. Other goals indicated in the C2 Plan.
- e. Redevelopment should improve public edges along streets and sidewalks and enhance walkability and connections between the Square and adjoining residential neighborhoods.

- f. Redevelopment will require accommodation of short-term public parking either as part of the redevelopment on each site or evaluation of short-term public parking needed to support the Square based on creating a consolidated parking facility – below grade or above grade, faced with active edges at street level if this is needed to release the remaining lots for desired redevelopment. Traffic impacts of such consolidation and optimal amount of parking spaces to be replaced must be evaluated at the time such a solution is contemplated to match supply to need based on changing behavior over time.

Since the completion of the C2 Plan, there has been discussion at the City Council about evaluating the potential of building below-market rental housing on City-owned parking lots along Bishop Allen Drive, including a Policy Order O-4 dated December 12, 2016 regarding the potential of building affordable housing on these City-owned parking lots. Therefore, we are working to determine the potential for creation of housing units, impact on municipal parking that serves Central Square businesses and institutions, and implications on the goals for the parking lots expressed in the C2 Plan. We anticipate providing a staff response to Policy Order O-4 in late winter/early spring.

Transportation

The C2 Plan's transportation recommendations for Central Square focus on strengthening pedestrian, bicycle and transit amenities through measures including improvements to public streets, advocacy for transit system improvements, improved information for transit riders, and enhanced traffic enforcement. The study also recommended maximum parking ratios to prevent excess parking and limit auto traffic demand, which are discussed in the Planning Board's recommendation and may be incorporated into the petition currently before the Council.

These transportation measures will involve long-term efforts, though some elements have begun to be implemented, including some signal and intersection improvements, sidewalk improvements, and installation of real-time transit screens in key locations throughout the area. Other measures are in the planning stages, including separated facilities for bicycles and improved bus shelters and waiting areas. Envision Cambridge will also address the Massachusetts Avenue corridor and investigate ways to improve functionality of the roadway cross-section. Additionally, the City intends to initiate a Goods Movement study that would be of particular relevance to roadway functioning in business districts with significant loading needs, such as Central Square.

2. Laboratory Zoning

In Cambridge, commercial laboratory uses fall under the following zoning category:

- 4.34 f. Technical office for research and development, laboratory & research facility subject to the restrictions in Section 4.21m [which allows limited manufacturing activity]

This category includes "wet lab" uses such as chemical/biological laboratories, but could also include other types of research facilities where prototypes or other products are produced on a small scale. The use category also does not differentiate based on size, so a small research operation would be regulated

in the same way as a large-scale laboratory. Technical office is currently allowed in all districts where general office uses are allowed, including Central Square.

Concerns about large-scale chemical/biological laboratories have been raised in the past, particularly where they include large mechanical stacks that can have considerable visual, acoustical or other impacts on nearby residences. A possible approach is to limit the number of districts where technical office is an allowed use; however, this approach might have the unintended consequence of limiting opportunities for smaller or less impactful research operations along with larger laboratory buildings.

The Commercial Land Use Classification Study conducted for CDD in 2015 provided some recommended approaches for revising land use definitions so that laboratory buildings with greater potential impacts could be regulated differently than other types of commercial buildings. Because revising land use definitions would have widespread effects across the entire city, it was recommended that such a change might be better included as part of a comprehensive citywide rezoning effort that might emerge from the Envision Cambridge process.

Councillors noted that large-scale “wet lab” uses are not common in Central Square, though there are some research and development companies that occupy commercial buildings in the district. The City could investigate different regulatory approaches for technical office use that could be applied specifically within Central Square, but the current petition as it has been advertised does not contemplate any such restrictions, and therefore they would need to be considered as a separate zoning petition or as part of a refiled and newly advertised version of the current petition.

3. Formula Business

The Central Square Restoration Zoning Petition proposes a definition of formula business based on recommendations from the C2 Plan and modeled after such practices that have been explored in other parts of Massachusetts and the United States. The City Solicitor’s legal opinion, submitted with this memorandum, outlines whether such a practice would be legally permissible under current Massachusetts law.

A key principle in formula business regulations is to regulate the design characteristics of a use, building or site. Therefore, formula business regulations focus on characteristics of the use and design that might be considered “generic” in a way that would impact the character of the district as a whole. Formula business regulations tend to discourage the types of businesses that rely heavily on standardized characteristics like signage, colors or architecture that are applied at multiple locations.

The petition proposes regulating formula businesses through special permit review, which is an approach supported by the Planning Board. Requiring a special permit would likely dissuade potential operators that wish to implement a generic formula and not to engage in a public dialogue around the design and other characteristics of the use. In cases where a special permit is sought, there is an incentive for the business owner or property owner to work with community members to address concerns and tailor the proposal to meet the community’s expectations.

It is possible to impose more strict limitations on formula businesses, but the drawback with such an approach is that it would not allow for any discretion in assessing individual proposals. One of the frequently cited issues with the current “fast order food establishments” cap is that it treats all short-order restaurant uses alike, regardless of the type of food they serve or the nature of the business, and allows no flexibility to approve businesses that might be beneficial despite their classification as fast-order food. Similarly, a formula business might provide goods or services that have been identified as desirable, such as affordable clothing, food or family dining options.

4. In-Lieu-Of Parking Fee

The Central Square Restoration Zoning Petition proposes a mechanism by which required parking could be reduced in exchange for a payment to a public improvement fund. Such a mechanism is currently included in the requirements for the Harvard Square Overlay District, and the proposed language for Central Square mirrors that in Harvard Square.

Over the past 20 years, only a handful of projects in Harvard Square have sought such a reduction in exchange for an in-lieu-of payment. The magnitude of the parking reduction has varied from one parking space to over 70 parking spaces, and because the payment is based on the construction costs per space, the resulting contributions have ranged from about \$11,000 to over \$800,000, with a total accumulated contribution of approximately \$1.3 million over the 20-year period. There are two additional projects currently permitted by the Planning Board that will be required to make a contribution at the time of seeking a building permit.

The zoning for Harvard Square allows such funding to be used for public parking, improvements to public parks, restoration of publicly owned historic structures and monuments, or extension of the surface improvements installed by the MBTA as part of the Red Line subway extension. The Harvard Square Advisory Committee may review and comment on proposed uses of funds. Past uses have included restoration of historic buildings and contributing to recent streetscape improvements including new sidewalks and crosswalks, bicycle facilities, “shared street” designs and other pedestrian/bicycle amenities. Given the availability of commercial parking facilities in Harvard Square and the desire to limit traffic growth, funds have generally not been used to create new public parking.

6 and 7. Zoning Chart and Site Analysis

Attached to the end of this document is a chart comparing the current and proposed Central Square Overlay District development standards, along with comparable standards for the Harvard Square Overlay District.

In addition, CDD has engaged its urban design consultant Over,Under to prepare some diagrams showing, at a conceptual massing level, potential outcomes under the proposed Central Square Overlay District standards. This work is in progress and CDD expects to have illustrations to present at a future Ordinance Committee hearing on this topic.

8. Design Guidelines

A previous CDD memo raised the point that while the zoning petition proposes changing some development standards in Central Square, it does not include a reference to updated design guidelines to inform the Planning Board's review of proposals.

The C2 Plan completed in 2013 included an updated set of Central Square Design Guidelines meant to inform the implementation of the zoning recommendations from that study. Though some guidelines may not be as applicable given the standards proposed in the current petition, many of them would still be relevant given the proposed standards.

The following pages summarize the 2013 Central Square Design Guidelines from the C2 Plan and provide some commentary on how those guidelines would apply given the current petition. These guidelines, or a modified version, could be referenced in the petition or could be further refined through the ongoing work of the Planning Board.

Central Square Design Guidelines (2013)	Relationship to Current Petition
<p><i>Streets and Sidewalks</i></p> <ol style="list-style-type: none"> 1. Establish Mass Ave and Main Street as great public spaces in an improved system of streets and sidewalks. 2. Enhance the street network to make walking more convenient, safe and fun. 3. Balance the goals of active Street edges and residential privacy on streets other than Mass Ave and Main Street. 	<p>Guidelines would remain applicable given proposed development standards.</p>
<p><i>Integrating Buildings with Public Places</i></p> <ol style="list-style-type: none"> 1. As the design of existing public spaces is revisited and redevelopment of adjacent properties occurs, seek to improve the attractiveness and functionality of the open space at all levels. 2. Create new outdoor and indoor gathering spaces. 	<p>Guidelines would remain applicable given proposed development standards.</p>
<p><i>Ground Floor Design</i></p> <ol style="list-style-type: none"> 1. Storefronts should be oriented to the pedestrian and provide visual interest both day and night along Mass Ave and Main Street. 2. Pedestrians should be encouraged to window shop by the provision of varied and interesting display areas and ground floor facades. 3. Every effort should be made to create welcoming storefronts and to express an individual building or store identity. 4. Windows should be expansive and illuminated from within to create interesting display or viewing areas for retail space. 5. Provide a framework for variation in the design of the ground floor, so that the architecture of the building does not dominate the architecture of the street. 6. Encourage expansion of the definition of ground floor articulation to the lowest 2 levels to further enhance the pedestrian experience. 7. Pedestrian level treatments should relate to the human dimension and be rich in detail to enhance the pedestrian experience through the use of architectural elements such as trim, sills, lintels, awnings and canopies or, in more modern fashion, should be inviting and interesting through dramatic treatment of space, lighting, and signage. 8. Enliven the public realm by expanding the publicly accessible private spaces along sidewalk, in association with the creation of retail, cultural and office space. 	<p>Guidelines would remain applicable given proposed development standards.</p>

Central Square Design Guidelines (2013)	Relationship to Current Petition
<p><i>Built Form - height</i></p> <ol style="list-style-type: none"> 1. Variation of height is encouraged. 2. While buildings are encouraged to align facade elements with tops of adjacent buildings, overall building height does not necessarily need to be uniform from one building to another. 3. Allow the greatest height and bulk on Mass Ave with a diminution in height and bulk as the project approaches the lower residential uses in abutting areas 4. Consider opportunities to maintain and enhance views to significant historic structures when composing building height and bulk. 	<p>Because the petition retains a uniform 80' (or lower) height limit, it is less likely to result in variations in height. Therefore, guidelines 1 and 2 may be less applicable, while 3 and 4 remain relevant.</p>
<p><i>Built Form - massing</i></p> <ol style="list-style-type: none"> 1. Continuation of a strong linear retail frontage is critical to preserving the strength and historic character of the commercial district. 2. Building fronts should maintain a strong linear edge along Mass Ave. 3. Adjacent structures should build to a common party wall, although occasional setbacks of up to 15 feet to accommodate outdoor dining or retail sales, integrated with ground floor design and programming, are encouraged. 4. Alleyways between buildings are not encouraged except at identified locations where public pedestrian passages are desirable. 5. Limit shadow impacts of new development on portions of neighborhoods outside the study area and public parks within approximately 1-2 blocks or 500 feet of development site. Shadow impacts should not substantially reduce the appeal of public spaces, nor direct sun access to neighborhood housing, during spring and fall. 	<p>Guidelines would remain applicable given proposed development standards.</p>

Central Square Design Guidelines (2013)	Relationship to Current Petition
<p><i>Streetwalls and Bulk Control</i></p> <ol style="list-style-type: none"> 1. Building facades along Mass Ave and Main Street should both reinforce the traditional 55 foot height range of traditional buildings, and introduce variation in height. 2. Added height is especially encouraged where it can help buildings serve as attractive landmarks. 3. Streetwall height should step down towards the neighborhoods. 4. Relate architectural elements of new construction to significant architectural elements, including cornice heights, on adjacent buildings. 	<p>As above, provisions related to variation in height and added height are not as relevant to the current petition given the retained uniform height limit. Otherwise, the guidelines remain applicable.</p>
<p><i>Building Facade</i></p> <ol style="list-style-type: none"> 1. Respond to orientation with regard to environment, place, and site, while providing context by acknowledging the importance of building profile, edges and corners. 2. New projects should be conceived with enduring and durable qualities, such that, many years from their conception, they are seen as strong contributors to the liveliness of the Square and to its role as presenting a diverse set of architectural statements over a century or more. 	<p>Guidelines would remain applicable given proposed development standards.</p>
<p><i>Parking and service areas</i></p> <ol style="list-style-type: none"> 1. Off-street parking and service areas should be screened from the public realm wherever possible 2. Enrich neighborhood walkability with safe, green streets. Promote use of transportation modes other than driving. 	<p>Guidelines would remain applicable given proposed development standards.</p>

Central Square Restoration Zoning Petition – CDD Memo

Summary of Development Standards

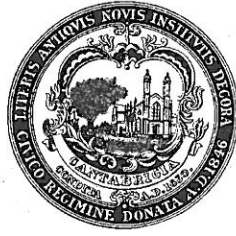
	Central Square Overlay District – BB				Harvard Square Overlay District – BB	
Zoning	Current Zoning		Proposed Zoning		Current Zoning	
Requirement	As-of-Right	Special Permit	As-of-Right	Special Permit	As-of-Right	Special Permit
FAR*	2.75 non-res. 3.00 residential	2.75 non-res. 3.00 residential	2.75 non-res. 4.00 residential (excl. residential balconies and retail spaces of 1,500 SF or less)	2.75 non-res. 4.00 <i>combined</i> (excl. residential balconies, retail spaces of 1,500 SF or less, and rooftop spaces)	4.00 non-res. 3.00 residential	4.00 non-res. 3.00 residential
Height	55'	80' with 45° bulk control plane above 60' (can be waived)	55'	80' with 45° bulk control plane above 60' (can be waived)	60'	80' with 45° bulk control plane above 55' (can be waived)
Required Setbacks	None for non- residential; formula setback for residential	Can be waived except where abutting a lot outside the overlay district	None for non- residential; formula setback for residential	Can be waived except where abutting a lot outside the overlay district	None for non- residential; formula setback for residential	Can be waived
Required private open space	None for non- residential; 10% for residential	No modification	None for non- residential; 10% for residential	Can be modified or relocated above grade	None for non- residential; 10% for residential	No modification
Lot area per dwelling unit*	300 SF	300 SF	300 SF	300 SF	300 SF	300 SF

* Note that Inclusionary Housing provisions allow a 30% increase in floor area and dwelling unit density under current and proposed zoning for both Central Square and Harvard Square.

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Vali Buland
First Assistant City Solicitor



Assistant City Solicitors

Paul S. Kawai
Samuel A. Aylesworth
Keplin K. U. Allwaters
Sean M. McKendry

CITY OF CAMBRIDGE

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

January 30, 2017

Louis A. DePasquale
City Manager
City Hall
Cambridge, MA 02139

***Re: Awaiting Report No.16-110 re: Policy Order No. 6 of 12/19/16 re:
Report on the Central Square Restoration Zoning Petition***

Dear Mr. DePasquale:

This is in response to the above referenced Council Order regarding the Central Square Restoration (*Sater*, et al) Zoning Petition (the "*Sater* Petition").

The Ordinance Committee held a hearing on the *Sater* Petition on December 1, 2016. At the Ordinance Committee meeting, a proposed policy order concerning a number of questions with regard to the proposed zoning amendments were submitted to the City Council. The proposed policy order was thereafter transmitted as part of the Committee Report by the City Clerk to the City Council for consideration at the City Council's December 19, 2016 meeting, and adopted as Policy Order #O-6 of 12/19/16.

Policy Order #O-6 requested a report with regard to the *Sater* Petition as to, *inter alia*: 1) "the legality of the petition as initially submitted", and 2) "how a formula business model can be achieved."

The *Sater* Petition includes the following proposed new definition for Article 2:

Formula Business. An individual Retail or Consumer Service establishment that is required by virtue of a contract, franchise agreement, ownership or other similar legal obligation to conform or substantially conform to a set of common design and operating features that serve to identify the establishment as one of a group of establishments for business, marketing and public relations purposes. Specifically, an establishment shall be considered a Formula Business if it shares at least two (2) of the

following three (3) characteristics with ten (10) or more other establishments in Massachusetts or with twenty (20) or more other establishments:

1. Trademark, service mark or logo, defined as a word, phrase, symbol, or design or combination thereof that identifies and distinguishes the source of the goods or services from others;
2. Standardized building architecture including but not limited to façade design and signage;
3. Standardized color scheme used throughout the exterior of the establishment, including color associated with signs and logos.

In Section 20.304.5 “*Use Limitations and Restrictions*”, Subsection 3 (b) (4) “*Restricted Uses*”, the Sater Petition proposes to add the following:

Formula Business District. A Formula Business as defined in this Ordinance may be established in the Central Square Overlay District only after the issuance of a special permit from the Planning Board. In reviewing an application the Planning Board shall take the following into consideration:

- (a) The extent to which the design of the proposal reflects, amplifies, and strengthens the established historical character of existing buildings and store fronts in Central Square.
- (b) The extent to which the particulars of the building or storefront design is varied from the formula or standard design of the chain in order to reflect the unique character and conditions of Central Square generally or the specific location in particular.
- (c) The extent to which the standard elements of the enterprises as they define it as a Formula Business are modified to respect and provide unique expressions of Central Square history and traditions as well as innovation in physical design and marketing that will distinguish the Central Square location from other locations of the Formula Business.

Legal Analysis

The Massachusetts Zoning Act, General Laws Chapter 40A, §4 (the “Zoning Act”) provides that:

“Any Zoning Ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.”

This so-called “uniformity requirement” of the Zoning Act is based upon the principle that all land in similar circumstances should be treated alike. See *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass. App. Ct. 101, 107 (1984), (if anyone can go ahead with a certain development in a district, then so can everybody else). The regulation of so-

called “formula businesses” through zoning, without regard to use, was challenged in the recent Massachusetts Land Court case of *Cumberland Farms, Inc. v. Jacob*, 12 Misc. 459503 (October 6, 2015), *aff’d pursuant to Rule 1.28*, 90 Mass. App. Ct. 1118 (unpublished decision) (2016) (“*Cumberland Farms*”) as violating the uniformity provision of the Zoning Act.

In *Cumberland Farms*, the Land Court opined that in order to determine whether the town of Wellfleet’s Zoning by-law violated the uniformity provision of the Zoning Act, the question to be answered was: does a store, simply because it is one of twenty-five or more with the same name and/or sales format “use” land *differently* (or put another way have materially different use-related impacts) than a store that is not [one of twenty-five or more stores with the same name and/or sales format]?” The court found that the answer was “no”, noting that there was no evidence in the record that formula businesses had more or different adverse impacts than similar non-formula businesses, and that no studies were conducted of such impacts prior to the bylaw’s adoption. Moreover, the court found that “the absence of uniformly-applied design regulations, applicable to *all* businesses, to maintain the quaint, small-town ‘character’ or ‘aesthetic’ the bylaw purportedly seeks, strongly suggests another agenda behind the bylaw.” As a result, the ordinance violated the requirement of uniformity in zoning laws.” As the court concluded in summary: “it is difficult to see how the bylaw will not become a way (or, just as problematically, be perceived in practice as a way) for the Planning Board to ‘play favorites.’”

In an Opinion of the Attorney General dated November 7, 2011 Re: Wellfleet Annual Town meeting of April 25, 2011, Case No. 5883 (“Opinion”), the Attorney General cautioned that although a municipality’s broad zoning power includes the authority to preserve neighborhood aesthetics, a town’s zoning bylaw “[m]ay not be used to regulate ownership without regard to differences in use. In commenting on a proposed amendment to the Wellfleet bylaw, the Attorney General opines” “It cannot be overstated that the amendments... cannot be applied so as to protect locally owned businesses from business competition.” (See Also, *Cumberland Farms, supra*, which, quoting *CHR Gen., Inc. v. City of Newton*, 367 Mass. 351, 356 (1982) stated “Zoning can only deal with use, ‘without regard to the ownership of the property involved or who may be the operator of the use.’”) “The uniformity requirement ‘is based upon principles of equal treatment: all land in similar circumstances should be treated alike so that if anyone can go ahead with a certain development [in a district], then so can everyone else’, and is designed to prevent ‘conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between land owners similarly situated.’” *Cumberland Farms, supra*, quoting *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass. App. Ct. 101, 107-8 (1984) (internal citations and quotations from that case omitted).

The Attorney General also noted in the Wellfleet Opinion that a number of cases in other jurisdictions have been brought pursuant to the Commerce Clause of the United States Constitution, striking down ordinances that favor locally owned stores over national chains as “[i]mpermissibly burdening interstate commerce, since no legitimate local purpose was shown.”

Based upon the United States Commerce Clause, the Massachusetts Zoning Act, recent Massachusetts case law promulgated thereunder, and the analysis set forth above, the proposed sections of the *Sater* Petition proposing to regulate Formula Businesses may be impermissible if they serve to inhibit business competition or are used to regulate business ownership or operation for an otherwise permitted use.

Very truly yours,



Nancy E. Glowa
City Solicitor