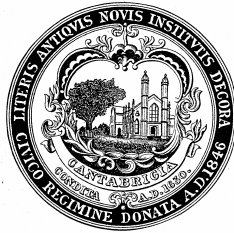


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## CITY OF CAMBRIDGE

Office of the City Solicitor  
795 Massachusetts Avenue  
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February 25, 2013

Robert W. Healy  
City Manager  
City Hall  
Cambridge, MA 02139

***Re: Council Order No. 14 of 2/11/13 Re: Review the Forest City Petition and Letter of Commitment to Ensure that it is Consistent with Other Letters of Commitment, Said Review to Include Continuity and Adherence to City Ordinances with Special Attention to the Language in the Commitment Letter Relating to the Affordable Housing Component; and Council Order No. 15 of 2/11/13 Re: Whether the Forest City Petition would be Considered Spot Zoning***

Dear Mr. Healy:

The City Council has requested an opinion from this office regarding the above referenced questions in relation to the Forest City Zoning Petition (“Petition”).

### **I. Introduction**

The Forest City Zoning Petition proposes to amend the Zoning Ordinance and Map by extending the Cambridgeport Revitalization Development District, set forth in Article 15.000 of the Zoning Ordinance (the “District” or “CRDD”)<sup>1</sup> from Green Street out to

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<sup>1</sup>In January 1988, the City adopted a zoning amendment that created the CRDD. By way of background, in the early 1970s, Massachusetts Institute of Technology (“MIT”) purchased from the Simplex Wire and Cable Company a large industrial site in Cambridgeport, and in the 1980’s, formed a partnership with the developer Forest City to redevelop the Simplex site into the mixed-use University Park project. In 1983, the City conducted a comprehensive planning study of the entire Cambridgeport industrial area, and published the *Cambridgeport Revitalization Plan*, finding that the “Simplex Area” contained “the most extensive sites of land that are vacant or available for development in the Cambridgeport revitalization area”. In December, 1986, a City-appointed “Blue Ribbon Committee” including representatives from the City, MIT, Forest City, neighborhood residents, and academics issued a report that included goals, objectives and recommendations for redevelopment in Cambridgeport, particularly at University Park. The report was adopted by the City Council in February, 1987.

The stated purpose of the CRDD was to implement the Blue Ribbon Committee Report, to allow a diversity of land uses in close proximity within a limited area; to provide a transition from the existing Cambridgeport residential neighborhoods to the business oriented uses in the District; to encourage interaction among activities located within the CRDD; and to provide for mixed income residential uses as an

Massachusetts Avenue in the area adjacent to Blanche Street. The petitioner, Forest City Commercial Group (“Forest City” or “Petitioner”) has indicated that the inclusion of this property into the District will allow for the development of new office, research and retail building that will enhance the street life and vitality of Massachusetts Avenue, support the expansion requirements and job creation goals of Millennium: The Takeda Oncology Company, and provide for approximately 15,000 square feet of new, active and independently operated ground floor retail uses.

The proposed amendment would expand the boundaries and certain requirements of the CRDD to include an adjacent development site at 300 Massachusetts Avenue, which would allow the construction of a new commercial building with approximately 246,000 square feet of gross floor area, consisting of office and laboratory use with ground floor retail with Massachusetts Avenue frontage. The total effective FAR across CRDD would be 2.47 and the FAR for non-residential uses would be 1.77, with larger buildings including the proposed building at 300 Massachusetts Avenue separated from lower-scale residential uses. The maximum allowed height on the 300 Massachusetts Avenue site would be 95’, which is similar to the 100’ limit recommended by the recent year-long Central Square (“C2”) Planning Study (“C2 Study”) for non-residential uses. The proposed amendment would further limit the part of the building that fronts on Massachusetts Avenue to extend to the maximum district height of 2/3 of the building frontage, would require a cornice at 65’ with a step back of 15’ from the Massachusetts Avenue property line, and would require ground floor retail with an average depth of 40’ along 75% of the building frontage on Massachusetts Avenue. This development would be subject to new standards that have been adopted since the time of the establishment of the CRDD, including the Incentive Zoning and Inclusionary Housing Provisions of the Ordinance and project review by the Planning Board, which would consider both the University Park Design Guidelines and the Central Square Design Guidelines.

## **II. Process Regarding the Petition**

The Ordinance Committee held two hearings to consider the Petition, on January 17, 2013 and on January 30, 2013. At the first hearing on January 17, 2013, staff from the Community Development Department, the Petitioner and members of the public presented information and commented on the merits of the Petition. The Ordinance Committee also heard from opponents of the Petition and received a number of written communications in support of and in opposition to the Petition.

The Planning Board submitted a recommendation to the City Council in support of the Petition on January 22, 2013, following its hearing on the Petition on January 8, 2013.

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extension of the existing Cambridgeport residential neighborhood. The CRDD zoning provisions allowed for a mixed-use, master-planned, phased development, and established requirements for total floor area, mix of uses, building height and parking, among other development characteristics. The *University Park at MIT Design Guidelines* were created and agreed to by the City, MIT and Forest City at the time the zoning was adopted. The design guidelines set parameters for overall master planning of the development area, open space, streetscape design, building design, parking, service and loading functions. Development of University Park has since proceeded, with the last building identified in the master plan completed in 2005.

In its recommendation, the Planning Board explained that its positive recommendation is supported in part by its finding that the Petition is consistent with the policies and goals of the City and the urban design goals of the year-long C2 Study and will provide enhanced public benefits. In particular, the Planning Board commented positively on the following: larger buildings, including the proposed building at 300 Massachusetts Avenue, would be separated from lower scale residential uses; a maximum height of 95' would be permitted on the 300 Massachusetts Avenue site, which is similar to the 100' limit recommended by the C2 Study for non-residential uses; development would be subject to existing and future design guidelines for the area, including the Central Square Design Guidelines developed through the C2 Study; ground floor retail would be required, consistent with the C2 Study's emphasis on the creation of active ground floors along Massachusetts Avenue, particularly retail; the ability to share existing structured parking with other uses without adding new parking would be created along with the addition of new bicycle parking, all of which are consistent with the C2 Study recommendations; as well as the commitments made in the Petitioner's letter of commitment to extend the affordability of all existing affordable units in University Park for the duration of Forest City's leasehold interest and to create 20 new affordable units or contribute \$4 million to the Affordable Housing Trust.

At the second hearing of the Ordinance Committee on January 30, 2013, additional information was submitted by the Petitioner and members of the public as well as from CDD staff. Assistant City Manager for Community Development Brian Murphy gave a brief overview of the summary submitted by the C2 Advisory Committee (the "C2 Committee"), which he indicated serves as an executive summary of the C2 Committee's work. Mr. Murphy stated that the Planning Board's favorable recommendation in support of the Petition references how the Petition lines up with the C2 Committee's recommendations. The Chair of the Ordinance Committee stated that the Committee was in receipt of a revised letter of commitment from the Petitioner. He noted that the revised letter of commitment provides for an increase in the number of affordable housing units to be created from 20 to 25, and an increase in the contribution to the Affordable Housing Trust from \$4 million to \$5 million in the event that the 25 affordable housing units are not provided in accordance with the terms of the letter of commitment. The Petitioner explained that the letter of commitment provides that all affordable units controlled by Forest City entities including 168 existing affordable units will be maintained in accordance with their current use either as low or moderate income housing for the full term of Forest City's leasehold interest and will be deed restricted and administered using the same rent and other requirements, policies and procedures used for units subject to the requirements of the Inclusionary Housing Ordinance, Section 11.200 of the Zoning Ordinance.

### **III. Legal Analysis**

#### **1. Spot Zoning**

In order for a zoning amendment to be considered spot zoning, it must be established that there was a "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, *all* for the economic benefit of the owner of that lot", *Lanner v. Bd. of Appeal of Tewksbury*, 348 Mass.

220, 229 (1964), quoting *Marblehead v. Rosenthal*, 316 Mass. 124, 126 (1944). That it will incidentally lead to a private advantage is not a legitimate objection to a legislative solution of a public problem. *Id.*

Generally, great deference is allowed to municipalities in zoning matters. The law provides that “[i]f the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body...should be sustained and the reviewing court should not substitute its own judgment.” *National Amusements, Inc. v. Boston*, 29 Mass. App. Ct. 305, 310 (1990). As noted in a treatise on Massachusetts zoning law, “[t]he purpose behind the doctrine of illegal spot zoning—which, when it applies, results in the invalidation of the offending zoning regulation—is to prevent municipalities from violating the uniformity provision of G.L. c. 40A, §4 by treating similarly situated properties differently ‘without rational planning objectives’.” *Massachusetts Zoning Manual*, MCLE, Inc. 4th ed. 2007, §3.3.4, citing *National Amusements, Inc. v. Boston, Id.* at 312. As stated above, the particular concern addressed by the concept of 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, whether the decision is the result of an analysis of land use and planning considerations; *National Amusements v. Boston, supra*, at 310; the benefit and detriment to the property owner and public, the character of the area adjacent to the reclassified land; *Powell on Real Property*, 79C.03[3][b][i]; and whether there has been a rationale set forth for the proposed rezoning. “It often is difficult to draw the line between neighborhoods that should be devoted to different uses, and where there is room for reasonable doubt the judgment of the local authorities should prevail.” *Crall v. Leominster*, 362 Mass. 95, 101-102, n. 4 (1972), quoting *Lanner v. Bd. of App. of Tewksbury*, 348 Mass. 220, 228 (1964); *W. R. Grace & Co.-Conn. v. Cambridge City Council, supra* at 569 (“the legality of a zoning amendment turns not on what parcel has been singled out, or even the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act.”)

Thus, if the amendment is passed by the City Council and then challenged, a court would look at whether the City Council had a rational basis for adopting the amendment. Factors that a court would consider include whether the amendment advances a legitimate zoning purpose and is consistent with the purposes set forth in the Cambridge Zoning Ordinance and the City’s policy goals. In the instant case, the amendment would appear to advance a legitimate zoning purpose, in part by furthering the goals of the year-long C2 study, including encouraging retail uses, and locating increased development density along Massachusetts Avenue and away from established residential neighborhoods. In addition, the Petition contains enhanced public benefits including significant indoor and outdoor open space, enhanced retail, and a significant commitment to permanent affordable housing. Finally, the planning considerations that led to the original enactment of the CRDD could be considered in analyzing whether there was a legitimate zoning purpose for

the amendment, as the reasons for amending the boundaries and requirements of the existing CRDD are consistent with and in furtherance of the original goals of the CRDD. Therefore, while the amendment as proposed may be advantageous to the Petitioner, unless it could be shown that the *sole* purpose of the amendment is to benefit Forest City, a Court would likely be persuaded that a rational basis for the amendment exists, and therefore, that it does not constitute spot zoning.

2. Letter of Commitment’s Continuity and Adherence to City Ordinances particularly with respect to the Affordable Housing Components

a. Contract Zoning

As an incentive and public benefit to be provided to the City in the event the Petition is adopted, the Petitioner has committed through its letter of commitment to provide significant public benefits to the City if the Petition is adopted. Amenities such as this that are provided to municipalities in the context of zoning amendments have been recognized as lawfully permissible “contract zoning.” This is to be distinguished from illegal contract zoning, which the courts have disallowed.

Illegal contract zoning “involv[es] a promise by a municipality to rezone a property either before the vote to rezone has been taken or before the required [G.L. c. 40A, § 5] process has been undertaken [and] evades the dictates of G.L. c. 40A.” *Farrington v. City of Cambridge, et al, Farrington v. City of Cambridge*, 81 Mass. App. Ct. 1135, *req. for further appellate rev. denied*, 462 Mass. 1110 (2012), quoting *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 53 (1997.) The *Farrington* court noted that “[i]n *Durand*, the court held that there is ‘no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is in any way prompted or encouraged by a public benefit voluntarily offered.’ *Id.* at 57. Challenges to zoning adoptions on the basis that they are products of illegal contract zoning require the court to consider whether the action was ‘contrary to the best interest of the city and hence offensive to general public policy’ and whether it involved extraneous consideration that ‘could impeach the enacting vote as a decision solely in respect of rezoning the locus.’ *Sylvania Elec. Prod. Inc. v. Newton*, 344 Mass. 428, 434 (1962.) As the court in *Farrington* (which involved an unsuccessful challenge to another recent amendment to the Cambridge Zoning Ordinance) stated: “[i]f a zoning amendment was adopted pursuant to the zoning act, i.e. pursuant to c. 40A, and the amendment serves a public purpose, then a voluntary payment made by a developer to a municipality, standing alone, cannot invalidate the legislative act”, citing *Durand*, 440 Mass. 53-55.

The C2 Committee, the Planning Board and the members of the Ordinance Committee have all noted the desirability of preserving and creating more affordable housing in the CRDD. The letter of commitment proposed by Forest City outlines Forest City’s commitment to preserve the continued affordability of Forest City’s 168 existing affordable housing units currently housing low and moderate income residents and to the creation of 25 new affordable housing units off-site or alternatively, a contribution of \$5 million to the Affordable Housing Trust in the event that the 25 affordable units are not provided in accordance with the terms of the letter of commitment. Thus, all affordable

units controlled by Forest City entities, including the 168 existing affordable units, will be maintained in accordance with their current use either as low or moderate income housing for the full term of Forest City's leasehold interests and will be deed restricted and administered using the same rent and other requirements, policies and procedures used for units subject to Section 11.200 of the Zoning Ordinance. This is a significant public benefit, one in keeping with the City Council's long-expressed commitment to preserve and create new affordable housing in the City. It does not seem likely that a court would find that Forest City's voluntary provision of such benefits is contrary to the best interests of the City or otherwise offensive to public policy.

The amenities provided in the letter of commitment, as summarized above, including the commitments to the preservation of existing affordable housing and the creation of new affordable housing, together with the other benefits outlined in the letter of commitment are also consistent with Article 11.200 and other provisions of the Cambridge Zoning Ordinance as well as with the planning and design policies and goals of the City. It is thus likely that these benefits would be considered by a Court to be part of a valid and enforceable contract zoning measure.

b. Continuity with and Adherence to the Zoning Ordinance.

A number of letters of commitment have been submitted to the City in connection with zoning petitions in recent years, which have been incorporated by reference to and made part of the Cambridge Zoning Ordinance when such zoning petitions were adopted. This would be equally true for the letter of commitment attached to the Forest City Petition. Local zoning ordinances including the Cambridge Zoning Ordinance are promulgated pursuant to the Massachusetts Zoning Act, G.L. Chapter 40A, and are enforced pursuant to the provisions of that act, either by enforcement actions of appropriate officials or in court. Our Zoning Ordinance provides that zoning violations can be enforced initially by the Commissioner of Inspectional Services, and failing compliance, in court proceedings. In addition, deed restrictions that Forest City has committed to place on all of Forest City's new and existing affordable housing units are also legally binding mechanisms which can be enforced through appropriate legal process. The fact that all of Forest City's new and existing affordable housing units will be administered using the rent requirements and other requirements set forth in Section 11.200 of the Zoning Ordinance will ensure consistency with how other affordable units are administered under the Zoning Ordinance and the ability to enforce the long term affordability of those units.

Very truly yours,

Nancy E. Glowa  
City Solicitor