



CITY OF CAMBRIDGE
OFFICE OF THE MAYOR

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Marc C. McGovern
Mayor

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To: Paula M. Crane, Acting City Clerk
From: Marc C. McGovern, Mayor
Date: July 30, 2019
Subject: Referring Legal Opinion from City Solicitor Nancy Glowa *Requesting a Legal Opinion on the Issue of the Different Requirements for Affordable Housing and Market Rate as it Pertains to the Affordable Housing Overlay*

Acting City Clerk Paula M. Crane:

Please include the attached legal opinion from City Solicitor Nancy Glowa "Re: Response to your Letter of July 3, 2019 Requesting a Legal Opinion on the Issue of the Different Requirements for Affordable Housing and Market Rate as it Pertains to the Affordable Housing Overlay," recently communicated to my office as a late Communication and Reports from City Officers for the Special City Council Meeting scheduled for Tuesday, July 30, 2019.

Due to an Ordinance Committee hearing being scheduled on the Affordable Housing Overlay later this week and the high level of interest in this topic, I wanted to make the attached legal opinion publicly available as soon as possible.

7:25 pm on 7/30

Very truly yours,

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Samuel A. Aylesworth
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

July 30, 2019

Marc C. McGovern
Mayor
City Hall, 795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Re: Response to your Letter of July 3, 2019 Requesting a Legal Opinion on the Issue of the Different Requirements for Affordable Housing and Market Rate as it Pertains to the Affordable Housing Overlay

Dear Mayor McGovern:

On July 3, 2019, you requested that I provide a "legal opinion to the City Council on the issue of the different requirements for affordable housing and market rate as it pertains to the Affordable Housing Overlay." You further stated that the Ordinance Committee Members "would like an opinion on whether the zoning amendment for an Affordable Housing Overlay would withstand legal challenge as currently conceived" and whether the "uniformity clause" of M.G.L. Chapter 40A ... [and] specifically [] Chapter 40A, Section 4, ... would have any bearing on the proposed zoning ordinance." It is my opinion, as set forth further below, that the proposed Affordable Housing Overlay ("AHO") is likely to withstand a legal challenge as a court would likely find that it is not in conflict with the uniformity provision of the Zoning Act, G.L. c.40A, §4. However, it does not appear that a court has reviewed an affordable housing overlay ordinance such as the proposed AHO at this time, so we cannot be certain how a court would rule on such a legal challenge.

The uniformity provision of the Zoning Act, found in G.L. c.40A, §4 states that "[a]ny 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." The purposes behind this provision are for there to be uniformity of zoning regulations in order to achieve predictability and equal treatment as to uses allowed in a zoning district. SCIT, Inc. v. Planning Board of Braintree, 19 Mass.App.Ct. 101 (1984). Specifically, "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 everybody else.'" Id. at 107; quoting 1 Williams, American Land Planning Law § 16.06 (1974). Further, the uniformity provision "does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and

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virtually unlimited power to discriminate as to uses between landowners similarly situated.” Id. at 108.

In accordance with G.L. c.40A, §4 and the Appeals Courts holding in SCIT, Inc. v. Planning Board of Braintree, the Supreme Judicial Court has held that a zoning district must allow at least one use as of right without the need for a special permit. Gage v. Egremont, 409 Mass. 345 (1991). The Court has struck down a zoning bylaw that made all uses in a zoning district dependent on the grant of a special permit. SCIT, Inc., supra. The concern with requiring a discretionary special permit before any use is allowed in a district is it could lead to a lack of predictability and unequal treatment, and “open[s] the door to discrimination not based upon valid differences.” SCIT, Inc., 19 Mass.App.Ct. at 108; quoting Smith v. Board of Appeals of Fall River, 319 Mass. 341, 344 (1946).

The same reasoning applies to overlay zoning districts. KCI Management, Inc. v. Board of Appeal of Boston, 54 Mass.App.Ct. 254, 262-263 (2002) (the principles of SCIT, Inc. are applied to uses within an overlay district). Furthermore, when evaluating whether an overlay zoning district complies with the uniformity provision, the analysis is whether the regulations within that overlay district are uniform, and not whether the regulations of the overlay district and the underlying district(s) are uniform. Farrington v. City of Cambridge, 81 Mass.App.Ct. 1135 (2012). This is because an overlay district may impose more stringent requirements than the underlying zoning district, but also may impose less restrictive requirements than the underlying zoning district. Id. Under the Cambridge Zoning Ordinance Section 3.12, the City may establish overlay districts having “special regulations which shall be applicable in lieu of or in addition to the regularly applicable regulations for the base zoning district.” So, a structure or use that is not allowed in an underlying zoning district may be allowed in an overlay zoning district, and this is permissible as long as the requirements that apply within each separate district are uniform within that district. Id.

Here, the proposed AHO would be a citywide overlay zoning district that would create special regulations governing residential uses that are already permitted or newly permitted by the AHO in a given district and that would impose less restrictive requirements than the underlying zoning districts in as much as it would “allow increases in density, limited increases in height, and relaxation of certain other zoning limitations for residential developments in which all units are made permanently affordable to household earning up to 100% of area median income (referred to as ‘AHO Projects,’ as defined in Article 2.000 of this Zoning Ordinance).” Affordable Housing Overlay Zoning Petition, Section 11.207(1). This overlay district would be citywide and would overlay all zoning districts except open space districts. Affordable Housing Overlay Zoning Petition, Section 11.207(2)(a). The proposed AHO defines an AHO Project as “[t]he construction of a new building or buildings and/or the modification of an existing building or buildings resulting in single-family, two-family, townhouse, or multifamily dwelling with which each dwelling unit is an AHO Dwelling Unit subject to the standards and restrictions set forth in Section 11.207 of this Zoning Ordinance.” Additionally, there would be no special permit requirement for AHO Projects, and AHO Projects could contain single-family, two-family, townhouse or multifamily dwellings as of right. Affordable Housing Overlay Zoning Petition, Section 11.207, *et seq.*

In districts that currently allow AHO-listed residential uses (single-family, two-family, townhouse, or multifamily), where such an AHO Project is proposed to be developed, those residential uses would be additionally regulated by the AHO's special regulations. In districts where some or all of the residential uses listed in the AHO are not permitted, the AHO would now permit them in those districts for AHO projects. The AHO would not create a new use within the meaning of G.L. c.40A, §4 or Article 4.000 Use Regulations of the Cambridge Zoning Ordinance, but would create special regulations dealing with affordability, uniformly applied, to those existing residential uses.

Accordingly, a court would likely find that the proposed AHO does not violate the uniformity provision of the Zoning Act, G.L. c.40A, §4. Under the proposed AHO, throughout the AHO zoning district, all AHO Projects would be allowed as of right. As set forth in SCIT, Inc., supra, "if anyone can go ahead with a certain development [in a district], then so can everybody else", and here, if anyone could go ahead with a certain AHO Project under the AHO, so could everyone else. All proposed AHO Projects would be treated equally without requiring a discretionary special permit, and there would be predictability as to what would be allowed as of right as the requirements would be set forth in the Zoning Ordinance. This would eliminate the exact situation that the uniformity provision is intended to eliminate which is an "attempt[] to delegate to the board [either the Board of Zoning Appeal or the Planning Board] ... a new power to alter the characteristics of zoning districts, a power conferred ... only upon the legislative body of the city to be exercised only in the manner prescribed by G.L. c.40A" SCIT, Inc., 19 Mass.App.Ct. at 108; *quoting Smith*, 319 Mass. at 344.

Additionally, while the uniformity provision of G.L. c.40A, §4 prohibits spot zoning, the proposed AHO would not constitute spot zoning. "The 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*, 29 Mass.App.Ct. 305, 312 (1990). 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 (or conversely, for reverse spot zoning, more restrictive) treatment than that applied to similar lots, with the sole purpose being to benefit (or disadvantage) the landowner of the particular lot or small area. W.R. Grace & Co.-Conn. v. City Council of Cambridge, 56 Mass.App.Ct. 559, 569 (2002). The proposed AHO would not constitute illegal spot zoning because it would not single out a small area for less (or more, in the case of reverse spot zoning) restrictive treatment, but rather would allow fewer restrictions for AHO Projects citywide. Additionally, the proposed AHO would further a defensible public interest that is consistent with the City's comprehensive planning goals and objectives.

Lastly, G.L. c.40A, §9 does not limit the scope of promoting affordable housing to special permits. General Laws c.40A, §9 describes the use of special permits and, among other things, expressly allows use of "special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements,

installation of solar energy systems, protection for solar access, or other amenities. Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits.”

The City has a variety of zoning provisions for affordable housing, some of which apply to special permits. In this case, if for policy reasons, the City chooses to encourage affordable housing through an as-of-right approach, Section 9 does not require that it be the sole and exclusive mechanism that could be used to encourage the provision of affordable housing. It simply expressly provides for one approach through special permits.

Therefore, in my opinion, the AHO if adopted would likely be found not to violate the uniformity provision of the Zoning Act, G.L. c.40A, §4.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Nancy E. Glowa', with a long horizontal stroke extending to the right.

Nancy E. Glowa
City Solicitor