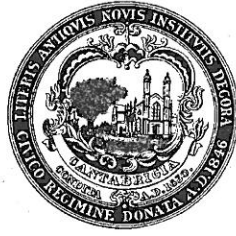


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## CITY OF CAMBRIDGE

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,

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

Nancy E. Glowa  
City Solicitor