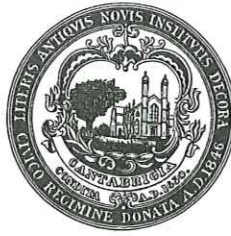


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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September 6, 2022

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

Re: Special Permit for 40 Smith Place, Case No. PB-391

Dear Mr. Huang:

I am submitting this opinion in response to the Planning Board's (the "Board") request for a legal opinion concerning the above-referenced case. Specifically, the Board requested a legal opinion as to whether it has authority to grant a special permit for a new building for office and laboratory uses, pursuant to Section 20.93.5 of the Zoning Ordinance, which establishes a development moratorium in Alewife Overlay Districts 1-5 (the "Alewife Moratorium"). As set forth below, the Planning Board has to accept applications for special permits for properties subject to the Alewife Moratorium, but the Planning Board cannot grant any special permit relief during the moratorium period.

The Alewife Moratorium states:

20.93.5 Development Moratorium. For a period beginning from the date of enactment of this Section 20.93.5 and lasting until December 31, 2023, or until the time of enactment of an amendment to or deletion of this Section 20.93.5, whichever occurs sooner, **no permits** for the building, renovation, or enlargement of any structures to accommodate a new or enlarged Office or Laboratory Use as listed in Section 4.34 of this Zoning Ordinance shall be issued within the Alewife Overlay Districts 1-5. The purpose of such moratorium is to create and enact amended requirements for the Alewife Overlay Districts in consultation with residents of the Alewife Overlay Districts and surrounding neighborhoods, based on development plans and guidelines published by the City.

(emphasis added). To be consistent with the intent of the Alewife Moratorium, “no permits” shall be issued should be interpreted to include special permits and building permits. Additionally, if special permits were issued during the Alewife Moratorium but building permits were not, there could be issues with special permits expiring before the end of the Alewife Moratorium.

Please note, the Planning Board has to accept all applications for special permits, hold hearings and issue decisions, even for projects subject to the Alewife Moratorium, or a petitioner could claim a constructive approval. In regard to the above-referenced case, or any applications for special permits subject to the Alewife Moratorium, the Board’s options are to deny the special permit, or approve the applicant’s withdrawal of the special permit application without prejudice. If the Board denies the special permit application, the applicant cannot apply for the same relief again within two years. G.L. c.40A, §16. However, the Board can vote to approve the applicant’s withdrawal of the application without prejudice, which will not prevent the applicant from reapplying within two years. *Id.* Additionally, an applicant can always withdraw an application without prejudice if it is withdrawn before publication of notice of the hearing. *Id.*

Even if the Board denies an application, the two-year prohibition against reapplication can be lifted if the Planning Board finds and describes on the record “specific and material changes in the conditions upon which the previous unfavorable action was based” and all but one of the members of the Planning Board consent to reapplication, after notice of the meeting at which the Board would vote on whether to consent to reapplication was provided to parties in interest. G.L. c.40A, §16. The Court has held that a change in legal status constitutes a “specific and material change” so the end of the Alewife Moratorium period would likely constitute a specific and material change. *Lingerman v. 6 Mill Road, LLC*, 88 Mass.App.Ct. 1108 (2015) (Rule 1:28 Decision).

In conclusion, for projects subject to the Alewife Moratorium, including this one, the Planning Board would not be authorized to grant any special permit during the moratorium period. The Planning Board has to accept all applications subject to the Alewife Moratorium so as to avoid a claim of constructive grant, but the Planning Board can either deny the application, or vote whether to allow the applicant to withdraw the application without prejudice.

Very truly yours,


Nancy E. Glowa