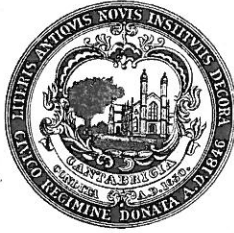


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## CITY OF CAMBRIDGE

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

June 18, 2019

Planning Board  
City Hall Annex  
344 Broadway  
Cambridge, MA 02139

**Re: 57 JFK Street, Case No. PB-296**

To the Planning Board:

I am submitting this legal opinion in response to the Planning Board's (the "Board") request for legal guidance concerning the above-referenced case.

Specifically, the Board has requested guidance concerning the following issues associated with applicant Crimson Galeria, LP's (the "Applicant") request to amend a Special Permit granted in 2015 for the property located at 57 JFK Street (the "Property"): 1) whether the Applicant's request to amend the special permit is appropriate or whether the Applicant should abandon the special permit and apply for a new special permit; 2) provide guidance in interpreting the definition of Gross Floor Area ("GFA") as it pertains to the request for a special permit to exempt basement space from the calculation of GFA; and 3) whether the Board can amend a special permit by removing a requirement that a payment be made to the City of Cambridge (the "City"). I will address these issues below.

### Background

The Applicant is the owner of the Property. In 2015, the Applicant applied for and received a special permit from the Board to waive parking and loading requirements at the Property for the proposed construction of a three-story office addition on top of the existing two-story building at the Property (the "Special Permit"). The Special Permit included a condition requiring the Applicant to "make a cash contribution to the Harvard Square Improvement Fund established by the City of Cambridge in an amount equal to fifty (50) percent of the cost of construction of the minimum number of parking spaces required based on the Gross Floor Areas of the proposed office use" pursuant to Section 20.54.4 of the Zoning Ordinance.

The Applicant now seeks to amend the Special Permit to exempt the existing basement area from the GFA calculations, pursuant to the definition of GFA in Article 2.000 of the Zoning Ordinance. If the basement area, which is 12,310 square feet, is exempt from GFA, the GFA on the Property would be less than eighty (80%) percent of the maximum GFA allowed. Pursuant to Section 20.54.4 of the Zoning Ordinance, uses in the Harvard Square Overlay District are exempt from the parking and loading requirements if “the total development authorized on the site is reduced to eighty (80) percent of the maximum permitted on the lot.” Accordingly, the Applicant also seeks to amend the Special Permit to remove the condition requiring the cash contribution to the Harvard Square Improvement Fund in order to waive the parking and loading requirements.

### Analysis

1. Whether the Applicant’s request to amend the Special Permit is appropriate or whether the Applicant should abandon the Special Permit and apply for a new special permit?

As an initial matter, there is no prohibition on applying for multiple special permits for the same property after the grant of a special permit. So, the Applicant may apply for a new special permit to exempt the basement area from the GFA and waive the parking and loading requirements on the basis that if the GFA at the Property is eighty (80%) percent of the maximum permitted at the Property. The only prohibition on applying for multiple special permits for a single property is if an application has been denied, a board cannot grant the same application within two years, unless the board finds there have been material changes in the circumstances. G.L. c.40A, §16. Accordingly, the Applicant could abandon the Special Permit and apply for a new special permit.

Additionally, generally the Court has not allowed an applicant to seek to modify a special permit to remove a condition since it is the equivalent of an appeal of the condition, which must be timely appealed pursuant to G.L. c.40A, §17. However, a board may consider and act on an application to amend a special permit to modify a condition in light of changed circumstances. Wendy’s Old Fashioned Hamburgers of New York, Inc. v. Board of appeal of Billerica, 454 Mass. 374, 385 (2009). Here, the Special Permit was granted in 2015, and in 2016, the Zoning Ordinance was amended to allow, by special permit, basement area to be excluded from the calculation of GFA. Accordingly, the amendment to the Zoning Ordinance is a changed circumstance that would permit the Board to consider and act on an application to amend the Special Permit by modifying the condition requiring the payment to the Harvard Square Improvement Fund. Therefore, it is appropriate for the Board to act on the application to the amend the Special Permit, or the Applicant could apply for a new special permit.

2. Provide guidance in interpreting the definition of GFA as it pertains to the request for a special permit to exempt basement space from GFA.

The Board has also requested guidance in interpreting the definition of GFA that allows for the exemption of basement area from the calculation of GFA. Specifically, under Article 2.000 of the Zoning Ordinance, there is a definition of the term “Floor Area Gross” which is

followed by the sub-headings “Gross Floor Area shall include” and “Gross Floor Area shall not include.” Number 16 under the sub-heading “Gross Floor Area shall not include” states: “[a]ny basement or cellar living space in any other type of structure with the issuance of a special permit. In granting such a special permit, the permit granting authority may approved [sic] the exemption of any portion of Gross Floor Area (GFA) located in a basement or cellar from the calculation of GFA, **provided the permit granting authority finds that the uses occupying such exempted GFA support the character of the neighborhood or district in which the applicable lot is located.**” (emphasis added).

Accordingly, pursuant to the language of the Zoning Ordinance, in considering the Applicant’s request to exempt the basement area from the calculation of the GFA, the Board should determine whether “the uses occupying such exempted GFA support the character of the neighborhood or district in which the applicable lot is located.” It is within the Board’s discretion to make this determination. Additionally, as with any special permit application, the Board must also determine whether the request satisfies the special permit criteria pursuant to Section 10.43 of the Zoning Ordinance.

3. Whether the Board can amend a special permit by removing a requirement that a payment be made to the City?

The Board has requested an opinion as to whether the Board is authorized to grant an amendment to the Special Permit that will nullify a required payment to the City. The Board is concerned about the precedent it would set, and its authority to waive a required payment after a special permit has been granted. As set forth above, the Special Permit contained a condition requiring the Applicant to make a payment to the Harvard Square Improvement Fund. The Applicant is now seeking to amend the Special Permit on the basis that if the GFA at the Property is eighty (80%) percent of the maximum permitted at the Property, the payment is not required. Here, the Applicant has not yet exercised the Special Permit, so the Board has authority to amend the Special Permit to remove the condition requiring payment.

I have been informed by the Commissioner of the Inspectional Services Department that the Applicant has not commenced construction pursuant to the Special Permit. The Applicant has applied for and received a building permit to conduct some internal work in the existing building on the Property, including reinforcing columns, but the Special Permit was not required to obtain that building permit, and the Applicant has not yet commenced any of the construction permitted pursuant to the Special Permit.

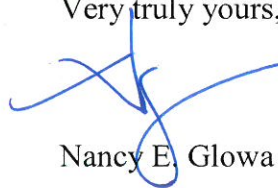
Where an applicant has not yet commenced construction pursuant to a special permit, or commenced a use allowed by special permit, the applicant has not yet exercised the special permit and received the benefit from the special permit. If the Applicant had already commenced the construction allowed pursuant to the Special Permit, then the Applicant would have exercised the Special Permit. If the Applicant had exercised the Special Permit, it would be required to comply with the Special Permit conditions and would not have the right to challenge the conditions. Klein v. Planning Board of Wrentham, 31 Mass.App.Ct. 777, 778 (1992).

However, here, where the Applicant has not exercised the Special Permit, the Applicant can either abandon the Special Permit and not make the payment, or, as set forth further above, the Board may amend the Special Permit and remove the condition requiring payment to the Harvard Square Improvement Fund. If the Board removes the condition requiring payment here, the Board is not setting a precedent because any similar requests in the future will require a fact specific analysis of whether an applicant has exercised a special permit.

Therefore, for all of the reasons set forth above, if the Board finds that the Applicant's application to amend the Special Permit satisfies the criteria to exempt basement area from the calculation of GFA, pursuant to Zoning Ordinance Article 2, and satisfies the special permit criteria, pursuant to Zoning Ordinance Section 10.43, the Board may find that the GFA on the Property would be less than eighty (80%) percent of the maximum GFA allowed, and the Board may remove the condition requiring the cash contribution to the Harvard Square Improvement Fund, pursuant to Zoning Ordinance 20.54.4.

Please let me know if I may be of assistance with any additional questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Nancy E. Glowa', is written over the typed name. The signature is fluid and cursive, with a large loop at the end.

Nancy E. Glowa