Nutter

Robert A. Fishman
Direct Line: (617) 439-2204
Fax: (617) 310-9204
E-mail: rfishman@nutter.com

MEMORANDUM

May 1, 2018
11878-462

TO: Ted Tye, National Development

FROM: Robert A. Fishman, Esq.

RE: Proposed Zoning Amendment to Allow a Traditional Neighborhood Theater to be Located in a Particular Portion of the Traditional Neighborhood Village Sub-District

---

You have asked me to consider whether the proposed zoning amendment presently being reviewed by the MarketStreet Advisory Committee would be considered illegal "spot zoning".

For the reasons describe below, the pending zoning amendment definitely is not spot zoning.

The proposed amendment would (1) create a new definition of Traditional Neighborhood Theater, (2) establish parking and height requirements for such a use, and (3) designate on a plan (which would be part of the amendment) the specific location within the Traditional Neighborhood Village Sub-District for this new use.

Further, although structured parking is permitted in the Traditional Neighborhood Village Sub-District, in response to some visual concerns expressed by nearby residential areas outside of said Sub-district, the same plan described above also would establish the location for a garage near the theater, further away from such residential areas. Sections 9.5.7.12 and 9.5.7.13 of the Zoning Bylaw will also require approval by the Planning Board of the garage design, location and capacity.

The proposed amendment would not establish a new zoning district. Rather, the amendment simply would add a new permitted use within the Traditional Neighborhood Village Sub-District. More detailed plans for the proposed structures (both theater and garage) still would be required to comply with the Design Standards under Section 9.5.9 of the Zoning Bylaw and undergo Site Plan Review by the Planning Board under Section 9.5.12 of the Zoning Bylaw.

As defined by a long line of cases and settled law, spot zoning only occurs when there is a "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, [and] all for the economic benefit of the owner of that lot". *Board of Appeals v. Housing Appeals Comm., 363 Mass. 339, 361-62 (1973).*

If there is any public benefit, a rezoning cannot be spot zoning even if a private landowner will derive some benefit. *Lanner v. Board of Appeal, 348 Mass. 220, 229-30 (1964)*; *Rando v. Town of North Attleborough, 44 Mass. App. Ct. 603, 606 (1998)*; and *W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 571 (2002)*.

Section 9.5.1. Purposes of the Zoning Bylaw, which established the Chapter 40R overlay district in 2007, has a long list of public benefits created by the district including, without limitation, "(a) [implementing] the objectives of the Lynnfield Master Plan (2002), which identified the area within the PVDD for mixed-use development", and (f) "[generating] positive tax revenue, and to benefit from the financial incentives provided by Gen. Laws. Ch. 40R, while providing the opportunity for new business growth and additional local jobs".

Since the proposed amendment would accomplish some of the public benefits under Section 9.5.1, the proposed amendment does not constitute spot zoning.

Further, in the present case, a new zoning district is not being created for the land in question. All of the land within the MarketStreet project remains in the Traditional Neighborhood Village Sub-District. All of the land is owned by a single landowner.

The proposed amendment is no different than a situation in which, for example, the Table of Uses for a downtown business district might be amended to permit some new use within that district, for example a yoga studio or health spa. That very common type of zoning change is not spot zoning. Again, illegal spot zoning occurs only when land owned by a particular land owner, indistinguishable from other land within the same zoning district, is singled out for different treatment by the establishment of a new zoning district (for example, from residential to business) or by the expansion of an existing zoning district to allow previously residential property to be zoned for commercial use. See, for example, *Mitchell v. Board of Selectmen, 346 Mass. 158, 161 (1963)* (turning residentially zoned parcel into business district was spot zoning); *Schertzer v. City of Somerville, 345 Mass. 747, 751-52 (1963)* (amendment invalid that re-zoned parcel from business to residential); *McHugh v. Board of Zoning Adjustment, 336 Mass. 682 (1958)* (amendment invalid that converted residentially zoned land into business zoned); and *National Amusements, Inc. v. City of Boston, 29 Mass. App. Ct. 305, 309 (1990)* (amendment invalid that changed parcel from business use to multi-family residential when surrounding land was commercial use).

Unlike the foregoing cases, the proposed zoning change here is evolutionary in nature, allowing an additional use within the Traditional Neighborhood Village Sub-District which will be consistent with, and complimentary to, the existing retail, restaurant and recreational uses within the Sub-district. See *Van Renselaar v. City of Springfield, 58 Mass. App. Ct. 104, 109 (2003)* (no spot zoning where neighboring land was zoned or used for commercial or business uses and zoning change was harmonious with surrounding allowed or existing uses).

In summary, the proposed amendment is valid since it: (1) creates public benefits as set forth in Section 9.5.1 of the Zoning Bylaw, and (2) does not single out one parcel of land indistinguishable from it in character for treatment differently from other land in the same zoning district.

RAF:cnb