



CITY OF SOMERVILLE, MASSACHUSETTS LAW DEPARTMENT

April 23, 2014

Honorable Board of Aldermen
City Hall
93 Highland Avenue
Somerville, MA 02143

Re: Order No. 195725
Provide Input on Restricting Formula Businesses in Somerville By Requiring Specific Review and Oversight Before Entering Central Business Districts

Dear Honorable Board Members:

You have asked this office to provide input relative to the authority of the City of Somerville ("City") to restrict formula businesses in Somerville by requiring specific review and oversight before entering central business districts. In my opinion, if a zoning ordinance required a special permit for this type of use, the ordinance must be supported by a legitimate public purpose and not be arbitrary or inconsistent with state law or constitutional provisions.

It should be noted that a court in this jurisdiction has not ruled on a challenge to a local zoning regulation of "formula businesses"¹, and other such regulations have been challenged based upon the Commerce Clause of the United States Constitution². Consideration of a proposed ordinance would include: legislative purpose, definition of "formula business", manner of use regulation, and review criteria or standards.

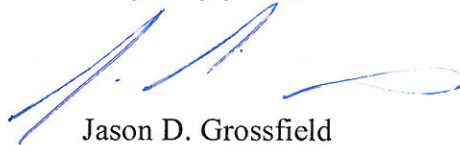
¹ There is a pending Land Court case which reportedly includes a challenge to the Town of Wellfleet, MA's formula business bylaw. See Cumberland Farms, Inc. v. Town of Wellfleet, 12 MISC 45903 (Land Court).

² See e.g., Cachia v. Islamorada, 542 F.3d 839 (11th Cir. 2008) (because an ordinance's complete prohibition of formula fast food restaurants disproportionately targeted restaurants operating in interstate commerce, the ordinance must be supported by a legitimate local purpose and the municipality must have no reasonable alternative to achieve that purpose); Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844 (11th Cir. 2008) (striking down ordinance that effectively excluded national chain stores as impermissibly burdening interstate commerce, since no legitimate local purpose was shown); Mead Square Commons, LLC v. Village of Victor, 930 N.Y.S.2d 431 (Sept. 30, 2011) (upholding ban on formula fast-food restaurants because the ban treats all similarly situated owners identically and is based on neutral planning and zoning principles); Coronadans Organized for Retail Enhancement et al. v. City of Coronado, 2003 Cal.App.Unpub. Lexis. 5769 (2003)(upholding special use permit and frontage requirement on formula retail). Also See Attorney General, Case #6357(Bolton)(August 17, 2012).

Zoning regulations regarding “formula businesses” have been adopted in other communities, including several Massachusetts municipalities.³ The Massachusetts Attorney General’s Municipal Law Unit has reviewed several town zoning bylaws on the subject of “formula businesses” pursuant to MGL c. 40, s. 32. As the Attorney General’s office has opined, a municipality’s zoning power includes the authority to preserve neighborhood aesthetics. John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 218 (1975). However, zoning power may not be used to regulate ownership without regard to differences in its use, or to consider a proposed use’s economic impact on surrounding businesses. CHR General, Inc. v. City of Newton, 387 Mass. 351 (1982); See Circle Lounge & Grille v. Board of Appeals of Boston, 324 Mass. 427, 429-30 (1949). The Attorney General’s determinations have also noted that the authority to regulate the interior features of business establishments, i.e. features not visible by the public from a public place, is uncertain. John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 218 (1975).

Please contact me if you have any additional questions.

Very truly yours,



Jason D. Grossfield
Assistant City Solicitor

cc: Mayor Joseph A. Curtatone

³See Bolton, MA (2012); Concord, MA (2011); Chatham, MA (2010); Provincetown (2010); Nantucket, MA (2006); and Dennis, MA (2008).