



May 17, 2017

The Honorable Members of
City of Somerville Board of Alderman
Somerville City Hall
93 Highland Avenue
Somerville, Massachusetts 02143

Dear Board of Alderman,

Sugar Law Center for Economic & Social Justice (SLC), is a national non-profit organization that has extensive experience in equitable development legislation, also referred to as community benefits agreement (CBA) and/or process. After reviewing the Somerville Law Department's memorandum dated May 15, 2017, we respectfully disagree with the legal conclusions of that memo.

In our opinion, courts are unlikely to find the pending ordinance to impermissibly delegate the powers of the Special Permit Granting Authority (SPGA). The pending ordinance established a process for Coordinated Development Special Permit applicants. The ordinance asks applicants to meet with the Neighborhood Council and negotiate in good faith towards a community benefits agreement before submitting an application. The ordinance does not require that a community benefits agreement be reached. If an agreement is reached between the identified parties, it is submitted by the developer with their permit application. If no agreement is reached, the ordinance permits the developer to show good cause why negotiations did not occur or why an agreement was not reached. In all instances, the SPGA retains authority and discretion to approve or deny the permit in the presence or absence of a community benefits agreement. The pending ordinance thus establishes a desired process for CDSP applications and there can be little dispute that it is wholly within the authority of the City to adopt such processes.

The process sought to be established by the ordinance **does not conflict** with *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376 (1963). In that case, the court considered whether a particular zoning board decision operated as a permit or as a determination that a permit should issue upon the satisfaction of certain conditions. The zoning board's decision imposed a specific condition requiring that the "water situation must be arranged to the satisfaction of all concerned." The board's decision was nullified because of ambiguity in this condition. The court found that the board decision *could not be considered a present permit* because the condition clearly implied that a further determination was required to establish whether the water situation was resolved to the satisfaction of all concerned. The court further found that the board decision *could not be considered a determination that a permit should issue upon satisfaction of the condition* because the condition was too ambiguous since it did not establish any standards for resolving the water issue and did not identify any of the concerned parties. In the presence of such ambiguity, the board would be improperly delegating its decision-making powers to third parties if a permit would automatically issue upon the satisfaction of the ambiguous

condition. As a result, the court found that the board's decision was neither a permit nor a determination that a permit should issue upon satisfaction of the condition, and as a result, the board's decision was struck as an improper advisory opinion. **The pending ordinance contains no such ambiguities and in all instances, the SPGA retains authority and determines whether a permit issues.**

Ordinances of the City of Somerville presently identify a variety of factors for boards to consider for special permits in various contexts and further identify materials required to be submitted with applications. There is no question that the City may amend and enhance such ordinances and the pending ordinance seeks to do so.

The suggestion that the proposed ordinance would "potentially allow the imposition of obligations which exceed existing regulatory authority and are not permitted by law" is also without merit. First, it is based on a facially false premise: that "the SBO requires an applicant to enter into a Community Benefits Agreement containing undefined standards." The ordinance does not require a Community Benefits Agreement – it requires that the applicant meet and confer in good faith with the Neighborhood Council and attempt to negotiate one. Thus, no further obligations are imposed on any parties – they are free to walk away if after negotiating *in good faith* an agreement cannot be reached. Second, the developer and the Council are private parties and are free to enter into any agreement they so choose. They are not bound by the regulatory restraints of government actors. If they voluntarily agree, they are contractually obligated to meet those conditions. The conditions are not imposed by any party, but rather, are voluntarily agreed to by private parties and not by a regulating authority.

Furthermore, the Neighborhood Council does not "mandate" funding requests or impose any authority over the Somerville Benefits Committee. Rather, the Neighborhood Council (NC) suggests funding priorities, such as housing, jobs, environmental concerns, etc. that are needed in its area of the city. The SBC then retains the authority to determine which priorities will be address, sole discretion over the manner in which they will be addressed, and sole discretion over to whom funds would be allocated. The very limited role of the NC in this process is unlikely to convert it from a private entity into a public body. The NC simply having a voice in the process of determining priorities is akin to that of the general public, business groups, and others who are regularly solicited by governmental agencies to provide input when decisions are made that will affect them and their communities.

We hope this information helps the Board understand the issue at hand and that, ultimately, the Somerville Benefits Ordinance does not conflict with current law. Should you have any questions please feel free to contact us at 313-993-4505.

Sincerely,



John Philo
Executive Director

Cc: Union United Coalition, Somerville