Hello Doug,

Thank you again for you response.

You are right that you are not going to convince me that waiving the permit fees for certain developments is a good idea. It was thoughtless for the Select Board to offer to waive the special permit fee without first consulting the ARB and confirming the ARB had the authority to waive the fee, and then expect the ARB to go along after accepting a proposal that involved waiving this fee. And it is foolish of the Select Board to give away tens of thousands of dollars in building permit fees, just to satisfy an irrational obsession with mixed-use development.

I could be convinced that the ARB has the authority to set and waive its special permit fee, but neither you nor anyone else has provided any evidence of that. All I've seen are claims without any supporting documentation, such as the language in the rules the ARB created for itself.

I've inserted my responses to you points below in brackets. I've tried to keep them brief as I don't see much point in continuing this email conversation. I've given you several opportunities to demonstrate that the ARB has the authority to set and waive its special permit fee. It is obvious to me that you can't do it. And I am glad of that. I believe the lack of authority to waive fees on a case by case basis is really a good thing for the town. For if the ARB (or the Select Board/Town Manager) were to have that authority, it would be a recipe for cronyism.

No need to respond to this message. You obviously see your job as justifying the decisions of the Select Board/Town Manager however misguided they may be.

Sincerely,

Chris Loreti

On 8/12/2019 6:44 PM, Doug Heim wrote:

Good evening Chris,

I understand that you remain unconvinced. I'll stick to a few key points and answers to questions that don't belabor areas of disagreement unlikely to be moved:

<!--[if !supportLists]-->A. <!--[endif]--> On the RFP:

<!--[if !supportLists]-->1. <!--[endif]-->It is false to state that those waivers were proposed by the applicant. [Indeed it would be false to state this. I have not done so.]

The RFP approved by the Select Board on June 20, 2016 called for waiver of permits fees as part of the deal in its introductory paragraphs:

"INTRODUCTION, HISTORY, & GOALS

This building is available for purchase and re-use in "as-is" condition, having been approved for disposition by the Arlington Board of Selectmen and Town Meeting. 1207 Massachusetts Avenue constitutes ***4,645 square foot (more or less) parcel*** *of land improved with a one-story masonry commercial building with approximately* ***2,700 square feet*** *of usable floor space.*

The Town, through its Board of Selectmen and Town Manager, is seeking proposals for the purchase and future use of the parcel with highly advantageous bidders accepting a 40-

year deed restriction to require mixed-use development of the property consistent with recent revisions to the Arlington Zoning Bylaws, and defined as "[a] Combination of two or more distinct land uses, such as commercial, lodging, research, cultural, artistic/creative production, artisanal fabrication, residential in a single multi-story structure to maximize space usage and promote a vibrant, pedestrian-oriented live-work environment." ***Such advantageous bidders shall receive waivers of building and special permit fees in additional consideration.*** *"*

(emphasis added).

<!--[if !supportLists]-->2. <!--[endif]-->Similarly, the applicant is required to commit to mixed use. [No applicant was required to submit a proposal for mixed use. The RFP contained five "Comparative Quality Evaluation Criteria" with ratings ranging from "Highly Advantageous" to "Not Advantageous". A mixed-use deed resitriction was just one of these criteria. There was no requirement that an applicant be rated "Highly Advantageous" for all of the criteria or specifically for the one related to the mixed-use deed restriction. Moreover, mixed-use was not one of the required goals of the RFP.

If you are saying the applicant is required to commit to mixed use because that is what he proposed, that is a different matter. I am confident, however, that since there was only one proposal sumbitted if the applicant wished to switch to a development other than mixed use, a good attorney could explain to the Select Board how it could approve such a change subject to the other conditions in the RFP being met.]

The RFP was structured to afford the Select Board some discretion should no advantageous bidders respond to its call for mixed-use. It was an RFP, not an IFB, so price was not by design the only controlling factor. Indeed the first "Qualitative Criteria" (Section VI) was a deed-restriction for mixed-use:

<!--[if !supportLists]-->***1.*** <!--[endif]-->***"Purchase for Mixed-Use Development***

Highly Advantageous – Proposer will accept a 40-year deed restriction requiring that redevelopment of the property would be restricted to "mixed-use," defined as follows:

A combination of two or more distinct land uses, such as commercial, lodging, research, cultural, artistic/creative production, artisanal fabrication, residential in a single multi-story structure to maximize space usage and promote a vibrant, pedestrian-oriented live-work environment.

As part of its consideration for such restriction the Town will agree to waive special permit and building permit fees for proposed mixed-use developments.

Advantageous – Proposer presents a means of confirming commitment to mixed use

development of the parcel by alternate means than a deed restriction.

<u>Not Advantageous</u> – Proposer does not intend to develop the parcel for mixed-use."

The only applicant who submitted a response to the RFP agreed to the deed restriction for mixed use. The proposal states "The proposer will accept a 40 year deed restriction ***as defined in the RFP.***" (emphasis added). Under c. 30B, a applicant is bound to the most of terms of their bid – in this case terms we specifically demanded to rate as advantageous. Thus mixed used development is very much a requirement both substantively in receiving an advantageous rating and substantively in that the applicant committed to such a term.

<!--[if !supportLists]-->B. <!--[endif]-->With respect to G.L. c. 40 sec 22F:

<!--[if !supportLists]-->1. <!--[endif]-->According to the Clerk's Records, the 2005 Annual Town Meeting adopted c. 40 sec. 22F in Article 42 on June 15, 2005, the Town's Main Budget Article that year. [I've attached both the Finance Committee's recommended vote on this article and the Clerk's record of the articles as voted. I can find nothing in either about the town adopting this permissive legislation. Until someone shows me some real documentation confirming that the town adopted this, I have to believe it never happened. If you can find it, please pass it on. (And please don't pass the buck to the Town Clerk. I expect the Town Counsel's office to keep records of all permissive legislation adopted by the town.) In any case, even if the town has adopted this legislation, I don't see that it allows case-by-case waivers of fees, and in the case of the ARB, it seems to me any permit fee it sets would have to approved by the Select Board and/or Town Manager since the ARB is an appointed board.]

<!--[if !supportLists]-->2. <!--[endif]--> My best understanding based is that there was some consideration of sec. 22F in response to the Finance Committee's request for a Bylaw Amendment on fees in the 2004 Town Meeting.

<!--[if !supportLists]-->C. <!--[endif]--> With respect to other fees, neither the RFP, nor my response to your questions suggests the ARB is considering waiver of expert fees. [I am glad to hear this, but aside from the correction I've made below, I don't see the rest of your comments as having any relevance.] More importantly, to my understanding, the applicant has not sought a waiver of those fees. My point remains a straightforward one: the money from the proceeds of a sale and the money derived from administrative special permit fees go the same place.

The zoning bylaw states the Board "may adopt reasonable administrative fees <u>*and*</u> fees for employing outside consultants" [You are confusing your Boards or doing a lawyer misquote here. This is what the Bylaw really says: "The Board of Appeals may adopt reasonable administrative fees...." The ARB is not the Board of Appeals, the ZBA is (and it is not clear where that bit about the ZBA adopting

administrative fees comes from). The zoning bylaw does not contain similar language for the ARB. And while I agree 53G and 53G 1/2 may apply to the ARB, those section of state law do not address the permit application fee that is charged irresepctive of any outside consultants or performance bonds the board may require.] under c. 53G and 53G ½ (emphasis added). We probably both agree that those are two different categories of fees. We also probably agree that those "administrative" special permit fees may be assessed even though those fees we are not set forth in the Town Bylaws.

Those "administrative" fees, like most other Town fees are supposed to be reasonably based on the costs of the Town's administrative business – primarily the Planning Department including the ARB Secretary Ex-Officio, Ms. Raitt, who I realize now was not included on your correspondence. Waiving or not waiving fees that go towards operating a Town Department might be more important if those fees and the proceeds of this property (unlike paying for expert consultants) were not going to end up in the same place – the General Fund.

In that vein, I've cc'd Ms. Raitt on this correspondence, given that it includes the rest of the ARB. I respectfully suggest that it would be helpful to have her included on future colloquies about the Redevelopment Board given her role as its Secretary Ex-Officio and status as the head of the Department of Planning and Community Development.

Sincerely yours,

Douglas W. Heim
Arlington Town Counsel
50 Pleasant St
Arlington, MA 02476

Tel: (781) 316-3150

Confidentiality Notice: *This communication and any attachments are intended solely for the intended recipient(s) and may contain information that is confidential and/or privileged attorney work product, exempt or prohibited from disclosure under applicable law. If you have received this e-mail in error, please notify this office by replying to the sender informing him that you are not the intended recipient and then deleting this e-mail and any attachment(s). Please be advised that if you are not the intended recipient(s) you are prohibited from any use, dissemination, copying or storage of this communication.*

From: Chris Loreti [mailto:cloreti@verizon.net]
Sent: Sunday, August 11, 2019 9:33 PM
To: Doug Heim
Cc: 'Adam Chapdelaine'; 'Jim Feeney'; DMahon@town.arlington.ma.us; JCurro@town.arlington.ma.us; DDunn@town.arlington.ma.us; JHurd@town.arlington.ma.us; SDeCourcey@town.arlington.ma.us; 'abunnell@town.arlington.ma.us'; KLau@town.arlington.ma.us; EBenson@town.arlington.ma.us; DWatson@town.arlington.ma.us; rzsembery@town.arlington.ma.us; MByrne@town.arlington.ma.us; 'John Leone'; ATosti@town.arlington.ma.us
Subject: Re: ARB and SB Authority to Waive Permit Fees

Hi Doug,

Thank you for your response.

I remain unconvinced that the ARB has the authority to set and waive special permit fees, and the Select Board or Town Manager can waive building permit fees. Moreover, the power to set a fee is not the same as the power to change that fee on case by case basis for particular developments. If you believe it is, do you think permit fees can be increased for a specific development if the developer refuses to employ union labor, should one or more of Arlington's Select Board so desire? The recent convictions of Boston Mayor Walsh's two aids suggest otherwise. I see no difference in town officials thinking they can lower permit fees to advance the political agenda (e.g., for mixed-use) of one or more Select Board members.

While my original question wasn't specifically about 1207 Mass Ave., I am convinced the Select Board has botched the disposition of that property, and not just in its handling of permit fees. Now it is looking to other town officials to clean up the mess it caused, which will cost the likely cost the town tens of thousands of dollars. And the Select Board doesn't seem to care whether those officials have the authority to act in the ways it likes. See more specific responses to your comments below [in brackets].

Sincerely,

Chris Loreti

On 8/9/2019 2:53 PM, Doug Heim wrote:

Hello Chris,

Under the present Zoning Bylaw Section 3.2.4, "[t]he Board of Appeals may adopt reasonable administrative fees and fees for employing outside consultants to assist the Board with is review of special permits, variances, administrative appeals, and applications for comprehensive permits in accordance with its regulations, in accordance with G.L. c. 44, § 53G and § 53G-1/2." [These sections of state law do not address the setting of permit application fees. They address the process for charging permit applicants for hiring outside consultants to review the permit applications and the posting of performance bonds. If the Town has adopted MGL C.40 s 22f (see more on that below), the ZBA can set its special permit fee, subject to the approval of the Select Board, as indicated by the first paragraph of the text you provided.]

Furthermore, the ARB acts as the Town's Planning Board under the Town Manager Act. Pursuant to its duties under G.L. c. 41 sec. 81, a Planning Board is permitted to set and waive fees for development review, which to my understanding they have from time to time. [This section of state law has nothing to do with setting and waiving fees; it pertains to damages to which Planning Boards may be subject. Did you mean some other section? Also, I am not sure what you mean by "fees for development review". I was referring to the special permit filing fee. The town shouldn't be paying a dime for permit review by outside experts to be used for 1207 Mass. Ave. or any other development (e.g., for a traffic study) and the RFP doesn't indicate that it will. I would be most interested to hear for which developments the ARB has waived permit applications fees in the past.]

Germane to the property Ms. Zwirko's memo references, the requested waiver of fees is part of a negotiated sale of Town Property. The Select Board was broadly authorized by Town Meeting to sell such property, with a stated goal of advantageous redevelopment. [The 2015 vote of Town Meeting was: "VOTED: That the Board of Selectmen be and hereby is authorized to dispose of property located at 1207 Massachusetts Avenue and its appurtenant land by sale, lease, or otherwise." It makes no mention of what type of development it deemed advantageous, and says nothing

about discounting pertmit fees for developments the Select Board or any one else decides are "advantageous" whether that be politically advantageous or otherwise.]

The Select Board in turn publicly developed an RFP which conditioned sale upon acceptance of a 40-year Mixed-Use Deed Restriction [The RFP has no requirement for a mixed-use development (the requirement for the mixed-use deed restriction only applies if the developer proposed mixed use). That was the Select Board's decision, as was the unauthorized claim that special and building permit fees would be waived if the development were for mixed-use.] and a minimum sale price of $750,000. Closing is conditioned upon receipt of required Special Permits for mixed-use and waiver associated fees. [This was a condition the developer proposed, not the town, though the town seems to have accepted it.] Hence, both the special permit itself and waivers of special permit fees may be conditions of the sale, but they are not orders to the ARB by the Select Board. [Seriously? If the Select Board doesn't have the authority to waive the special permit fee, what business did they have stating in an RFP that the fee would be waived for a mixed-use development? Did they just figure they could pass the buck to the ARB and know it would do whatever it wanted? Also, the RFP required that the respondents demonstrate how the proposed use complied with uses allowed in the Zoning Bylaw for the R7 (Apartment District - High Density) zoning district, a particularly bizarre requirement as the subject lot is zoned B2 and mixed use is not even allowed in the R7 district. The sole respondent did not comply with this RFP requirement, nor did he demonstrate compliance with the uses allowed in the actual (B2) zoning district, which of course he could not do for a hotel because hotels are not allowed in the B2 district. The proposal should have been rejected for failure to include the required Zoning Compliance Statement.]

You are correct that the Pre-April 2016 Zoning Bylaw, stated "Fees shall be as established by the Bylaws of the Town of Arlington." That said, I'm not aware of a special permit fee in the Bylaw. I do not read the bylaw to assert that every potential fee must be listed therein, or that a special permit fee is impermissible. [I am not aware of special permit fees in the Bylaw, either, though I do see many other fees on the Town website that indicate they were set by Town Meeting.]

Moreover, the Town accepted G.L. c. 40 sec. 22F at the 2005 Annual Town Meeting, which provides in relevant part: [Can you provide the Article number for this ATM? I can't see that the 2005 ATM voted on this at all. The BoS comment on Article 28 of the 2004 ATM claims that the Town had already accepted this section of state law without stating when (and that some then current bylaw setting fees could be repealed in the future), but if that were true, there would be no need to accept this section of state law in 2005 or later.]

"Any municipal board or officer empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons, may, from time to time, fix reasonable fees for all such licenses, permits, or certificates issued pursuant to statutes or regulations wherein the entire proceeds of the fee remain with such issuing city or town, and may fix reasonable charges to be paid for any services rendered or work performed by the city or town or any department thereof, for any person or class of persons; provided, however, that in the case of a board or officer appointed by an elected board, the fixing of such fee shall be subject to the review and approval of such elected board.

A fee or charge imposed pursuant to this section shall supersede fees or charges already in effect, or any limitations on amounts placed thereon for the same service, work, license, permit or certificate; provided, however, that this section shall not supersede the provisions of sections 31 to 77, inclusive, of chapter 6A, chapter 80, chapter 83, chapter 138, sections 121 to 131N, inclusive, of chapter 140 or section 10A of chapter 148. The provisions of this section shall not apply to any certificate, service or work required by chapters fifty to fifty-six, inclusive, or by chapter sixty-six. The fee or charge being collected immediately prior to acceptance of this section for any license, permit, certificate service or work will be utilized until a

new fee or charge is fixed under this section."

With respect to Building Permit fees, Section 15 (a) of the Town Manager Act vests the Manager with authority to direct officers, committees, and commissions except those enumerated. Section 15(h) vests the Manager with contract negotiating authority, and Section 15(j) vests the Manager with duties required of him/her by the Board. Hence, where the Town has authorized, and the Select Board has approved the sale of a Town property pursuant to certain conditions, including the waiver of permit fees, the Manager may execute a contract which includes waiver of building permit fees. [Let's be clear, the Town did NOT authorize the waiver of permit fees. And just because the Select Boad did so without any authorizaiton of their own, that does not mean the Town Manager is thereby authorized to execute a contract waiving such fees.] To my understanding, this interpretation is consistent with past interpretation and practice in Arlington, [Please cite examples of when the Town waived builiding and special permit fees at its own discretion.] and similar to the practice of many Towns were select boards may grant waivers of fees under a variety of circumstances.

Finally, because the proceeds of both the property sale and any permit fees both go into the general fund, it should be noted that the net effect of the sale would be the same if the sale price had been adjusted to reflect likely costs of review and permitting. [This is completely incorrect in the case of 1207 Mass. Ave. The winning bid was for the minimum purchase price. It could not have been reduced futher if the developer wanted to acquire the property. So any reduction in permit fees is a real reduction in income to the town. (And the fact that you refer to "costs of review" again makes me wonder if the town is planning to further increase its own costs by bearing the costs of outside consultant review--something the RFP made no mention of--costs which are normally borne by the developer.)]

Sincerely yours,

Douglas W. Heim
Arlington Town Counsel
50 Pleasant St
Arlington, MA 02476

Tel: (781) 316-3150

Confidentiality Notice: *This communication and any attachments are intended solely for the intended recipient(s) and may contain information that is confidential and/or privileged attorney work product, exempt or prohibited from disclosure under applicable law. If you have received this e-mail in error, please notify this office by replying to the sender informing him that you are not the intended recipient and then deleting this e-mail and any attachment(s). Please be advised that if you are not the intended recipient(s) you are prohibited from any use, dissemination, copying or storage of this communication.*

From: Chris Loreti [mailto:cloreti@verizon.net]
Sent: Thursday, August 8, 2019 12:43 PM
To: Douglas Heim
Cc: Adam Chapdelaine; Jim Feeney; DMahon@town.arlington.ma.us; JCurro@town.arlington.ma.us; DDunn@town.arlington.ma.us; JHurd@town.arlington.ma.us; SDeCourcey@town.arlington.ma.us; abunnell@town.arlington.ma.us; KLau@town.arlington.ma.us; EBenson@town.arlington.ma.us; DWatson@town.arlington.ma.us; rzsembery@town.arlington.ma.us; MByrne@town.arlington.ma.us; John Leone

Subject: ARB and SB Authority to Waive Permit Fees

Hello Doug,

A memo dated August 7, 2019 from Erin Zwirko to the ARB begins with this line: "The Arlington Redevelopment Board (ARB) may vote to waive all or some of the Special Permit filing fee in cases where it is warranted."

Could you kindly cite the legal basis for that statement? According to Section 10.06 of the pre-recodification Zoning Bylaw (see below), fees for both special permits and building permits are established by the Town Bylaws--in other words by a vote of Town Meeting. (And since the public was assured there were no substantive changes made to the Zoning Bylaw during recodification, presumably this is still the case.)

If there was a change to our local bylaws or state law since 2016 that allows the ARB and Select Board to set special permit and building permit fees and grant exceptions to those fees, could you provide the legal reference? If not, I can see no basis for Ms. Zwirko's claim that the ARB can change the fees however it wishes should it deem it warranted. And I can see no basis for the Select Board or anyone else to waive building permit fees.

Thank you,

Chris Loreti

Section 10.06 - Permit and Certificate Fees
ART. 4, ATM 5/91; ART. 33, ATM 4/97
Fees shall be as established by of the Bylaws of the Town of Arlington.