

KRATTENMAKER O'CONNOR & INGBER P.C.

ATTORNEYS AT LAW

ONE MCKINLEY SQUARE
BOSTON, MASSACHUSETTS 02109
TELEPHONE (617) 523-1010
FAX (617) 523-1009

August 12, 2020

CHARLES G. KRATTENMAKER, JR.,
MARY WINSTANLEY O'CONNOR
KENNETH INGBER

OF COUNSEL: RAYMOND SAYEG

VIA EMAIL

Jennifer Raitt, Director
Department of Planning and Community
Development
Town of Arlington
730 Massachusetts Avenue
Arlington, MA 02476

Re: August 6, 2020 Report by the Transportation Advisory Committee
Docket No. 3602

Dear Director Raitt:

I am responding on behalf of the applicant to the report prepared by the Transportation Advisory Committee dated August 6, 2020, which I did not receive until the afternoon of August 10, 2020 (hereinafter referred to as "TAC" and the "Memorandum", respectively).

I will respond to TAC's comments in the order in which the comments appear in the Memorandum:

- Massachusetts Avenue at Appleton Street and Appleton Place

The issues at this intersection were not created by the applicant and will not be further negatively impacted by the proposed project. It is the applicant's understanding that the unusual geometry of the intersection and glare were the primary cause of the unfortunate bicycle fatality at this intersection.

The duty to improve this area is the responsibility of the Town. Frankly, I would have expected that TAC would have by now focused on safety improvements that will benefit all residents and businesses that utilize this area. To attempt to shift this burden to the applicant is inequitable and inappropriate.

The applicant has agreed to pay the Town of Arlington thirty percent (30%) more than the fair market value of the property at 1207 Massachusetts Avenue, a property I would suggest would otherwise have little marketable value.

I respectfully suggest that the attempt to extract from the applicant funds for "mitigation improvements" at this site constitutes an impermissible tax and/or impermissible fee.

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In *Greater Franklin Developers Association, Inc. v. Town of Franklin*, 49 Mass. App. Ct. 500, 502 (2000), the Appeals Court affirmed the lower court ruling that requiring a developer to pay a "school impact fee" to ensure that the proposed development bore a proportionate share of the cost of capital facilities necessary to accommodate the residences it was building and to promote and protect public health, safety and welfare was invalid.

The Appeals Court held that the attempt to charge the developer a fee was without basis. In dicta, the Appeals Court stated that fees "share common traits that distinguish them from taxes: [1] they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society'; [2] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and [3] the charges are collected not to raise revenue but to compensate the government entity providing the services for its expenses." Quoting *Emerson College v. Boston*, 391 Mass. 415, 424-425 (1984).

Here, the applicant is not seeking any particular government services but, as a condition of the proposed project, is being asked to essentially pay a fee to obtain the special permit for the project for traffic mitigation measures neither occasioned nor exacerbated by the proposed project and for measures that clearly are shared by other residents in the Town.

This attempt to extract the costs for the mitigation measures is patently unfair and, I would suggest, based on the traffic impact study wholly inappropriate.

Any mitigation measures which the Town decides to take at this intersection will be funded, in part, by the substantial increase in real estate taxes once the site is developed and the hotel tax the Town will collect.

The Town has determined that improvements are necessary at this intersection irrespective of any other uses in the area. It is the Town's obligation, not the applicant's, to address and fund any measures. To expect the applicant to do so is patently unfair and an improper attempt to extract from the applicant a fee to address a long-standing issue that the applicant neither created nor will exacerbate by his proposed use.

- Parking and Traffic

Clearly, Town Meeting when it voted to grant to the Board the ability to reduce parking in business, industrial and multifamily residential zones to twenty-five percent (25%) of

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the parking required in the table of off-street parking regulations (Article 6, Section 6.1.5) understood that customers visiting the businesses at these mixed-use developments would be parking on the public streets of Arlington.

I would suggest to you that the patrons of the proposed restaurant that do not walk to the site will be parking on public streets in the area much like: (a) the prospective patrons of the pub at 1314 Massachusetts Avenue for which a special permit was recently approved; and (b) the prospective patrons of the retail marijuana dispensary that was approved at 1386 Massachusetts Avenue.

This Board issued a special permit for the proposed use at 1314 Massachusetts Avenue and concluded that patrons could park on streets surrounding the area. This Board approved the marijuana dispensary which will offer twelve (12) spaces for a business expected to generate "105-160 customers per hour" and an increase of one hundred forty-two (142) vehicles to the site or two hundred eighty-three (283) trip ends. These two special permits will result in substantial increased traffic in the area, including at an intersection (Park Avenue and Massachusetts Avenue) which is heavily travelled.

On July 20, 2020, this Board approved a special permit for 882-892 Massachusetts Avenue, a project directly across from Arlington High School, which would require thirty (30) spaces, twenty-four (24) of which spaces would be required for prospective residents, who will be primarily exiting and entering the site during the peak a.m. and p.m. hours and while students are walking to Arlington High School.

I want to be clear; I am a proponent of the orderly expansion of the commercial space along Massachusetts Avenue. It is in keeping with the goals outlined in the 2015 Master Plan. However, applicants need to be treated equitably and fairly.

Here, you have a use that by its very nature is not introducing vehicles into the roadway during the morning commute or during school hours. This is a hotel in which checkout is usually 11:00 a.m. or noon and check-in which is at 3:00 p.m. or 4:00 p.m. In addition to the off-peak hours, hotel guests check out and in at staggered times.

The restaurant patronage would generally occur during the evening hours.

Here, the applicant is proposing twenty-four (24) parking spaces, exclusively serviced by a valet with the ability to have eight (8) tandem spaces. Contrary to the conclusion of TAC, the applicant's civil engineer has confirmed that the eight (8) tandem spaces can be accommodated.

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Unfortunately, it appears that TAC was not provided the applicant's transportation demand management plan or the updated information concerning employee parking submitted by the applicant.

In any event, the traffic study done by BSC Group concludes that "no additional mitigation or capacity enhancements are necessary at the study intersections or on the surrounding transportation infrastructures to accommodate the Project."

The criteria you must consider in deciding whether to grant the special permit requested includes a determination whether "the requested use will not create undue traffic congestion or unduly impair pedestrian safety." (emphasis supplied). Bylaw, Article 3, Section 3.3.3(c).

As a matter of fact and law, this means to deny this permit on the basis of traffic congestion that you must make specific findings, not that the proposed use will create some traffic congestion but that the purported additional traffic will result in excessive traffic congestion.

The expert evidence presented establishes that the proposed project will not create excessive traffic congestion. No objective evidence has been presented which will enable the Board to make a finding that the proposed project will create undue traffic congestion. Indeed, I would suggest that the decisions referred to above prevent the Board from reaching such a conclusion. Accordingly, the applicant satisfies this criteria of the Bylaw.

- Standards in the Industry

It is accepted practice to utilize trip generations of former uses of a property to ascertain the additional trip counts. Should the applicant be penalized because 1207 Massachusetts Avenue has not been utilized?

In the unfortunate event that there are closures in the Town of other buildings and/or businesses particularly related to business hardship due to the pandemic, is the Board going to adopt a position ignoring the industry adopted method for determining additional trips as provided for by the ITE?

If the position of the Board is to adopt this position, the likelihood of anyone purchasing 1207 Massachusetts Avenue, a nonconforming undersized lot, which as a matter of law under the Bylaw can only be developed as a mixed-use development will not likely occur.

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Moreover, the applicant's traffic engineer applied a 2% traffic growth for his five year projection, which is a very conservative growth rate even if you were to remove the trips generated by 1207 Massachusetts Avenue from the calculation. The applicant's traffic engineer has informed me that a one percent traffic growth rate for a highly developed urban area like Arlington would be more typical. Here, he utilized a five-year projection with a 2% traffic growth rate.

- Pedestrian/Bicycle Volumes

The archives of WBZ news indicate that the weather on Tuesday, February 4, 2020, the date used for the collection of data for the traffic impact study, was, in fact, in the high 40's. Such weather would result in an increase in pedestrian and bicycle traffic for a winter day. I submit it is disingenuous to suggest otherwise.

There is a flashing light at the intersection of Appleton Street, Appleton Place and Massachusetts Avenue that can be utilized by cyclists and pedestrians.

As Mr. Santos opines in his letter of July 22, 2020, which supplements his report, "adjustments to pedestrian and bicycle activity will not materially change the results of the operations analysis or the conclusions presented in the TIAS." Further, Mr. Santos states that the number of bicyclists and pedestrians in the area is not "relevant to determine improvements" at the intersection of Appleton Street, Appleton Place and Massachusetts Avenue. The Town is intending to make improvements irrespective of whether this project is developed.

As set forth hereinabove, Article 3, Section 3.3.3(c) requires that you consider and determine whether the proposed use by the applicant will "unduly impair pedestrian safety." (emphasis supplied). Bylaw, Article 3, Section 3.3.3(c). The inquiry is not whether the project will have some impact but whether the proposed project will impair pedestrian safety to an unwarranted degree.

No object evidence has been presented which would enable this Board to make a finding that the project will impair pedestrian safety to an unwarranted degree. Accordingly, the applicant satisfies this criteria in the Bylaw.

- Improvements

The applicant will agree to the following improvements at his cost and expense:

- The repair of the sidewalk/curb between Massachusetts Avenue and the project along the site frontage of Clark Street.

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- The installation of an ADA-compliant ramp and a detectable warning panel only on the corner of Clark and Massachusetts Avenue abutting his property.
- Installation of a sidewalk on the east side of the semi-circle driveway. However, due to grade issues, the sidewalk will require the installation of several steps. This approach from the east will not be handicapped accessible. The handicapped accessible ramp will be available for access.
- The driveway slopes, as confirmed by the applicant's civil engineer, comply with the ADA. Further, all public access to the property is ADA complaint as confirmed by the applicant's civil engineer. In any event, this is a building department compliance issue.

In advance, I thank the Board and Director Raitt for their consideration of this application. It is now time to make a decision on this project.

Very truly yours,

Mary Winstanley O'Connor

MWO/ccg
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