

To: Arlington Redevelopment Board
cc: Jennifer Raitt, ARB Secretary Ex Officio
From: Chris Loreti, 56 Adams St., Arlington
Date: August 16, 2020
Re: Docket 3602, 1207-1211 Massachusetts Avenue and Scope of the ARB Authority

1. Introduction

I am writing as a current Arlington resident and former member of the Arlington Redevelopment Board (ARB) in response to the ARB's recent decision to unilaterally expand its powers to grant special permits in lieu of variances issued by the Zoning Board of Appeals as well as the implications of that decision for Docket 3602. The ARB assumed such powers in its July 20 vote on Docket 3625 and it has since received sanction for this new-found authority in an August 13, 2020 memorandum from Arlington Town Counsel to the ARB.

The ARB's granting of variances through the process of Environmental Design Review (EDR) has no basis in the law, and I am confident the ARB's decision on Docket 3625 will be overturned on appeal, should one be made. As described below, Town Counsel's opinion interprets Arlington's zoning bylaw in ways it has never been interpreted before, and grossly misstates the nature of past ARB decisions in the mistaken claim that they relaxed the dimensional, density, and parking requirements of the bylaw in ways not specifically authorized by the bylaw—that is, in the same way as a variance.

I am making these comments in the context of Docket 3602 because Town Counsel believes you can use the flawed reasoning in his memo to approve similar variances for the development proposed in this docket. Thus, I request that this memo be made part of the record for Docket 3602.

Below, I set forth the reasons Town Counsel is the wrong party to advise the ARB on this Docket, why his arguments concerning the ARB's authority to relax dimensional and density standards are incorrect, and why granting a special permit for Docket 3602 would be arbitrary, capricious, and contrary to the law.

2. The ARB Should Not Seek Legal Advice from Town Counsel on Docket 3602

Town Counsel's principal responsibility is to Arlington's Select Board. The Select Board is responsible for the sale of 1207 Massachusetts Avenue, one of the lots involved in the development under Docket 3602. If the ARB denies the special permit, the sale of 1207 Mass. Ave. will not proceed. Thus, Town Counsel's main client has a particular interest in the ARB granting the special permit beyond the ARB's authority to do so.

Town Counsel cannot credibly claim that he represents the entire town, including Town Meeting (its legislative body) and those residents who respect the law. Indeed, Town Counsel

has already demonstrated that his opinion related to the ARB's authority and this docket depends on whom he is representing.

When Arlington's Mixed-Use zoning bylaw amendment was passed by Town Meeting in 2016, ARB Chair Andrew Bunnell testified to Town Meeting that any use allowed as part of a mixed-use has to comply with what is already allowed by the zoning bylaw. His then-colleague on the ARB, Mike Cayer, reiterated the point stating that "We've worked with both the Inspectional Services, the head of Inspectional Services, as well as Town Counsel on the wording that's before you. And only the uses that are permitted in a particular district are the ones that can happen in a mixed use in that district¹."

It is notable that both Town Counsel and the head of Inspectional Services were present at Town Meeting during this testimony and neither objected to it. Now, four years later, as he represents Arlington's Select Board, Town Counsel gives a different interpretation of the mixed-use bylaw amendment, suggesting that the ARB can approve a special permit for a mixed use on the lot the Select Board is selling even though it contains a use that is not permitted by itself on that lot, thus directly contradicting the representations made by the ARB to Town Meeting when the Mixed-Use zoning amendment was passed².

It is unclear who, if anyone, asked Town Counsel for the opinion he provided in his August 13, 2020 memo to the ARB. It is the ARB's responsibility to request legal opinions, and to my knowledge it has not voted to do so at any of its hearings on this docket. In any case, it should be obvious to the ARB that outside counsel should be used for any legal advice it seeks given Town Counsel's inability to serve two masters on Docket 3602.

3. Town Counsel Misrepresents the Purpose of EDR in Arlington's Zoning Bylaw

Contrary to the account of Town Counsel, the establishment of the ARB as a special permit granting authority that would issue special permits subject to Environmental Design Review stemmed not from an over-worked ZBA as much as a general level of dissatisfaction with the way development proposals were being approved at the time.

As described in the report to Town Meeting, and the text of the bylaw change, the purpose of EDR was to allow more detailed environmental review of prominent special permit developments which would be possible with the staff support of the Planning Department. It was not to allow EDR to be used as an alternative to the variance process for project proposals that violated the dimensional and density regulations of the zoning bylaw.

Town Counsel makes particular note of Section 1.03 of the 1975 Zoning Bylaw, which is referenced by what was formerly Section 11.06 (Environmental Design Review). It should be no surprise that Section 1.03 was referenced. It is a listing of the numerous purposes of the Zoning Bylaw. One would certainly expect Section 11.06 to promote those purposes rather

¹ See copy of the Town Meeting transcript submitted by Christopher Loreti on January 27, 2020 for Docket 3602 under "Correspondence Received" for the ARB meeting of February 24, 2020.

² This suggestion was made in an email to me; to my knowledge the ARB has neither sought nor received a formal written opinion on the matter.

than work against any of them. In no way does this reference confer any special powers on the ARB beyond those explicitly described in the zoning bylaw. In fact, MGL 40A Section 9 requires such consistency of special permits with the purposes of the bylaw³.

3.1. Town Counsel Creates a False Narrative of a Bifurcated Approach to Special Permits in Arlington

Town Counsel tries to argue that special permits issued by the ARB have greater flexibility than those issued by the ZBA and that EDR has served as an alternative to bonus provisions available only to special permits issued by the ZBA. Both assertions are false.

Town Counsel, like counsel for the developer under Docket 3625, improperly seeks to extend the statement that EDR standards “shall not be regarded as inflexible requirements⁴” to mean that all requirements in the zoning bylaw are subject to modification by the ARB. There is no basis in the law for such an interpretation.

Town Counsel then goes on to suggest that various bonus provisions in the zoning bylaw were intentionally designed for ZBA special permits only because the ARB had the flexibility under EDR to achieve the same ends. This interpretation is clearly incorrect:

- The bonuses originally described in Section 6.05 for uses 2.05 (churches, etc.) and 2.07 (schools, etc.) made no mention of the ARB or EDR not because these bonuses were limited to the ZBA, but rather because they were available to both the ARB and the ZBA—and in the case of use 2.05 to churches allowed by-right in certain districts.
- The bonuses described in Section 6.12 may have originally omitted mention of the ARB’s ability to use them, but by 1985 this oversight was corrected for most of them.
- By 1991, the bylaw had been further corrected to include the ARB in both Section 6.12d and 6.29.

If the ARB thought it could use EDR to achieve the same ends as the bonus provisions of Section 6.12 and 6.29, it would have had no need to recommend amending the bylaw to include the ARB throughout those sections. Clearly, that was not the case.

³*Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.*

⁴ The first paragraph of the zoning bylaw section on EDR standards reads as follows:

3.4.4. Environmental Design Review Standards

The following standards shall be used by the Board and the Department in reviewing site and building plans. The standards are intended to provide a frame of reference for the applicant in the development of site and building plans as well as a method of review for the reviewing authority. They shall not be regarded as inflexible requirements and they are not intended to discourage creativity, invention, and innovation.

As Town Counsel’s Attachment “E” makes clear, the additions of the ARB to the bonus provisions of Section 6 did not reflect policy changes. Rather, they were merely administrative corrections made to make the bylaw consistent between the two boards. As such, it is no surprise that these changes didn’t attract any public comment during the warrant article hearing.

Today, there are virtually no differences in the provisions of the zoning bylaw that the ARB and ZBA apply to special permit applications that come before them—other than the EDR standards that apply to special permit applications that come before the ARB.

3.2. Town Counsel Improperly Conflates Site Plan Review with EDR to Suggest the ARB can Use EDR to Circumvent the Variance Process

Since the time that the ARB became a special permit granting authority, Arlington has not had site plan review. Town Counsel makes a common mistake of confusing Site Plan Review with the special permit process⁵.

The uninformed description of one author of the Town’s Master Plan notwithstanding, EDR, unlike Site Plan Review is a part of special permitting. It does not exist separately from the special permit process when those special permits are issued by the ARB.

More importantly, Site Plan Review does not allow the special permit granting authority to grant exceptions to the zoning bylaw that would otherwise require a variance. Town Counsel cannot provide any examples where courts have said otherwise. Thus, even though they are not relevant to EDR special permits issued by Arlington’s ARB, none of the court cases Town Counsel cites for communities that do have Site Plan Review do that.

3.3 Town Counsel Falsely Claims that EDR Has Been Used in the Past to Grant Exceptions to the Zoning Bylaw

As the Chair of the ARB at the time of the Brigham’s redevelopment (Docket 3386), I take particular exception to Town Counsel’s claim that an EDR condition was used to “carve out exceptions to zoning bylaw requirements” for open space. This claim is completely false.

In 2010, town officials had far greater respect for the town’s zoning bylaw than they do today. They did not try to convince the ARB that it could use the EDR special permit process to allow violations of the dimensional and density requirements of the zoning bylaw when variances were required. There were, in fact, several such violations in the Brigham’s redevelopment proposal. The applicant followed the procedures laid out in the zoning bylaw and obtained the necessary variances from the Zoning Board of Appeals as described in the ARB’s opinion⁶.

A variance was not needed to meet the open space requirements because the submitted plans met the requirement for usable open space and far exceeded the requirement for landscaped

⁵ See: https://masscptc.org/docs/core-ocs/Site%20Plan%20Review%20Module2%201_.pdf
As noted in the Conclusion: *Too many cities and towns confuse site plan review and special permits.*

⁶ See the second paragraph of Attachment F to Town Counsel’s memo

open space (See Attachment 1). Thus, while the conditions in the permit to provide public access to landscaped open space near the bike path, improvements and access to a pocket park near the high school, and the right of the public to cross the site to both of these areas certainly supported EDR-3 (Open Space), in no way did these conditions allow the developer an exception to the open space requirements of the zoning bylaw⁷.

Town Counsel's discussion of the special permit revision for the Common Ground restaurant is similarly nonsensical (Docket 2911). This permit was reopened due solely to the fact that the restaurant was increasing the number of seats (without changing the size or exterior of the building), and thus required more parking. The applicant simply used a long-standing provision in the zoning bylaw that allows both the ARB and ZBA to permit parking in public lots to substitute for the on-site parking requirements of the bylaw⁸. This provision has nothing to do with EDR.

The EDR criteria Town Counsel refers to in the decision for "Open Space" and "Preservation of Landscape" were completely irrelevant to the reopening of this special permit as they are not dependent on the number of seats in the restaurant. Open space does depend on the floor area, which did not change, and there were no increases in any open space non-conformities. As outlined in its rules, the ARB has the discretion to consider EDR criteria irrelevant, and often does⁹. The same does not apply to other requirements of the zoning bylaw.

4. Conclusion

Acting in his capacity as the attorney for the owner of a property for which a special permit is sought, Arlington's Town Counsel has inappropriately advised the Arlington Redevelopment Board that it may usurp the authority of the Arlington Zoning Board of Appeals to grant variances to the dimensional and density requirements of the Arlington zoning bylaw¹⁰.

He has done this by incorrectly describing Environmental Design Review as a flexibility mechanism under which certain developments are "eligible" when in fact EDR is an additional set of criteria those developments are *required* to meet before the ARB can grant a special permit.

Town Counsel is unable to cite any case law to support his claim that EDR (or even site plan review) may be used as an alternative means of granting a variance. He has cited no examples when the ARB has used or even attempted to use the EDR standards as a means of relaxing the dimensional and density requirements of the zoning bylaw. His claim that MGL 40A

⁷ Town Counsel's note that there was no existing usable open space on the site is both irrelevant and misleading for as the ARB decision states no usable open space was required for the former uses

⁸ This section (8.11 at the time) applies to public parking lots within 1000 feet of the site.

⁹ Indeed, the EDR instructions to the applicant state: "Where a particular standard is not applicable, a statement to that effect will suffice." Prior to recodification of the zoning bylaw in 2018, this same statement was in the bylaw itself under the procedures for EDR.

¹⁰ He has also improperly suggested that a mixed-use development can contain a use that would be prohibited on its own, in effect allowing use variances in Arlington where use variances are not allowed.

Section 9 grants the ARB authority to grant exceptions to the dimensional and density regulations in the zoning bylaw which otherwise would require a variance is completely false.

Town Counsel's misguided advice has serious implications for the ARB in rendering a decision on Docket 3602. The development proposed under this docket has numerous zoning violations, violations for which the ARB has no authority to grant the relief to which the developer thinks he is entitled (See Attachment 2). Thus, it would be arbitrary, capricious, and contrary to the law for the ARB to vote to grant this special permit. Until and unless these zoning violations are remedied, it will also provide aggrieved abutters an excellent basis upon which to appeal the granting of the special permit.

Attachment 1

DIMENSIONAL INFORMATION FOR PROPOSED APARTMENT USE



TOWN OF ARLINGTON
Dimensional and Parking Information
for Application to
The Zoning Board of Appeals or
The Arlington Redevelopment Board

Docket No. _____

1. Property Location 30-50 Mill Street Zone B2A
2. Owner CSB Transaction LLC Address 1374 Massachusetts Avenue
c/o Cambridge Savings Bank Cambridge, MA 02138
3. Present Use/Occupancy: No. of Dwelling Units _____ Use(s) and their Gross Floor Area
Office / Warehouse / Restaurant / 65,253 Gross S.F.
4. Proposed Use/Occupancy: No. of Dwelling Units _____ Use(s) and their Gross Floor Area
Manufacturing
116 Apartment Units with 129,997 GFA

FILL IN COMPLETELY

		Present Conditions	Proposed Conditions	Min. or Max. Required by Zoning for Proposed Use
5.	Lot Size (Sq. Ft.)	168,462	168,462	min. 20,000
6.	Frontage	79.81 Ft. 26.04 Ft.	79.81 Ft. 26.04 Ft.	min 100 Ft.
7.*	Floor Area Ratio	0.39	0.79	max. 0.80
8.*	Lot Coverage (%) (where applicable)	N/A	N/A	max. N/A
9.*	Lot Area per Dwelling Unit (Sq. Ft.)	N/A	1,452 Ft.	min. 1,450
10.	Front Yard Depth (Ft.)	31.3 Ft.	204.3 Ft.	min. 15.0 Ft.
11.	Side Yard Width (Ft.)	11.3' OVER PL	27.6 Ft.	min. 27.7 Ft.
12.	Rear Yard Depth (Ft.)	125.7 Ft.	102.4 Ft.	min. 30.0 Ft.
13.*	Height Stories	1 & 2 Stories	4 Stories Res 1 Story Podium Parking	max. 3 Stories
14.	Feet Open Space (% of G.F.A.) Landscaped (Sq. Ft.)	N.A.	59.2 FT.	max. 30 Ft.
14.	Usable (Sq. Ft.)	11.1%	50.5%	min. 10%
14.		0%	25%	min. 25%
15.	Parking Spaces (No.)	122	166	165
16.*	Parking Area Setbacks (Ft.) (where applicable)	0 Ft	7.4 FT.	min. 5.0 FT.
17.*	Loading Spaces (No.)	6	N/A	N/A
18.*	Type of Construction	N/A	N/A	N/A
19.	Distance to Nearest Principal Building (Ft.)	21.7 Ft.	115.37	min. 60 Ft.

* If information is not required in this case indicate "N/A"

Attachment 2

Zoning Violations in the Special Permit Application for 1207-1211 Mass. Ave. (Docket 3602)
(Zoning Bylaw section number follow each listed violation.)

- Hotels are not permitted in the B2 zoning district (1207 Mass. Ave.) 5.5.3 Use Regulations for Business Districts and 3.3.3 (A) Decision Criteria for special permits
- The hotel use is improperly considered to be non-residential. Hotels are listed as residential uses under Section 5.5.3 Use Regulations for Business Districts. In addition, where terms are not defined, Section 2 (Definitions) refers to the state building code: Section 310.3 of this code (IBC 2015) lists hotels and motels under Residential Group R1
- The maximum floor area ratio is exceeded. 5.5.2(A) B District Building Height and Floor Area Ratio Regulations
- Bonus provisions for floor area do not apply to lots of less than 20,000 square feet when the principal use is residential. 5.3.6(A)(2) and does not apply to lots in the B2 zoning district (1207 Mass. Ave.) in any case. 5.3.6(C). And even if it did apply, the land area planned for an easement is improperly included in the calculated maximum floor area. 5.3.6(D)(5)
- The proposal lacks the required usable open space. 5.5.2(A) B District Lot Regulations and 2. Definitions
- The proposal lacks the required landscaped open space. 5.5.2(A) B District Lot Regulations and 2. Definitions
- The step-back on the top floor of the building does not meet the requirements of the zoning bylaw. 5.3.17
- The front yard on Clark St. does not meet the requirements of the bylaw for both the building itself and the retaining wall (which is a structure subject to the yard requirements) and the applicant has not provided sufficient justification for any relief. 5.3.8(A) and 5.3.16