

ATTORNEY-CLIENT PRIVILEGE

MEMORANDUM

To: Claire Ricker, Director, Department of Planning and Community Development
From: Michael Cunningham, Town Counsel
Jaclyn Munson, Deputy Town Counsel
Date: August 28, 2024
Re: Atwood House Special Permit

Background:

On April 13, 2009, the Town’s Redevelopment Board (“ARB”) issued its decision (the “Decision”) approving CVS’ (“Applicant”) request for a special permit subject to environmental design review (“EDR”) for the premises located at 833 Massachusetts Avenue in Arlington, MA (the “Site”). See Docket 3348. On the Site stands the Atwood House, an historical structure within Town limits.

The ARB Decision expressly stated that “[a]ny modification of the Atwood House [would] require an amendment” of the special permit issued. See Decision, EDR-10. The ARB subsequently re-opened the special permit by way of new decisions dated November 4, 2019 (the “2019 Decision”). The 2019 Decision, however, was re-opened to permit the Applicant’s installation of new consistent with CVS branding. See 2019 Decision at 2. Upon information and belief, the ARB has not previously re-opened the special permit for the Site to consider any modifications of its prior conditions regarding the Atwood House.

Question presented:

Can the ARB open a *new* special permit for purposes of issuing a decision regarding the proposed demolition of the Atwood House, or must the ARB re-open the original special permit?

Brief answer:

The ARB may open a new special permit so long as it amends the original special permit to reflect the modification.

Legal Analysis:

I. ARB authority

The ARB was created by state law (Chapter 738 of the Acts of 1971, amending Chapter 503 of the Acts of 1952, the Town Manager Act) and has authority to issue special permits for projects that require an EDR pursuant to the Town’s Zoning Bylaw, s. 3.4. As a result, the ARB is a ‘special permit granting authority’ under the state’s zoning law, M.G.L. ch. 40A.

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- II. Although the ARB has the authority to modify a special permit, it has the discretion to open a new special permit.

A condition imposed by the ARB in connection with issuing a special permit may later be modified or eliminated by the planning board. Vaillancourt v. Gray Wolf Realty, LLC, 29 Mass. L. Rep. 496 (2012). This means that the ARB has the authority to both impose conditions and modify – or even eliminate– those conditions thereafter. Id. The discretion for the ARB to modify a special permit is further enshrined in the spirit of ch. 40A, s. 11 (“Upon the granting of a variance or special permit, or any extension, *modification* or renewal thereof...”; “A special permit, or any extension, *modification* or renewal thereof ...”) (emphasis added).

Notably, there is nothing contained in 40A that *requires* the ARB to modify a special permit, rather than open a new special permit. Conversely, the spirit of 40A and longstanding case law confers upon the ARB broad discretion to deny the modification of a special permit.

This is because the judicial review of ARB decisions “involves a highly deferential bow to local control over community planning,” Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 73, 794 N.E.2d 1198 (2003), thereby constraining the power of courts to order a modification of the ARB’s decision. Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Bd. of Appeal of Billerica, 454 Mass. 374, 382 (2009). This is because modifications “should be analyzed and approved by the [ARB], which is better equipped than a court to consider such matters.” Id., *citing* Board of Appeals of Dedham v. Corporation Tifereth Israel, 7 Mass. App. Ct. 876, 876 (1979).

Although the special permit issued by the ARB has not yet lapsed (upon information and belief), meaning that the ARB *could* reopen it for purposes of issuing a decision regarding the demolition of the Atwood House, the ARB is not *required* to modify that special permit. This decision is squarely within the discretion of the ARB. See Barlow v. Planning Bd of Wayland, 64 Mass.App.Ct 314, 320 (2005) (“Whether we term the application as a modification of a special permit or a new one, the matter involves the discretion of the planning board”).

Therefore, the ARB may open a new permit for the Atwood House.

Conclusion:

The ARB has the authority to open a new permit for the Atwood House. In doing so, it must comply with any obligations under ch. 40A, the ARB’s rules and regulations and the Town’s Zoning Bylaw.