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## CITY OF CAMBRIDGE

Office of the City Solicitor  
795 Massachusetts Avenue  
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September 7, 2022

Yi-An Huang  
City Manager  
Cambridge City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

***Re: Response to Council Order No. O-15 of 8/1/22 Re: Report on a Legal Opinion on Whether a Tiered Linkage Fee System by Square Footage and/or a Marginal Rate System Would be Permitted Under the Current Petition Parameters and What was Previously Advertised.***

Dear Mr. Huang:

I am writing in response to Council Order No. O-15 of 8/1/22 which seeks a legal opinion regarding whether a tiered linkage fee system by square footage and/or a marginal rate system would be permitted under the current Incentive Zoning Rate Increase Zoning Petition (the "Petition") parameters, and what was previously advertised. As discussed further below, if the Council were to amend the Petition to add a tiered linkage fee system or a marginal rate system, those changes would likely be found to be changes to the fundamental character of the Petition, and therefore require that the Petition be re-filed and re-advertised.

Also, as discussed below, I recommend that a tiered linkage fee system and/or a marginal rate system be studied in a new nexus study before amending the Incentive Zoning Provisions of Zoning Ordinance to incorporate these types of linkage fee systems.

### A. **Background**

#### 1. **Incentive Zoning Rate Increase Zoning Petition**

The Petition seeks to amend Article 11.000, Section 11.202(b) of the Zoning Ordinance to increase the Housing Contribution Rate to thirty-three dollars and thirty-four cents (\$33.34) per square foot. Section 11.202 contains the Incentive Zoning Provisions of the Zoning Ordinance, which require that a Housing Contribution payment be made based on multiplying the Housing Contribution Rate by the gross floor area devoted to the uses that qualify a new development as an Incentive Project, as defined in Article 2.000 of the Zoning Ordinance. The

current Housing Contribution Rate is \$21.02. The Petition does not otherwise amend the Incentive Zoning Provisions.

2. **July 27, 2022 Ordinance Committee**

On July 27, 2022, the Ordinance Committee opened the hearing on the Petition. At that meeting, two possible amendments to the Petition were discussed. One possible amendment was amending the Petition to include tiered linkage fee system where different Housing Contribution Rates would be applied to different size thresholds. For example, under a tiered linkage fee system developments that are 30,000 to 50,000 square feet could pay \$10 per square foot, developments that are 50,000 to 100,000 square feet could pay \$20 per square foot, and developments that are greater than 100,000 square feet could pay \$30 per square foot. Under that example, a 15,000 square foot development would not pay a Housing Contribution Payment, a 40,000 square foot development would pay a payment based on a \$10 Housing Contribution Rate, a 75,000 square foot development would pay a payment based on a \$20 Housing Contribution Rate, and a 100,001 square foot development would pay a payment based on a \$30 Housing Contribution Rate.

The other possible amendment discussed was a marginal rate system which would apply one rate to the first X amount of square feet per building, then apply a higher rate to the next Y amount of square feet per building, and so on. As an example, a marginal rate system could have no charge for the first 30,000 feet of any Incentive Project, then a rate of \$10 per square foot for the next 50,000 square feet of any Incentive Project, then a rate of \$20 per square foot for the next 50,000 square feet of any Incentive Project, and finally a rate of \$30 per square foot for any square feet over 120,000 square feet. Under that example, for an Incentive Project that consists of 150,000 square feet, it would not pay anything for 30,000 square feet, it would pay \$10 per square foot for 50,000 square feet, it would pay \$20 per square foot for the next 50,000 square feet, and it would pay \$30 per square foot for the final 20,000 square feet.

B. **Discussion**

1. **Would the possible amendments discussed at the July 27, 2022 Ordinance Committee Meeting require that the Petition be re-filed and re-advertised?**

The Council has requested an opinion as to whether the Petition could be amended to change the Incentive Zoning Provisions to include a tiered linkage fee system and/or a marginal rate system. The Zoning Act, G.L. c.40A, §5, ¶2, requires that notice of the public hearings on a petition include “the time and place of [the] public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected.” The courts have held that “when changes are made to a proposal during the legislative process, whether new notice and hearing are required depends on the degree of similarity between the amendment originally proposed and the one ultimately recommended or adopted. Specifically, new notice and hearing are not required if the changes to the original proposal are ‘not of a fundamental character.’” Penn v. Town of Barnstable, 96 Mass. App. Ct. 205, 210–11, review denied sub nom. Penn v. Town of Barnstable, 483 Mass. 1108 (2019); quoting Burlington v. Dunn, 318 Mass. 216, 218, 61 N.E.2d 243 (1945).

The purpose of the notice requirement is to ensure that current views of local residents are taken into account by a city council when it considers a proposed amendment to a zoning ordinance. Gricus v. Superintendent & Inspector of Buildings of Cambridge, 345 Mass. 687 (1963). The notice gives residents an opportunity to know what zoning amendment will be considered by the Council and gives residents an opportunity to offer input in that process if they choose to do so. If the fundamental character of a zoning petition changes after advertisement, but before the Council votes, the purpose of the notice requirement is thwarted because residents have not had an opportunity to offer input on the fundamentally amended petition.

The Massachusetts Appeals Court has held that changes that clarified elements of an initial zoning petition were not changes to the fundamental character of the petition. Penn, 96 Mass. App. Ct. at 211-212. In that case, the original petition allowed for the as-of-right operation of commercial parking lots through the creation of an overlay district, and the amendments clarified certain elements of the original petition and thus were “amendments that merely facilitated enforcement” of the zoning proposed in the original petition. Id.

Here it is likely that a court would find that the two proposed amendments explained above would be changes to the fundamental character of the Petition that would require re-filing and re-advertisement of the Petition. The Petition amends the Housing Contribution Rate that is applied to all Incentive Projects from \$21.02 to \$33.34 per square foot. That is the only change to the Zoning Ordinance in the Petition. An Incentive Project is defined as “any new development of at least thirty thousand (30,000) square feet of Gross Floor Area devoted to one or more of” certain stated uses. Article 2.000 of the Zoning Ordinance. The proposed amendments would either amend the definition of “Zoning Project” and/or would amend Section 11.202 of the Zoning Ordinance to establish a tiered linkage fee system and/or a marginal rate system. Such changes are more than just clarifications and are instead the imposition of new rate systems.

Although the Zoning Ordinance currently treats new developments of at least 30,000 square feet differently than smaller new developments by excluding smaller new developments from the definition of Incentive Project, the Petition does not address what size projects are subject to the Housing Contribution rate, but only increases the Housing Contribution Rate. The public has not had notice that the proposed amendments would do anything other than increase the payment required for buildings over a certain size from one flat rate to another flat rate, yet under the new proposed scheme, there would be multiple rates applicable to buildings of different sizes. In my opinion, these changes would likely be deemed by a court to be ones that sufficiently alter the fundamental character of the petition that they require new notice, and the amendments should therefore be re-filed and re-advertised as a new zoning petition.

2. **Do the possible amendments discussed at the July 27, 2022 Ordinance Committee Meeting require a new nexus study?**

Although Council Order No. O-15 of 8/1/22 did not address this, there was some discussion at the July 27, 2022 Ordinance Committee meeting as to whether the proposed amendments to include a tiered linkage fee system and/or a marginal rate system would require a

new nexus study. I am providing an analysis on this question to help inform the Ordinance Committee as it determines next steps. As set forth below, I recommend that the Council obtain a new nexus study to study these rate systems to determine whether there is a sufficient nexus and proportionality before proceeding with these amendments.

A linkage fee is an exaction that is paid by a developer to mitigate impacts from a development. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); “Low and Moderate-Income Housing: The Anti-Snob Zoning Act, Linkage, Inclusionary Housing and Incentive Zoning,” Massachusetts Zoning Manual, MA-CLE 5-1 (2021). To pass constitutional muster, there must be an essential nexus between the exaction and a legitimate public interest, and a rough proportionality between the impact of the development and the particular exaction. Dolan v. City of Tigard, 512 U.S. 374 (1994). If challenged, the City has the burden of proof. Therefore, in order to impose a linkage fee, the City has to have evidence that there is a nexus between the linkage fee and a legitimate public interest, and that the linkage fee being collected is roughly proportional to the impact the development will have on that public interest. A nexus study provides evidence the City Council can rely on and serves as the basis for imposition of a linkage fee.

The Cambridge Incentive Zoning Ordinance Nexus Study, dated December, 2019 (“2019 Nexus Study”), did not study whether varying rates based on building size, i.e. a tiered linkage fee system and/or a marginal rate system, would be roughly proportional to the impacts those different sized buildings will have on the need for affordable housing. The analysis to support a linkage fee is not whether the developer of a larger building has the means to pay a higher rate, but whether imposing a higher rate on larger buildings and a lower rate on smaller buildings is proportional to the impact those buildings have on the need for affordable housing. Therefore, I recommend that a tiered linkage fee system and/or a marginal rate system be studied in a new nexus study before the Council considers whether to amend the Incentive Zoning Provisions of the Zoning Ordinance to incorporate a tiered linkage fee system and/or a marginal rate system.<sup>1</sup>

I will be available to discuss this opinion and answer questions at the September 7, 2022 Ordinance Committee meeting.

Very truly yours,



Nancy E. Glowa  
City Solicitor

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<sup>1</sup> Please note that Section 11.202(d) of the Zoning Ordinance states that the “City shall initiate a reevaluation of the Housing Contribution Rate and any other aspect of these Incentive Zoning Provisions at an interval of no less than three (3) years from the time the rate was last amended by the City Council.” The policy reason behind this provision is that the 3-year period provides predictability for development and allows for time to pass to be able to understand impacts from a particular change before proposing a new change. This section can be amended but would be a fundamental change from the pending Petition that would require re-filing and re-advertisement.