

2030018
1 of 6

CITY OF SOMERVILLE
INTEROFFICE MEMORANDUM

To: Ald. Mark Niedergang, Chair, Legislative Matters Committee
Ald. Jefferson Thomas Scott
Members of the Board of Aldermen

From: Eileen M. McGettigan, Special Counsel

Re: Neighborhood Council Recognition Questions

Date: January 29, 2018

I. BACKGROUND

At the January 18, 2018 Legislative Matters Committee meeting, a letter from the Union Square Neighborhood Council (“USNC”) was introduced which requested recognition of USNC as the designated party to negotiate a Community Benefits Agreement (“CBA”) with Union Square Station Associates (“US2”), the Union Square Master Developer, and discussion of a designated role for USNC as a representative voice for the neighborhood in pending and future proceedings of significance before City departments, boards, and commissions.

In furtherance of the discussion and in support of USNC’s request, a resolution was submitted that the Board of Aldermen formally recognize USNC as a duly formed body ready to negotiate a CBA and urge the Administration to meet with the Board to discuss a designated role for USNC.

You have asked for an opinion on the legal issues implicated in the recognition by the Board of Aldermen of a neighborhood council. In addressing the topic, it will be helpful to revisit prior discussions regarding the formation of the neighborhood council itself and its role in the draft Community Benefits Ordinance.

The Development Covenant requires that US2, among other obligations, make payments to a Community Benefits fund. Paragraph 7 of the Covenant requires that US2 “negotiate in good faith a Community Benefits Agreement (“CBA”) with the Union Square neighborhood council or interim council, when such council has been duly formed and recognized in accordance with the City’s Community Benefits Committee ordinance to be promulgated by the City”. A draft Community Benefits Ordinance (“CBO”) was initially submitted to the Board of

Aldermen on April 13, 2017 to create a transparent public process for the equitable distribution of community benefits funds received by any developers, to be distributed both citywide and in the neighborhood most affected by a particular development. The CBO process was modeled on the Community Preservation Act process and was intended to put in place a mechanism that would accommodate developer contributions in other neighborhoods, as well as the potential formation of other neighborhood councils.

At the time of the CBO's first introduction, the City's LOCUS community process was winding down, and participants in the process had begun to consider organizing as a neighborhood council. Accordingly, the draft CBO acknowledged these efforts by incorporating a role in the funding recommendation process for a self-organized neighborhood council, provided that the council was an

“open, inclusive, transparent and duly democratic organization or non-profit organization” [...], organized with a corporate purpose to maintain and improve the health, safety and welfare of all Somerville residents and to implement the goals of the city's comprehensive plan and the neighborhood plan adopted for the neighborhood represented, with special attention given to the members of the community for whom quality of life and permanence in the community may be harder to attain, including environmental justice populations and residents facing mobility, age and/or other personal and family challenges”¹ CBO , Section V.

Community organizers submitted a new, competing version of the CBO which enlarged the role of the neighborhood council and conferred greater power on it, including the ability to mandate inclusion of council funding priorities and to withhold special permits in the absence of a negotiated community benefits agreement between a developer and neighborhood council. The enlarged role and increased powers raised significant legal issues, some of which would serve to thwart the council's stated goals. Similarly, the question of recognition of the council itself requires navigating carefully through the same legal minefield.

II. QUESTIONS PRESENTED

1. May the Board of Aldermen act now to recognize USNC in the absence of a Community Benefits Ordinance, formal recognition process or designated role for USNC?

¹ If a particular neighborhood had no self-organized council, a neighborhood advisory committee would be appointed by the Mayor to represent neighborhood interests in the funding process until such time as a neighborhood council formed.

2. Will passage of a Community Benefits Ordinance or other ordinance setting forth a recognition process by the Board of Aldermen cause USNC to be considered a public body?
3. Will recognition of USNC by the Board of Aldermen raise federal or state constitutional issues?

III. BRIEF ANSWERS

1. In the absence of a Community Benefits Ordinance, the Board of Aldermen currently has no mechanism to recognize USNC. Moreover, the only potential role for USNC at this time is to be designated as the negotiating body for the CBA; this role arises not by ordinance but by contract.
2. Whether USNC will be considered to be a public body depends upon the nature of the designated role conferred upon USNC by the Board of Aldermen and whether any traditional governmental functions are delegated to it.
3. Recognition of USNC by the Board of Aldermen in anything other than an advisory capacity could result in USNC's being restricted in what it may negotiate for in a CBA. Conversely, as a private entity, the state Anti-Aid amendment may prohibit the City from providing direct funding to USNC.

IV. DISCUSSION

1. May the Board of Aldermen act now to recognize USNC in the absence of a formal recognition process or designated role for USNC?

In the absence of a Community Benefits Ordinance, the only existing potential role for USNC recognition at this time is as the entity designated to negotiate a CBA with the Master Developer. This role arises not by ordinance but pursuant to the Development Covenant between the City and the Union Square Master Developer. While Paragraph 7 of the Development Covenant anticipates that the designated community group will negotiate "when such council has been duly formed and recognized in accordance with the City's Community Benefits Committee ordinance to be promulgated by the City", the CBO, which provides guidance on the type of organization which would be recognized, has yet to be ordained, although a group has successfully self-organized. Accordingly, in order to recognize USNC, the Aldermen would need to either adopt a Community Benefits Ordinance or create an ordinance which would merely set forth the qualifications of a self-organized neighborhood council and a process by which one might be recognized solely for the purpose of negotiating a community benefits agreement.

203098
4 of 6

2. Will passage of a Community Benefits Ordinance or other ordinance setting forth a recognition process by the Board of Aldermen cause USNC to be considered a public body?

A fundamental question concerning the Aldermanic recognition of a neighborhood council is whether the act of recognizing the council will have the effect of deeming the council to be a public body. Certain actions by the City may result in the council's being deemed a public body even if, where, as here, a neighborhood council has self-organized as a private entity. Cases interpreting the term "governmental body" under the Open Meeting Law provide helpful guidance in this regard. In Connelly v. School Committee of Hanover, an advisory committee was established by the town's superintendent of schools solely to assist him in selecting candidates for a vacant high school principal position. 409 Mass. 232 (1991). The Supreme Judicial Court ("SJC") held that the advisory committee was not a public body because it was neither created by a governmental body nor established by statute or ordinance. *Id.* at 237-8. Another critical factor as to whether a body is considered public is whether the entity has been given traditional governmental powers. In District Attorney for the Northern District v. Board of Trustees of the Leonard Morse Hospital, the SJC held that the hospital's Board of Trustees was not a public body, noting that the board lacked traditional governmental powers such as "the power to regulate coercively individual and group conduct" or "the authority to control any other governmental authority". 389 Mass. 729, 733 (1983).

Thus, any ordinance adopted by the Board of Aldermen should be careful to merely "recognize" the council rather than to create it. In addition, if the Board of Aldermen chooses to ordain the pending CBO, it must be mindful that if a neighborhood council is empowered with essentially governmental functions, the privately organized council will be deemed to be a public body.² In our opinion, as in the Connelly case, serving in an advisory capacity would likely insulate the neighborhood council from a challenge that it is a public body.

² As a public body, the neighborhood council would be subject to the requirements of the Open Meeting Law (requiring, among other things, advance posted notice of meetings, the keeping of minutes, meeting in an ADA compliant venue, etc.) see M.G.L. c. 30A, sec. 18-25; and the Public Records Law, M.G.L. c. 66, sec. 10, which would involve retaining emails and texts, and producing copies thereof in response to public records requests, including but not limited to those sent or received on personal devices. In addition, as a public body, the neighborhood council would be subject to the state conflicts of interest law, which may limit or severely restrict its ability to receive any community benefits funds if it is also taking official action regarding those funds. G.L.c. 268A, sec. 19. Please see our prior handout which compares and contrasts legal requirements applicable to public bodies versus private entities.

3. Will recognition of USNC by the Board of Aldermen raise federal or state constitutional issues?

Potential constitutional issues may arise depending upon the type of recognition accorded USNC by the Board of Aldermen. Federal constitutional issues are implicated if the Board of Aldermen confers enough governmental functions upon USNC such that it is deemed a public body and therefore, a state actor. Conversely, state constitutional issues, specifically the Anti-Aid Amendment, come into play if USNC remains a private entity.

- a. Federal Constitutional Issues

In addition to state ethics, public records, open meeting and other state law concerns, if the recognition accorded a neighborhood council deems it to be a public body, federal constitution law may negatively impact a council's ability to negotiate a community benefits agreement. As a public body, the neighborhood council would be limited in the exactions it could require of a developer in a CBA. See Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994). The Nollan-Dolan test requires that exactions (1) have a substantial nexus to the impacts of the development; and (2) be roughly proportional in degree to those impacts. Importantly, the Nollan/Dolan test applies only to government action and does not apply to CBAs initiated, negotiated, signed, and enforced by community groups without municipal involvement. Assuming Aldermanic action does not deem the council to be a public body, in order to preserve the council's negotiating ability, the City should also minimize its involvement in the workings of the council and distance itself from any CBA negotiation processes.

- b. State Constitutional Issues

If empowerment by the Board of Aldermen does not deem a neighborhood council to be a public body, and the council is a private non-profit organization, the City is prohibited by the Anti-Aid amendment of the Massachusetts Constitution from providing assistance to private organizations. Art. 18, 46 & 103. The Anti-Aid amendment provides in relevant part:

“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any [. . .] charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents.”

Even indirect benefit to a non-profit organization may fall afoul of the amendment. See Bloom v. School Committee of Springfield, 376 Mass. 35, 37 (1978) (loan of textbooks to private

20 3098
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schools). Use of city staff time to further the mission of the private organization is also impermissible under the Anti-Aid Amendment and in certain cases may also be a violation under the state ethics law. See, e.g. State Ethics Commission, Public Enforcement Letter 92-3; EC-COI-98-2. Therefore, any ordinance which recognizes and establishes a role for a neighborhood council may not award municipal funding, or in kind services or materials, for its support.

V. CONCLUSION

In the absence of a Community Benefits Ordinance, the Board of Aldermen has no mechanism with which to recognize a neighborhood council, nor is there a defined role for the council other than as the designated negotiating entity for a CBA. If the Board of Aldermen opt to finalize the pending CBO, or if they wish to create an ordinance establishing a recognition process, it must limit the governmental functions it bestows on a council or else risk having the private entity be deemed a public body, which could significantly hamper the council in its negotiations of a CBA and ultimately restrict the ability of a neighborhood council to accomplish its goals. Moreover, any City assistance to a private non-profit neighborhood council, whether monetary or in kind, must benefit the community as a whole and may not directly support or assist the council in its operations in order to pass muster under the Anti-Aid Amendment.