CITY OF SOMERVILLE
INTEROFFICE MEMORANDUM

To: Ald. Mary Jo Rossetti, Chair, Legislative Matters Committee
Members of the Board of Aldermen

From: Eileen M. McGettigan, Special Counsel

Re: City Support of Neighborhood Councils: Federal and State Constitutional Concerns

Date: August 29, 2017

You have asked for a legal opinion as to the impact of City support for neighborhood councils. A fundamental question concerning the creation of neighborhood councils is whether the council will be a public body or a private entity. This designation can come about either by the council's own election or by actions of the City. Federal and state constitutional limitations on either choice require the preservation of a very delicate balance in the formation and empowerment of the neighborhood council. Even if a neighborhood council self-organizes as a private entity, actions and assistance by the City may result in the council's being deemed a public body. Our prior memorandum and handout have attempted to summarize the trade-offs present between formation as a public versus a private entity. This memorandum addresses the issue of City actions which may impact the public body/private entity designation and the resulting constitutional limitations which may arise.

I. Federal Constitutional Limitations on Actions by Public Bodies

In general, the more the City involves itself in the neighborhood council and community benefits agreement ("CBA") processes, the more likely the council will be deemed a public body, even if it has self-organized as a private non-profit entity. 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.

A second way that the City's actions may result in a self-organized private non-profit entity neighborhood council being deemed a public body is if an ordinance empowers the

neighborhood council with essentially governmental functions. Governmental functions would include, but not be limited to, any control over funding appropriations, a requirement that a CBA be negotiated with a neighborhood council prior to issuance of a permit, or other delegation of permitting authority to the council, such as the ability to revoke a permit in the absence of a CBA. In our opinion, serving in an advisory capacity would likely insulate the neighborhood council from a challenge that they are a public body subject to Nollan/Dolan constitutional restrictions.

II. State Constitutional Limitations on City Assistance to Private Non-Profit Entities

While City involvement may inadvertently result in a private non-profit council being considered a public body subject to federal constitutional restrictions, if the council is truly 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 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 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.

In order to determine whether the public assistance violates the amendment, a three part test is applied. First, there must be a permissible public purpose, rather than a purpose to aid the non-profit entity as such. Helmes v. Commonwealth, 406 Mass. 873, 877 (1990). Second, the assistance provided must not substantially aid the entity. Id. Finally, the use of public resources must not be abusive or unfair, politically or economically, but for the general good of all inhabitants of the municipality. In Helmes, the state provided substantial funds to the charitable corporation which had purchased the battleship *Massachusetts* from the U.S. Navy for the purpose of maintaining it and creating a war memorial. Although the Supreme Judicial Court found that the aid provided to the organization was substantial, in that it could not renovate the ship without the funds, the monies provided did not specifically enrich the non-profit, but would instead benefit the general public by creating a war memorial and educational exhibit. Id. at 878.

In conclusion, City involvement in the neighborhood council and CBA processes raises significant legal concerns which may 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.