

CITY OF MARLBOROUGH MEETING POSTING

Meeting Name: City Council Urban Affairs Committee

Date: October 4, 2016

Time: 5:30 PM

Location: City Council Chamber, 2nd Floor, City Hall, 140 Main Street

RECEIVED
CITY CLERK'S OFFICE
CITY OF MARLBOROUGH

2016 SEP 30 P 12: 09

07-25-2016 – **Order No. 16-1006631A**: Communication from Mirick O'Connell on behalf of BSL Marlborough Development LLC regarding Proposed Zoning Amendment to the City of Marlborough Zoning Ordinance Allowing Assisted Living Facilities along Bolton Street.

-REFER TO URBAN AFFAIRS COMMITTEE

-PUBLIC HEARING: SEPTEMBER 12, 2016

THE LISTING OF TOPICS THAT THE CHAIR REASONABLY ANTICIPATES WILL BE DISCUSSED AT THE MEETING IS NOT INTENDED AS A GUARANTEE OF THE TOPICS THAT WILL HAVE BEEN DISCUSSED. NOT ALL TOPICS LISTED MAY IN FACT BE DISCUSSED, AND OTHER TOPICS NOT LISTED MAY ALSO BE BROUGHT UP FOR DISCUSSION TO THE EXTENT PERMITTED BY LAW.

The public should take due notice that the Marlborough City Council may have a quorum in attendance due to Standing Committees of the City Council consisting of both voting and non-voting members. However, members attending this duly posted meeting are participating and deliberating only in conjunction with the business of the Standing Committee.

Electronic devices, including laptops, cell phones, pagers, and PDAs must be turned off or put in silent mode upon entering the City Council Chamber, and any person violating this rule shall be asked to leave the chamber. Express authorization to utilize such devices may be granted by the President for recordkeeping purposes.



IN CITY COUNCIL

JULY 25, 2016

Marlborough, Mass., _____

ORDERED:

Be it ordained by the City Council of the City of Marlborough that the Code of the City of Marlborough, as most recently amended, be further amended as follows:

1. In Section 650-5.B, amending the definition of "Boardinghouse or Lodging House" to read as follows (new text underlined):

BOARDINGHOUSE or LODGING HOUSE

A building or a portion thereof in which rooms or suites of rooms are let for fee as places of human habitation, either permanently or transiently, to four or more persons or which requires a license as required by MGL c. 140, § 22 et seq., as amended. The term "boardinghouse or lodging house" shall exclude convalescent homes, nursing homes, assisted living facilities, shelters, hotels and motels which are licensed as such pursuant to applicable state law.

2. Adding to the Table of Use Regulations, Section 650-17, a category for "Assisted Living Facilities" under "Residential Uses", as follows:

		Zoning District Abbreviations											
		RR	A-1	A-2	A-3	RB	RC	RCR	B	CA	LI	I	MV
Residential Use													
Assisted Living Facilities		SP	SP	SP	SP	SP	N	N	N	N	N	N	N

3. Adding to Section 650-18, Conditions for Use, new subsection 650-18.A(44) as follows:

(44) Assisted living facilities shall only be located on lots with an area of at least 10 acres and with at least 250 feet of frontage along Route 85.

4. Adding to Section 650-48.A a new item (16) as follows:

(16) Assisted living facility: half a space for each bed.

Be and is herewith refer to **URBAN AFFAIRS COMMITTEE, PLANNING BOARD, AND ADVERTISE PUBLIC HEARING FOR MONDAY, SEPTEMBER 12, 2016.**

ADOPTED

ORDER NO. 16-1006631



MIRICK O'CONNELL

ATTORNEYS AT LAW

14

David K. McCay
Mirick O'Connell
1800 West Park Drive, Suite 400
Westborough, MA 01581-3926
dmccay@mirickoconnell.com
t 508.860.1460
f 508.983.6273

July 21, 2016

HAND DELIVERED

Councilor Edward Clancy, President
Marlborough City Council
City Hall
Marlborough, MA 01752

VA
PH
PB
ADV
9/12/16

RECEIVED
CITY CLERK'S OFFICE
CITY OF MARLBOROUGH
2016 JUL 21 A 10:57

Re: Proposed Zoning Amendment Allowing Assisted Living Facilities

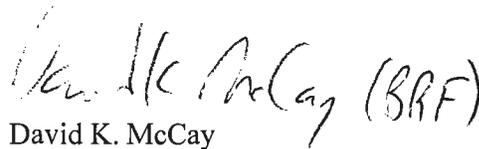
Dear Councilor Clancy:

I represent BSL Marlborough Development LLC, the prospective buyer of approximately 15 acres of land located on the eastern side of Route 85 (Bolton Street) at the southern corner of Poirier Drive, the entrance road to Marlborough High School. The land is currently owned by Richard and Jill Cochrane, and is located entirely within the Residence A-2 Zoning District.

As noted in the enclosed Letter of Authorization, Richard and Jill Cochrane, whose property would be affected by this proposal, request in accordance with M.G.L. c. 40A, § 5 that the City Council consider amending the Zoning Ordinance as specified in the attached Proposed Order, to allow assisted living facilities in certain zoning districts. Please refer this matter to the Planning Board and take the appropriate steps for review by the City Council.

Pursuant to City Council Order No. 91-3822A, I am notifying you that Mirick O'Connell is representing BSL Marlborough Development LLC in this matter before the City Council.

Very truly yours,


David K. McCay

DKM/ljg
Enclosures

cc: Client
Arthur P. Bergeron, Esq.
Brian R. Falk, Esq.

MIRICK, O'CONNELL, DEMALLIE & LOUGEE, LLP

WORCESTER | WESTBOROUGH | BOSTON

www.mirickoconnell.com

PROPOSED CITY COUNCIL ORDER

ORDERED:

Be it ordained by the City Council of the City of Marlborough that the Code of the City of Marlborough, as most recently amended, be further amended as follows:

1. In Section 650-5.B, amending the definition of "Boardinghouse or Lodging House" to read as follows (new text underlined):

BOARDINGHOUSE or LODGING HOUSE

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2. Adding to the Table of Use Regulations, Section 650-17, a category for "Assisted Living Facilities" under "Residential Uses", as follows:

	Zoning District Abbreviations											
	RR	A-1	A-2	A-3	RB	RC	RCR	B	CA	LI	I	MV
Residential Use												
Assisted Living Facilities	SP	SP	SP	SP	SP	N	N	N	N	N	N	N

3. Adding to Section 650-18, Conditions for Use, new subsection 650-18.A(44) as follows:

(44) Assisted living facilities shall only be located on lots with an area of at least 10 acres and with at least 250 feet of frontage along Route 85.

4. Adding to Section 650-48.A a new item (16) as follows:

(16) Assisted living facility: half a space for each bed.

ADOPTED
In City Council
Order No. 16-

Adopted

Approved by Mayor
Arthur G. Vigeant
Date:

A TRUE COPY
ATTEST:

Richard and Jill Cochrane
2 Turtle Creek Circle
Shrewsbury, MA 01545

June 15, 2016

Councilor Edward Clancy, President
Marlborough City Council
City Hall
Marlborough, MA 01752

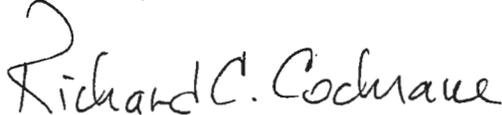
RE: Proposed Zoning Amendment Allowing Assisted Living Facilities

Dear Councilor Clancy:

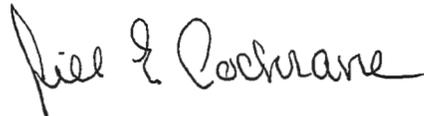
Please be advised that the undersigned, Richard C. Cochrane and Jill E. Cochrane, are the owners of the properties located at 421 Bolton Street, Assessors Map 30, Parcels 13 and 14 (the "Property"), and do hereby authorize Mirick O'Connell, on behalf of BSL Marlborough Development LLC, to submit to the City Council for consideration a proposed zoning amendment allowing assisted living facilities, which would affect the Property.

Thank you for your time and attention to this matter.

Sincerely,



Richard C. Cochrane



Jill E. Cochrane

**CITY OF MARLBOROUGH
OFFICE OF THE CITY CLERK
MARLBOROUGH, MASSACHUSETTS 01752**

LEGAL NOTICE

Public Hearing –Proposed Zoning Amendment, 650-5.B, 650-17, 650-18.A(44) and 650-48.A.

Notice is hereby given that the City Council of the City of Marlborough will hold a public hearing on **Monday, September 12 at 8:00 P.M.** in the City Council Chamber, 2nd floor, City Hall, 140 Main Street, Marlborough, Massachusetts to amend Section 650-5.B, 650-17, 650-18.A(44) and 650-48.A.

Be it ordained by the City Council of the City of Marlborough that the Code of the City of Marlborough, as most recently amended, be further amended as follows:

1. In Section 650-5.B, amending the definition of "Boardinghouse or Lodging House" to read as follows (new text underlined):

BOARDINGHOUSE or LODGING HOUSE

A building or a portion thereof in which rooms or suites of rooms are let for fee as places of human habitation, either permanently or transiently, to four or more persons or which requires a license as required by MGL c. 140, § 22 et seq., as amended. The term "boardinghouse or lodging house" shall exclude convalescent homes, nursing homes, assisted living facilities, shelters, hotels and motels which are licensed as such pursuant to applicable state law.

2. Adding to the Table of Use Regulations, Section 650-17, a category for "Assisted Living Facilities" under "Residential Uses", as follows:

		Zoning District Abbreviations											
		RR	A-1	A-2	A-3	RB	RC	RCR	B	CA	LI	I	MV
Residential Use													
Assisted Living Facilities		SP	SP	SP	SP	SP	N	N	N	N	N	N	N

3. Adding to Section 650-18, Conditions for Use, new subsection 650-18.A(44) as follows:
 - (44) Assisted living facilities shall only be located on lots with an area of at least 10 acres and with at least 250 feet of frontage along Route 85.
4. Adding to Section 650-48.A a new item (16) as follows:
 - (16) Assisted living facility: half a space for each bed.

***Per Order of the City Council
#16-1006631***

City of Marlborough
Commonwealth of Massachusetts

RECEIVED
CITY OF MARLBOROUGH
2016 SEP 29 A 10:10



PLANNING BOARD

Barbara L. Fenby, Chair
Colleen M. Hughes
Philip J. Hodge
Sean N. Fay
Shawn McCarthy
Brian DuPont

Melissa Peltier - Secretary
Phone: (508) 460-3769
Fax: (508) 460-3736
Email: MPeltier@marlborough-ma.gov

September 29, 2016

City Council President Clancy & Members
140 Main Street
Marlborough, MA 01752

RE: Proposed Zoning Amendment
421 Bolton Street
City Council Order #16-1006631

President Clancy & Members:

At the regular meeting of the Marlborough Planning Board on September 26, 2016, the Board took the following action regarding the proposed amendment to the City of Marlborough Zoning Ordinance, proposed by BSL Marlborough Development LLC ("BSL") on behalf of Richard and Jill Cochrane, owners of the 2 lots identified as Marlborough Assessors Maps 30, Parcels 13 and 14 (together, "421 Bolton Street").

As the proposed zoning amendment would amend 4 separate sections of the Zoning Ordinance, the Board took each proposal in a separate discussion.

1.) In Section 650-5.B, amending the definition of "Boardinghouse or Lodging House" to read as follows (new text underlined):

BOARDINGHOUSE or LODGING HOUSE

A building or a portion thereof in which rooms or suites of rooms are let for fee as places of human habitation, either permanently or transiently, to four or more persons or which requires a license as required by MGL c. 140, § 22 et seq., as amended. The term "boardinghouse or lodging house" shall exclude convalescent

homes, nursing homes, assisted living facilities, shelters, hotels and motels which are licensed as such pursuant to applicable state law.

- The Planning Board has no objection to this proposed amendment.

2.) Adding to the Table of Use Regulations, Section 650-17, a category for “Assisted Living Facilities” under “Residential Uses,” as follows:

	Zoning District Abbreviations											
	RR	A-1	A-2	A-3	RB	RC	RCR	B	CA	LI	I	MV
Residential Use												
Assisted Living Facilities	SP	SP	SP	SP	SP	N	N	N	N	N	N	N

- The Planning Board has no objection to this proposed amendment.

3.) Adding to Section 650-18, Conditions for Use, a new subsection 650-18.A(44), as follows:

(44) Assisted living facilities shall only be located on lots with an area of at least 10 acres and with at least 250 feet of frontage along Route 85.

- The Planning Board does have an objection to the overly restrictive terms (i.e., at least 10 acres, at least 250 feet of frontage, and along Route 85) and suggests that the City Council consider removing these terms from the amendment.

4.) Adding to Section 650-48.A, Off-Street Parking, a new subsection 16, as follows:

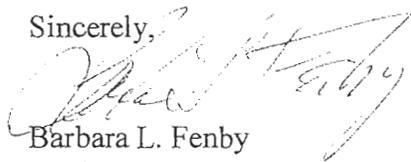
(16) Assisted living facility: half a space for each bed.

- The Planning Board has no objection to this proposed amendment.

On a motion made by Mr. Hodge, seconded by Mr. McCarthy, it was voted to forward a generally favorable recommendation to the City Council in regards to City Council Order #16-1006631, with reservations above. Motion carried 4-1(DuPont).

Should you have any questions or concerns regarding this communication, please do not hesitate to contact the Board Secretary above.

Sincerely,



Barbara L. Fenby
Chairperson

cc: David McCay, Esquire

City Council

From: City Council
Sent: Friday, September 30, 2016 12:06 PM
To: City Council
Subject: FW: From City Solicitor: 421 Bolton zoning petition

From: Donald Rider
Sent: Wednesday, September 28, 2016 7:28 PM
To: City Council <citycouncil@marlborough-ma.gov>
Subject: 421 Bolton

Karen-

As Councilors know from the opinion letter I provided to the Planning Board this past Monday regarding the zoning amendment being proposed on behalf of 421 Bolton Street, I raised in that letter an issue regarding “dementia special care units,” which has a particular meaning under State regulations. Just prior to the Board meeting, the developer’s counsel asserted to me that the 421 Bolton proposal would not include such units, though the proposal would include some level or form of dementia care. This assertion would mean that the problems with various Zoning Ordinance definitions I specified in the opinion letter would be moot. I so explained to the Board Monday.

At the same time, I did ask the developer’s counsel after the Board meeting to provide me with written corroboration that the level or form of dementia care proposed for 421 Bolton Street proposal does not, in fact, rise to the level of “dementia special care units” within the meaning of State regulations. I am awaiting that corroboration. Any third party to whom my letter has been forwarded should be so advised of the above, so as to avoid their chasing this potential issue prematurely, not to mention expensively.

-Don

Donald V. Rider, Jr.
City Solicitor
City Hall, 4th Floor
140 Main Street
Marlborough, MA 01752
T: (508) 460-3771
F: (508) 460-3698

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City of Marlborough
Legal Department

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DONALD V. RIDER, JR.
CITY SOLICITOR

CYNTHIA M. PANAGORE GRIFFIN
ASSISTANT CITY SOLICITOR

ELLEN M. STAVROPOULOS
PARALEGAL

September 26, 2016

Chairwoman Barbara Fenby
Marlborough Planning Board

Re: Proposed Zoning Amendment – 421 Bolton Street

Dear Dr. Fenby and Members:

A zoning amendment has been proposed by BSL Marlborough Development LLC (“BSL”) on behalf of Richard and Jill Cochrane, owners of the 2 lots identified as Marlborough Assessors Maps 30, Parcels 13 and 14 (together, “421 Bolton Street”) in Marlborough. If the zoning amendment is approved by the City Council, BSL would propose locating at 421 Bolton Street 1) an assisted living facility and 2) a wing for a dementia special care unit. This communication provides the Planning Board with some analysis which may assist in its recommendation to the City Council. The proposed zoning amendment speaks only of assisted living facilities; it is silent on dementia special care units.¹

In particular, a question has been raised about whether the proposed zoning amendment constitutes spot zoning. In making its recommendation to the Council, the Board should identify a rationale, if any, based on land use planning considerations as to how and why, if at all, the proposed zoning amendment is in accordance with a well-considered plan for the public welfare and is not designed solely for the economic benefit of 421 Bolton Street. First, however, there are some definitional issues under the current zoning ordinance.

I. The Current Zoning Ordinance.

Under the City’s Zoning Ordinance,² an “assisted living facility” is currently defined as:

¹ The proposed amendment would:

- 1) Add the term “assisted living facilities” to the list of uses excluded from the Zoning Ordinance’s definition of “boarding house or lodging house;”
- 2) Add to the Zoning Ordinance’s Table of Uses, as a residential use, the term “assisted living facilities,” and provide that “assisted living facilities” are allowed by special permit in the RR, A-1, A-2, A-3 and RB zoning districts, but are disallowed in all remaining zoning districts;
- 3) Add, as conditions for the use of land as “assisted living facilities,” that such facilities “only be located on lots with an area of at least 10 acres, and with at least 250 feet of frontage along Route 85;” and
- 4) Provide, as part of the plan for the new construction of “assisted living facilities,” that such plan show ½ parking space for each bed, as permanently maintained off-street parking.

² Zoning Ordinance, c. 650-5.B (“assisted living facility”).

[a] managed residential community, operating under the provisions of MGL Chapter 19D. Further, said facilities may provide assistance with activities of daily living, together with meal service, housekeeping services, social and recreational activities and personal care services, in a group setting for persons who require help or assistance with activities of daily living but do not require full-time nursing care.

(My underlining.) An “assisted living facility” under the Zoning Ordinance is termed an “assisted living residence” under MGL c. 19D.³

An assisted living residence provides its occupants “assistance with activities of daily living,” which Chapter 19D and its regulations in turn define to mean “physical support, aid or assistance with bathing, dressing/grooming, ambulation, eating, toileting or other similar tasks” that are “related to personal care needs.”⁴ Per an Appeals Court opinion in 2000,⁵ personal care services at an assisted living residence are more than merely

a non-essential, fortuitous, or minor consequence of providing room and board to the residents of ... [an assisted living residence]. These services cannot be separated from the residential purpose of an assisted living residence: If the services are not provided, the facility is not an assisted living residence.

At the same time, personal care services provided at an assisted living residence “are less intensive than the services provided in nursing home facilities.”⁶

Thus, under the current Zoning Ordinance:

- The definition of an “assisted living facility” excludes a facility providing full-time nursing care, such as a nursing or convalescent home.⁷
- But State regulation defines a “dementia special care unit” to include a nursing or convalescent home.⁸ “The purpose of a DSCU is to care for residents with dementia in the long term.”⁹ A DSCU is a “long-term care facility,” defined by State regulation as including “convalescent or nursing homes, rest homes, infirmaries maintained in towns and charitable homes for the aged.”¹⁰

³ MGL c. 19D, § 1. That section defines “assisted living residence” to mean: “any entity, however organized, whether conducted for profit or not for profit, which meets all of the following criteria:

1. provides room and board; and
2. provides, directly by employees of the entity or through arrangements with another organization which the entity may or may not control or own, assistance with activities of daily living for three or more adult residents who are not related by consanguinity or affinity to their care provider; and
3. collects payments or third party reimbursements from or on behalf of residents to pay for the provision of assistance with the activities of daily living or arranges for the same.”

⁴ 651 CMR 12.02 (2016).

⁵ APT Asset Management v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 142-43 (2000)(construing MGL c. 19D, § 1).

⁶ Id. at 142.

⁷ See note 2 above.

⁸ Under 105 CMR 150.023, a “dementia special care unit” means any “facility licensed pursuant to 105 CMR 150.000 ... that is capable of providing specialized care for residents with dementia”

⁹ Id.

¹⁰ 105 CMR 150.001 (2016)(my underlining).

- Therefore, since under State regulation a “dementia special care unit” includes a nursing or convalescent home, the Zoning Ordinance’s definition of an “assisted living facility” would exclude a “dementia special care unit.”¹¹
 - Accordingly, the proposed zoning amendment should provide a definition for “dementia special care unit.”
- Further, the Zoning Ordinance’s definition of a nursing or convalescent home – namely, “[a] residential facility providing long-term medical assistance to clients as defined in MGL c. 112, § 108, but not a hospital or facility for treating mental illness”¹² – excludes a “facility for treating mental illness,”¹³ such as a “dementia special care unit.”
 - Therefore, the proposed zoning amendment should seek to revise the definition of a “convalescent home/nursing home” so as to comport with State regulation defining a “dementia special care unit” as including a nursing or convalescent home.

Lastly, note that neither an “assisted living facility” nor a “dementia special care unit” is currently listed in the Zoning Ordinance’s Table of Uses. Therefore, both are deemed to be prohibited uses of land in Marlborough at present.¹⁴

II. The Proposed Zoning Amendment and Spot Zoning.

A. What is Spot Zoning?

Under Massachusetts law, spot zoning arguments raise “essentially a single issue, i.e., whether the [zoning] amendments were a legitimate exercise of the ... [municipality’s] authority under the Zoning Act,” as codified in MGL c. 40A.¹⁵ That zoning authority “rests for its justification on the police power, and that power is to be asserted only if the public health, the public safety and the public welfare, as those terms are fairly broadly construed, will be thereby promoted and protected. A zoning ... [ordinance] will be sustained unless it is shown that there is no substantial relation between it and the furtherance of ” the public health, safety or welfare.¹⁶

Thus, on the face of it, a zoning ordinance that singles out one lot, or several lots, for treatment different from that accorded to similar surrounding land, thereby benefiting the owner of the singled-out lot(s), could possibly be spot zoning. “The test, however, is not whether the zoning change is beneficial to a landowner. It is no objection to a legislative solution of a public problem that it will incidentally lead to private profit or advantage.”¹⁷

Rather, the precise issue on which the validity of the singling out turns is whether that singling out has been done “all for the economic benefit of the owner of that lot,” and not at all to serve the public

¹¹ Under Chapter 19D’s regulations, “premises or portions of premises [c]ertified as Assisted Living Residence[s] shall not be subject to ... the licensing requirements for convalescent and nursing homes.” 651 CMR 12.14(e).

¹² Zoning Ordinance, c. 650-5.B (“convalescent home/nursing home”)(my underlining).

¹³ See note 2 above.

¹⁴ Under the Zoning Ordinance, c. 650-16.B, “[a]ll uses not noted in § 650-17, entitled “Table of Uses,” shall be deemed prohibited, except where so to deem would interfere with or annul any other City of Marlborough ordinance, rule, regulation or permit.”

¹⁵ W.R. Grace & Co.-Conn. v. Cambridge City Council, 56 Mass. App. Ct. 559, 565 (2002).

¹⁶ Id. at 566 (citation & internal quotations omitted).

¹⁷ Van Renselaar v. City of Springfield, 58 Mass. App. Ct. 104, 109 (2003)(citation & internal quotations omitted)(emphasis supplied).

welfare.¹⁸ “Selective zoning of that kind violates the uniformity requirements of G.L. c. 40A, § 4, and constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions.”¹⁹ In other words, “[z]oning differentiations must be adopted in the service of some defensible public interest, not merely to benefit or harm a particular parcel.”²⁰

Therefore, the applicable test involves whether different zoning treatment of similar surrounding property is “in accordance with a well-considered plan for the public welfare and was not designed solely for the economic benefit of an owner of a locus.”²¹ If zoning classifications treat like properties in a non-uniform manner, at least “without rational planning objectives,” the result is invalid spot zoning.²² If, however, “the rezoning is adopted in accordance with a well-considered plan for the public welfare and was not designed solely for the economic benefit of an owner of a locus, ... the zoning is not invalid.”²³

B. Applying the Spot Zoning Test to the Proposed Zoning Amendment.

“[A] well-considered plan for the public welfare” is often embodied in a city or town’s master plan. The City Council adopted a sort of master plan in 1985,²⁴ which however is silent as to assisted living residences (not to mention dementia special care units), coming almost a decade before the State legislature enacted Chapter 91D so as to regulate such residences.²⁵ In any event, the test for spot zoning does not require “that zoning be in strict accordance with a master plan.”²⁶ Instead, “[t]he most that can be thought required is an analysis by ... [municipal] officials before the zoning decision of land use planning considerations.”²⁷

In applying land use planning considerations to the zoning proposal for 421 Bolton Street, the Planning Board would need to determine (or recommend that the Council determine) whether there are any other parcels, or potential assemblage of parcels, with an area of at least 10 acres, and with at least 250 feet of frontage along Route 85. For, if 421 Bolton Street is the only such parcel, the proposed zoning amendment would be singling out one lot for treatment different from that accorded to similar surrounding land.

The Board should also determine, for purposes of zoning, if the proposed assisted living facility falls more within a residential use, or instead a nonresidential use. 421 Bolton Street is located in a Residential A-2 zoning district. In an A-2 district, convalescent and nursing homes are allowable by special permit as an institutional use in A-2 under the Table of Uses. The zoning amendment proposes to add the term “assisted living facilities” to the Table of Uses as a residential use allowable by special permit in A-2. So proposed, “assisted living facilities” is a residential use dissimilar to the institutional use of convalescent and nursing homes, yet would be similar to convalescent and nursing homes in nonetheless requiring a special permit in A-2.

¹⁸ Rando v. Town of North Attleborough, 44 Mass. App. Ct. 603, 606 (1998)(citations & internal quotations omitted)(emphasis supplied).

¹⁹ Van Renselaar, 58 Mass. App. Ct. 104 at 108-09 (citation & internal quotations omitted).

²⁰ Allen v. Town of Dedham, 2006 WL 172209 (Mass. Land Ct.), at *6 (citation omitted).

²¹ Sullivan v. Town of Acton, 38 Mass. App. Ct. 113, 115 (1995)(citation omitted).

²² National Amusements, Inc. v. City of Boston, 29 Mass. App. Ct. 305, 312 (1990)(citations omitted).

²³ Sullivan, 38 Mass. App. Ct. at 115 (citation omitted).

²⁴ Council Order 85-435, approved August 12, 1985.

²⁵ A master plan is one adopted by a city or town’s planning board pursuant to MGL c. 41, § 81D. It does not appear that the Board has ever adopted a § 81D master plan. In 2013, the City Council did vote to approve an economic development master plan prepared in 2011. But that plan acknowledged (at 2) that it was “not a city-wide master plan,” that such a master plan had been adopted in 1985, and that the preparation of the 2011 plan “revealed an urgent need for the City to update its City-wide Master Plan and thereby address critical issues that are beyond the scope of this study.” Assisted living facilities/residences are not mentioned in the 2011 plan, nor in the 1985 master plan adopted by the Council in Order No. 85-435.

²⁶ Rando, 44 Mass. App. Ct. at 612 (citation omitted).

²⁷ Id. (citation omitted)(emphasis supplied).

This begs the question whether “assisted living residences” are properly classified under the Table of Uses as a residential use in the first place. MGL c. 19D, § 18(d) provides:

(d) Regardless of the designation of an assisted living residence as a residential, institutional or other use under any zoning ordinance, assisted living residences certified under this chapter shall be regarded as residential uses for the purposes of the state building code and shall be so regarded by the building inspectors of each city and town in the commonwealth.

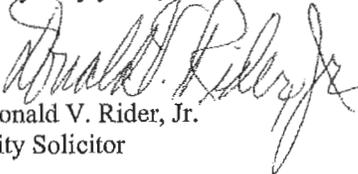
(My underlining.) In construing the underlined language, the Appeals Court observed that while “assisted living residences” statutorily fall within a residential use for purposes of the State building code, the State Legislature has “implicitly recognized that assisted living residences could fall within a nonresidential use classification” for purposes of zoning.²⁸

The Planning Board should determine (or recommend that the Council determine) whether “assisted living facilities” are properly proposed as a residential use in the Table of Uses, and whether the proposed zoning amendment as applied to 421 Bolton Street would treat that property differently from its bordering neighbors in the Residential A-2 zoning district – most of whom are nonresidential (the Navin skating rink, the High School, the Middle School, and the Police Department), although 2 are residential (the Housing Authority, as well as a single-family house).

III. CONCLUSION.

Apart from recommending some revising of the current zoning definitions as specified in Part I above, the Board should also identify (or recommend that the Council identify) a rationale, if any, based on “land use planning considerations” as to how and why, if at all, the proposed zoning amendment is “in accordance with a well-considered plan for the public welfare and was not designed solely for the economic benefit of” 421 Bolton Street.²⁹ It is the proponent’s burden to provide that rationale. Absent that rationale, any eventual Council vote to approve the proposed zoning amendment could, potentially, be open to a finding of spot zoning.

Very truly yours,


Donald V. Rider, Jr.
City Solicitor

cc: Marlborough City Council
David McCay, Esquire

²⁸ APT Asset Management v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 139 (2000)(emphasis in original)(construing MGL c. 19D, § 18). In that opinion, the Appeals Court agreed with the lower court’s reading of the Melrose zoning ordinance that a developer’s proposed conversion from an apartment building to an assisted living residence would constitute a change in the use of the property. That change in use was due to “the nature and extent” of the personal care services to be provided to the occupants of the assisted living residence by its employees – inasmuch as apartment building landlords do not customarily, nor are required by law to, provide such services to their tenants.

²⁹ Sullivan, 38 Mass. App. Ct. at 115 (citation omitted).