COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss: SUPERIOR COURT

HILARY PUTNAM, ET AL

vs.

ANDREW T. TRODDEN, ET AL

RESPONDENTS' BRIEF

Petitioners have brought the writ of mandamus in this case asserting that it is the duty of the City of Cambridge to place on the ballot for the election on November 4, 1969 the initiative petition filed with the City Clerk of Cambridge on July 28, 1969.

The petition seeks in substance to reduce all rents in all rental accommodations except single and two and three family owner-occupied buildings and other limited exceptions to the rent levels of January 1, 1968. The proposed ordinance contains thirteen printed pages and ten sections.

The City Clerk forwarded the petition to the election commission which, in accordance with General Laws, Chapter 43, sec. 38, certified the requisite number of signatures on the petition. At that point, in accordance with General Ordinances of Cambridge, Chapter 2, section 29, the election commission requested the advice of the city solicitor concerning the petition.

It then becomes the duty of the city solicitor to render an opinion in accordance with his sworn obligations of office to the election commission and obviously if it were the opinion of the chief legal officer of the city that the matter could not be the proper subject of a referendum, the election commission could not disobey the advice of the city solicitor and spend the city's funds for an illegal purpose.

1. The initiative petition cannot be the subject of a referendum unless the measure proposed could lawfully be adopted by the city council.

General Laws, C. 43, §37 provides that "a petition conforming to the requirements hereinafter provided and requesting the city council to pass a measure, except an order granted under section seventy or seventy-one of Chapter one hundred and sixty-four or Chapter one hundred and sixty-six, or requesting the School Committee to pass a measure, therein set forth or designated, shall be termed an initiative petition, and shall be acted upon as hereinafter provided. In this and the eight following sections, 'measure' shall mean an ordinance, resolution, order or vote passed by a city council or a resolution, order or vote passed by a school committee, as the case may be."

The Supreme Judicial Court in Dooling v. City Council of Fitchburg, 242 Mass. 599, held that the word "measure" used in C. 43,

s. 37 does not mean any proposal signed by the requisite number of voters. In the Dooling case, petitioners brought mandamus to compel the city to submit to the voters a referendum commanding the mayor to execute contracts in connection with school house construction. The only distinction procedurally between Dooling and the case at bar is that in Dooling, the city council refused to refer the petition to the election commission and in this case, while the city council refused to adopt the measure, the city clerk forwarded the petition to the election commission. The fact that in Dooling, the city council refused even to consider the measure or in this case, the election commission acting on the advice of the city solicitor refused to permit ballots containing the measure, is of no particular significance.

The court in Dooling v. City Council of Fitchburg made clear by the following language the basic limitation on referendum petitions. The Court said, at 601:

> "'Measure' is defined by §37 of the same chapter to be 'an ordinance, resolution, order or vote.' It is manifest that these words, although of broad signification, are necessarily limited to subjects vested by law in the city council. It cannot have been the purpose of the General Court to require or to permit the referendum or the initiative (for in this particular the provisions as to municipal

> initiative are the same as those as to municipal referendum) touching subjects wholly outside the field of authorized action by the city council. Such a futile intention cannot be imputed to the General Court." (Emphasis added).

The Court then considered whether the referendum petition contained matter which was within the sphere of authorized council action. The Court concluded, at 601, that "The orders of the city council as to which the referendum is sought in the case at bar are clearly executive and not legislative in their nature. A direction to an officer to sign a specified contract with a named person to do a defined thing for a specified price is not a legislative act." Accordingly the Court dismissed the petition for a writ of mandamus.

There is no suggestion whatever in Dooling to support the assertion at trial by petitioners that no matter what is presented to the city council, so long as it has the appropriate number of signatures, the city has a duty to place the matter on the ballot. Dooling is clearly to the contrary.

Dooling holds thus that irrespective of what action or inaction the city council takes, before an initiative petition may be submitted to the voters, it must satisfy the following criteria:

1. The petition must propose the adoption of a measure which is an ordinance, resolution, order or vote.
2. The proposed measure must be a subject matter vested by law in the city council.
3. The proposed measure may not relate to a subject outside the field of authorized council action.

In Gilet v. City Clerk of Lowell, 306 Mass. 170, petitioners filed with the city clerk an initiative petition with the appropriate number of signatures seeking in substance to reduce the City of Lowell budget. In that case, the city clerk refused to transmit the petition to the election commission, and when petitioners requested the election commissioners to act on the petition, the election commissioners did not take action.

The Court dismissed the petition for a writ of mandamus. As in Pooling, the Court noted, at 175, that "The petitioners, by their protest, which, if allowed and not acted upon adversely by the voters, would merely reduce the total amount of money appropriated without specific reference to any items, are seeking to bring about something that the city council itself could not accomplish directly by any such general and indefinite method." (Emphasis added.)

Again, Gilet makes clear the fundamental issue in an iniative petition: did the city council have authority to enact

the measure. If it did not, then the city clerk and the election commissioners have no duty to act under C. 43, sections 38 and 40. See also Flood v. Hodges, 231 Mass. 252.

If the rule were otherwise, then anything that bore the appropriate number of signatures would go on the ballot, no matter how unconstitutional or illegal. For example, under petitioners' theory, if the proper number of registered voters proposed an order that each year, the city should give all residents a certain sum of money, that would have to appear on the ballot. Although obviously illegal, the city would incur the expense of needlessly printing the ballot, submitting it to the voters, counting the ballots, and then refuse to comply with the vote, if carried, on the grounds that it is illegal. The Supreme Court has made clear that the city is not required to incur the expense or otherwise taking a series of fruitless steps when the petition is beyond the powers of the city council and illegal.

Horton v. Attorney General, 269 Mass. 503. Bowe v. Secretary of the Commonwealth, 320 Mass. 230, and Barnes v. Secretary of the Commonwealth, 348 Mass. 671, relied on by petitioners, are totally irrelevant to the case at bar. They do not involve municipal referenda nor do they in any way modify the holdings of Dooling v. City Council of Fitchburg or Gilet v. City Clerk of Lowell, supra.

The Court in Horton v. Attorney General, 269 Mass. 503, at 513, states the general principle that "no one can question in the courts the constitutionality of a statute already enacted except one whose rights are impaired thereby." This refers to a situation where a petitioner attacks the constitutionality of a statute which has not been applied against such a person. But see for an increasing tendency to depart from this rule, Coffee-Rich, Inc. v. Commissioner of Public Health 348 Mass. 414.

Even in these cases, however, the Court observed in Horton v. Attorney General, 269 Mass. 503, 502 that "Genuine controversy as to the conformity of acts of these bodies to the requirements of the constitution is a justiciable subject and cognizable by the courts when properly presented." And in Rome v. Secretary of the Commonwealth, 320 Mass. 230, at 247 that whether the subject matter of a state wide initiative was within the initiative powers was justiciable, stating: "Unless the courts had power to enforce these exclusions, they would be futile, and the people could be harrassed by measures of a kind that they had solemnly declared they would not consider. We think that the question whether any initiative petition related to an excluded matter is a justiciable question."

The case at bar does not involve an attack on an ordinance by persons whose rights are not impaired. To the contrary, the petitioners assert that the city has a mandatory duty to place

the measure on the ballot. The petitioners therefore have the burden of demonstrating to the court that the subject matter of the initiative petition was within the power of the city council to adopt.

Furthermore, the issuance of a writ of mandamus is an extraordinary remedy. And if it does not clearly and distinctly appear that the city council had power to adopt the measure and therefore the measure is a proper subject of referendum, the Court may in its discretion dismiss the writ.

2. The Certification by the Election Commission did not validate the subject matter of the petition.

The statement of agreed facts recites that the election commission certified the appropriate number of signatures and after the city clerk transmitted the petition to the city council, no objections were filed under General Laws, C. 43, sec. 38. From this, petitioners suggest that the petition is deemed to be valid.

But the provisions of C. 43, sec. 38 relate to the validation of the signatures to the petition and not the subject matter of the petition. It provides that the election commissioners shall file a certificate showing by what number of registered voters the petition is signed and what percentage that number is of the total number of registered voters.

The certificate becomes final unless objections are made and then the state ballot law commission must conduct a public hearing on the objections. Such objections under section 38, however, can relate only to the signatures on the petition.

The legal question of whether the subject matter of the petition is within the power of the city council can only be decided by the city solicitor and in the event that he decides the matter should not be on the ballot, by a writ of mandamus as in Dooling and Gilet, supra.

3. The city council did not have authority to enact the subject matter of the initiative petition.

Since the test of the legal sufficiency of the initiative petition is whether the measure was within the power of the city council to adopt, the threshold inquiry is whether the city council had at the time the petition was filed power to enact the ordinance.

A municipal corporation is one of limited and defined powers. Dillon, Municipal Corporations, Sec. 237. Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256.

In Greene v. Mayor of Fitchburg, 219 Mass. 121, 126, the city conditioned peddlers' licenses on the price at which peddlers could sell ice. The Court said "The third section likewise

is beyond the power of the city council to pass. They have not the authority to fix the prices at which ice shall be sold at retail . . . A city or town, in the absence of a grant of the authority from the Legislature, can no more fix the price of one of these articles than of the other." Therefore it is necessary to find either in the Constitution of Massachusetts or in an enabling statute, authority to enact the proposed measure.

Article 47 of the Articles of Amendment to the Constitution provides: "The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the General Court shall determine." (Emphasis added.)

The General Court, however, has not made any determination under Article 47, nor has it authorized the cities and towns to make provision for rent control. Thus, the situation is unlike that in Russell v. Treasurer & Receiver General, 331 Mass. 501 where the Court upheld St. 1953, C. 434 authorizing the cities and towns to impose rent control. The General Court did make a determination under Article 47 that there was a public emergency in residential housing and further determined that the means to alleviate the emergency was through rent control and accordingly

authorized the cities and towns to administer the details "in respect to matters peculiarly affecting local interests." 331 Mass. at 507.

The City of Boston concluded that it could not act under ARticle 47 without appropriate legislation from the General Court. Accordingly, there was filed House No. 4209 which became the subject of Opinion of the Justices, 1969 Ad. Sh. 1165 (August 14, 1969).

The Court pointed out serious deficiencies in the proposed enabling statute at 1168-1169: "The bill sets forth no standards for declaring an emergency, or for ensuring a fair return on the value of the property, or for determining what 'may be necessary to remove hardships or correct inequalities.' Also lacking in the bill are any procedures for judicial review of ordinances and related orders, or provisions for methods, effectiveness and fairness of enforcement, both within the city and in comparative areas elsewhere in the Commonwealth." (Emphasis added).

Certainly the City of Cambridge cannot satisfy these criteria by ordinance. The proposed measure does not establish a standard for declaring an emergency. That is a subject matter in any event that only the legislature can determine under Article 47.

The Court also made clear that there must be a procedure for "judicial review of ordinances" which clearly shows that even

CITY OF CAMBRIDGE

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LAW DEPARTMENT

PHILIP M. CRONIN
CITY SOLICITOR

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ASSISTANT CITY SOLICITORS

JOHN A. SERINO
LEGISLATIVE AGENT

September 29, 1969

Mr. James L. Sullivan
City Manager
City Hall
Cambridge, Massachusetts

Dear Mr. Sullivan:

The Petition for a Writ of Mandamus concerning the proposed rent control referendum was heard at the Middlesex Superior Court on Tuesday, September 23, 1969.

The Court directed all parties to file Briefs by today. I filed in behalf of the City this morning. Since the case is still pending, public discussion about it remains inappropriate.

Very truly yours,

Philip M. Cronin
City Solicitor

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measure must be submitted to the voter without alteration and therefore would if placed on the ballot contain the illegal provisions. A city solicitor has a duty to advise that the provisions sought to be placed before the voter cannot be lawfully adopted.

CONCLUSION

For the foregoing reasons respondents respectfully request that the petition be dismissed.

By their attorney,

Philip H. Cronin
City Solicitor

of liabilities is a fine of $1000 or imprisonment for one year under C. 44, section 62. Yet petitioners seek to have the voter approve this invalid provision and assent that the city's chief legal officer cannot direct that an invalid measure should not be presented to the voters.

Section 10(g) of the proposed measure states that "Pursuant to Massachusetts General Laws, Chapter 43, section 21, this ordinance shall not be amended or repealed except under the provision of Massachusetts General Laws, Chapter 43, sections 37 through 44, inclusive, which provide for both initiative petition and referenda on motion by the city council." In other words, petitioners do not want the measure amended or repealed except by another referendum.

General Laws, Chapter 43, section 21 provides that "no ordinance shall be amended or repealed except by an ordinance adopted in accordance with the chapter."

Once, enacted, an ordinance achieves no special distinction because it was the subject of a referendum. Chapter 43 authorizes the amendment or repeal of an ordinance under section 37 through 44 and also under sections 20, 22 and 23.

The provision in Section 10(c) that if any provision of the ordinance shall be held invalid, the validity of the remainder shall not be affected does not save the measure. The proposed measure in its entirety is beyond the power of the city council and therefore is not the appropriate subject of a referendum. General Laws, Chapter 43, sec. 40 provides that an initiative

after the General Court acted to establish standards for declaring an emergency, the General Court must provide that any ordinance enacted by a city council pursuant to Article 47 and the enabling legislation would be subject to judicial review. Certainly the city has no power whatsoever to confer jurisdiction on the Courts nor to provide under what circumstances the Courts can review its ordinances.

Further the Court observed that there must be "provisions for methods, effectiveness and fairness of enforcement, both within the city and in comparative areas elsewhere in the Commonwealth." This would be totally beyond the ability of Cambridge to provide for. Therefore, this again would need to be covered in the enabling legislation under ARticle 47.

The plain language of Article 47 clearly calls for enabling legislation. The Supreme Court in Opinion of the Justices, 1969 Ad. Sh. 1165, while not passing on the enabling legislation suggested there, nevertheless confirmed that enabling legislation is mandatory by pointing out general deficiencies in House No. 4209.

The General Court has not enacted general legislation under Article 47 nor has it authorized Cambridge to act.

4. The Home Rule amendment does not authorize the proposed measure.

Article 89 of the Amendments to the Constitution provides in section 6 that "any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws exercise any power or function which the General Court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the General Court in conformity with powers reserved to the General Court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter."

Article 89, section 6 does not give the city council authority to enact any sort of local ordinances. There must be consistency between what the city council enacts and the constitution and the general laws. Thus, the city council cannot proceed in the absence of enabling legislation to provide rent control because that would be inconsistent with Article 47 which requires a determination by the General Court as to the manner by which the city council may provide for shelter.

The only way to read Articles 47 and 89 of the amendment to the constitution consistently and in accordance with the discussion in the Opinion of the Justices of August 14, 1969 is as follows:

1.) The General Court must first in accordance with Article 47 find that there is a public emergency and provide that the cities and towns may provide for the emergency by specific means, such as rent control or indeed by some other manner, such as accelerated housing construction with a relaxation of building and zoning codes.

2.) The enabling legislation under Article 47 must provide a standard for declaring an emergency before any city or town invokes its powers under Artiale 47 and the enabling legislation. It must also protect the property owner to ensure a fair return, whether by tax adjustments or otherwise, and define judicial procedures for review of municipal ordinances and orders.

3.) The city must then conduct hearings and analyze the local situation to provide a rational basis that, in accordance with the standard established by the enabling legislation, a public emergency exists in that community. Under Article 89, once that finding is made, the city or town could then enact rent control without the need for specific enabling legislation for that particular town.

Article 89, section 7(5) has another significant limitation on the powers of a city or town. It prohibits the enactment of "private or civil laws governing civil relationship except as an incident to an exercise of independent municipal power." Russell v. Treasurer & Receiver General, 331 Mass. 501 makes clear that cities do not have a municipal power independent of the legislature to enact rent control. The Court in Opinion of the Justices did not pass on the meaning of the words "Civil Relationships." But if, as for example the Corporation Counsel of Boston contends, the relations between landlord and tenant is a civil relationship, then Article 89, section 7(5) would further prohibit the city from adopting rent control.

5. <u>There has been no showing of a public emergency and therefore the proposed measure is unconstitutional.</u>

If the city council has the power to act under Article 47, provided that there is appropriate enabling legislation, there still must be a showing of a "public exigency, emergency or distress," to authorize the city to intrude on constitutional rights of private property without violating Articles 1, 10, 12 and Part II, Ch. 1, sec. 1, Article 4 of the Massachusetts Constitution.

The proposed measure is obviously a direct intrusion on the rights of property ownership. It in effect tells every owner who owns real estate that he has to give up a benefit of his property by reducing the income that he receives from it to levels of January 1, 1960.

If the petitioners demonstrated a public emergency in accordance with Article 47 and standards enunciated by the General Court, then the intrusion into private property rights on a temporary basis would be permitted under Article 47 and the general police powers.

It is not the duty of the Court at this juncture to make findings on oral testimony that a public emergency in fact exists. Petitioners must instead demonstrate to the Court that there was before the city council on August 7, 1969 when it rejected the

petitioners sufficient, reliable evidence to warrant a finding by that body and if not by the council, by the people by referendum that there existed a public emergency in housing. Only in that manner could the Court be assured that the legislation bore a real and substantial relation to the general welfare. Coffee-Rich Inc. v. Commissioners of Public Health, 348 Mass. 414, Sperry & Hutchinson Co. v. Director of the Division on the Necessaries of Life, 307 Mass. 408. This the petitioners have completely failed to do.

The declaration of emergency in section one carries no presumption whatever in a municipal ordinance. The Supreme Judicial Court in Continental Construction Co. v. City of Lawrence, 297 Mass. 513 has already resolved the point. There the city council passed an order declaring an emergency because of an extreme amount of snow. The court observed the respective contentions of the parties — which are identical to the contentions at issue in the case at bar: "The plaintiff contends that this order creates a presumption, or constitutes prima facie evidence, of the existence of such emergency. The defendant contends that it is not even evidence of such emergency, and that the plaintiff must fail in the action for lack of proof that any emergency existed."

The Court said, at 515: "The conditions which will permit the lawful incurring of extraordinary indebtedness must exist on truth and fact. We can discover nothing to support a construction

which would permit a city council to shake off the limitations imposed upon it by merely declaring the existence of a state of emergency and then authorizing the incurring of liabilities to an unlimited amount for an unascertained period of time, nor do we think that such a declaration has any presumptive or evidential force in establishing the existence in fact of an emergency . . . There is no analogy whatever between the powers of a city council acting under statutory limitations and the power of the General Court to declare a law an emergency law under the express provisions of Article 48 of the Articles of Amendment of the Constitution."

Petitioners at trial have in fact produced no evidence warranting a declaration of an emergency. All they did was to make an offer of proof of some documents from the files of the City Manager. Petitioners' purpose in this remains distinctly obscure. In any event, making an offer of proof and having documents marked for identification does not satisfy petitioners' burden.

Therefore, respondents will not discuss the documents marked for identification. On the record of the Court, petitioners have not sustained their burden proving that there was sufficient evidence before the city council to warrant a conclusion that a public emergency existed.

Further, neither the evidence before the Court nor the declaration of emergency justifies the declaration of emergency

section of the proposed measure. The declaration claims that there is a shortage of rental housing accommodations, unwarranted speculation and profiteering and abnormal and excessive rental agreements. There is no showing that there was evidence before the city council to warrant those declarations.

There is also no showing by petitioners that the proposed ordinance is reasonably related to resolving a public emergency that allegedly "exists with respect to the housing of the citizens of the city." Section 4(a) of the proposed measure provides that the maximum rent for units that were occupied by the tenant on January 1, 1968 was the rent charged on that date. Thus, what the ordinance would do would roll back the rent of anyone who rents in Cambridge irrespective of how affluent the tenant is and how meaningless the rent reduction is to that person. The property owner however could be destroyed by such an arbitrary reduction.

The city council, no more that the legislature, can adopt an ordinance that is arbitrary and unreasonable on its face. Mansfield Beauty Academy Inc. v. Board of Registration of Hairdressers, 326 Mass. 624, Sperry & Hutchinson Co. v. Directors of the Division on the Necessaries of Life, 307 Mass. 408.

It is commonplace for the city council to request a city solicitor for his advice on the constitutionality and legality

of a proposed measure. "Generally speaking, the municipal law officer, whatever his title, is the legal adviser to city and town officers and departments... He prepares or approves legal documents, gives opinions on legal points and represents the municipalities, as requested, before the court, court commissioners, state departments and legislative committies." Hardy, Municipal Town and Practice, Sec. 156. If the city solicitor advises the city council that a proposed ordinance is unconstitutional in its face, the city council should obey that advice and even if the council disobeyed the city solicitor's opinion, the city treasurers could not lawfully expend the city's funds under an illegal ordinance.

If the proposed measure cannot be lawfully adopted by the city council because it is unconstitutional on its face, under Dooling v. City Council of Fitchburg, 242 Mass. 599, 601, it cannot be the proper subject of referendum. This is not a situation where the court is asked to interfere with the process of legislation before completion. Cf: Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247. Rather, it involves a fundamental question of the power of the city council and hence the voter to act at all.

6. The proposed measure violates the Equal Protection Clause.

Section 2 (h) of the measure provides that all housing

accomodations are "controlled housing accomodations" and therefore subject to the roll-back to January 1, 1968 with certain exceptions. One contained in Section 2(h)(3) is "single family dwellings, and two and three family dwellings in which the owner dwells."

If as the preamble asserts in Section 1, there is a severe public emergency with respect to housing, it then is totally unreasonable and irrational on the face of the ordinance to have the exemption contained in Section 2(h)(3). Petitioners have shown nothing in any material submitted to the city council to show that the exemption is a reasonable classification.

On its face, the proposed ordinance violates the equal protection clause of the Constitution of the United States.

7. The proposed measure is inconsistent with the General Laws

If the city council were to enact an ordinance in accordance with authority granted it under articles 47 and 89 of the Amendments to the Constitution, such an ordinance under article 89, Section 6 cannot be inconsistent with the General Laws. The initiative petition has glaring inconsistencies.

Section 10(e) provides that "the city council shall appropriated $150,000 for the initial administration and enforcement of this ordinance and thereafter such further monies as shall be required to operate, administer and enforce this

ordinance in accordance with its purposes and provisions."

The city council, however, does not have this power and therefore under Dooling v. City Council of Fitchburg, it is not the appropriate subject of a referendum.

Under General Laws, Chapter 44, sec. 32 and Chapter 43, sec. 104, the city manager prepares and submits to the city council the budget. This is an executive function. Flood v. Hodges, 231 Mass. 252, 256. The city council may reduce the budget but it cannot increase it. Hence, the city council has no power to appropriate except as to items stated in the budget. Gilet v. City Clerk of Lowell, 306 Mass. 170.

The city council may under C. 44, sec. 33 request of the city manager additional appropriations for a purpose not included in the budget, but this does not authorize an outright appropriation in an ordinance without a request and a two thirds vote.

Section 10(c) further provides "If such monies are unavailable in the initial fiscal period, the Rent Board shall be empowered and authorized to incur new liabilities until such monies shall be made available to the city council." General Laws, Chapter 44, section 31 provides that "no department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur new a liability in excess of the appropriation made for the use of such department..."

The penalty for any city official who violates or directs any official to violate the provisions relating to the incurring

CITY OF CAMBRIDGE

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EXECUTIVE DEPARTMENT
James L. Sullivan
City Manager
John H. Corcoran
Assistant City Manager

September 29, 1969

To the Honorable, the City Council:

With reference to City Council order of September 22, 1969, requesting the City Solicitor and the Election Commission to appear at the City Council meeting of this date, I transmit herewith communication from Philip M. Cronin, City Solicitor, with copy of Petition for a Writ of Mandamus concerning the proposed rent control referendum, in which communication Mr. Cronin states that it would be inappropriate for him and the Election Commission to attend the meeting.

Very truly yours,

James L. Sullivan
City Manager

JLS/eb

(13) 196

COMMUNICATION

from the City Manager transmitting one from Philip M. Cronin, City Solicitor, together with copy of Petition for Writ of Mandamus concerning the proposed rent control referendum. Mr. Cronin advises the City Council that it would be inappropriate to attend the meeting tonight.

September 29, 1969.