



CITY OF CAMBRIDGE

INTEROFFICE CORRESPONDENCE

To Robert W. Healy
Melvin H. Chalfen, M.D.
Chief Thomas Scott

Date March 8, 1984

From Birge Albright, Esq.
Law Department

Reference

Subject Powers of Commissioner of Health and Hospitals

The Commissioner of Health and Hospitals in Cambridge has the same powers as a Board of Health. St. 1976, c. 201, §2.

I. G.L. c. 111, §31 - Reasonable health regulations

G.L. c. 111, §31 provides that, "Boards of health may make reasonable health regulations...." This power is extensive. Section 31 "provided a comprehensive, separate, additional source of authority for health regulations." Bd. of Health of Woburn v. Sousa, 338 Mass. 547, 550 (1959). Such regulations may be "more stringent than the general law." Brielman v. Commissioner of Public Health, 301 Mass. 407, 410 (1938).

II. G.L. c. 111, §122 - Nuisance

G.L. c. 111, §122 states:

The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel. Whoever violates any such regulation shall forfeit not more than one hundred dollars.

III. G.L. c. 111, §143 - Trade or employment which result in a nuisance

G.L. c. 111, §143 (copy attached) provides, in part:

No trade or employment which may result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the public health...shall be established in a city... except in such a location as may be assigned by the board of health thereof after a public hearing...subject, however, to the provisions of (zoning ordinances), and such board of health may prohibit the exercise thereof within the limits of the city...or in places not so assigned, in any event.

Persons aggrieved by the action of the board of health may appeal to the Department of Environmental Quality Engineering. Appeal may also be had to the Superior Court with a jury. G.L. c.111, §147.

It is clear that under §143 the Board of Health has the power, in appropriate cases, to prohibit the carrying on of a particular business within the city. See Moysenko v. Board of Health of North Andover, 347 Mass. 305 (1964) (piggeries); Revere v. Blaustein, 315 Mass. 93 (1943) (painting truck bodies); Board of Health of Wareham v. Marine By-Products Company, 329 Mass. 174 (1952) (manufacturing fish by-products). Revere v. Riceman, 280 Mass. 76 (1932) (slaughtering fowl); Waltham v. Mignosa, 327 Mass. 250 (1951) (cows, swine goats, roosters, fowl, ducks, pigeons and rabbits).

In Moysenko v. Board of Health of North Andover, 347 Mass. 305, it appeared that, on February 24, 1960, the Board of Health adopted, after a public hearing, regulations relative to the keeping of pigs. The first regulation stated: "No person, firm or corporation shall keep a piggery within the Town of North Andover." On January 27, 1961, the Moysenkos were served with an order of prohibition under G.L.c. 111, §146 directing them to cease operating a piggery on certain designated premises. They filed a petition under G.L.c.111,

§147 to have a jury annul the Board's order and assess damages. G.L.c.111, §§149, 150. The jury affirmed the order of the Board and the Moysenkos appealed.

In affirming the action of the Board of Health, the Court held that the Board's regulation and order were enforceable against the Moysenkos, even though the Board issued the order without investigating the premises and without having any knowledge of the method of operation of the piggery, and even though there had been no complaints and State health officers "always found the premises fit and satisfactory for the operation of a piggery." Id. at 306. The court concluded that, "The sole reason for the...prohibition was because the board wanted no pigs in the town". Id.

The Court stated (at p.308):

...In regulating an occupation a board may not act in an unreasonable, arbitrary, whimsical, or capricious manner"....But under §143 an entire occupation may be prohibited if "it is conceivable that there might be circumstances where...(the exercise of that occupation) might become...(a nuisance)." Waltham v. Mignosa, 327 Mass. 250, 252 (1951). Clearly "the trade or employment need not in fact be a nuisance or attended by noisome and injurious odors before the power of prohibition arises." Id.

In Revere v. Blaustein, 315 Mass. 93 (1943). it appeared that the Board of Health, after inspecting defendant's premises, "passed a vote" prohibiting the painting of truck bodies on the premises. In upholding the Board's action, the Court stated that the Board was not required to give defendant notice or a hearing before making the order. The Court stated:

...That order was of a preliminary nature and was not conclusive. The defendant could contest the validity of the order and could secure an annulment or modification of it by the verdict of a jury upon a petition filed in accordance with G.L.c.111, §147. Ryder v. Board of Lexington, 273

Mass. 177 (1930) (piggery).

Id. at 95.

The court also said, "If the defendant was the only one affected by the order, that would not render it invalid."

Id. at 96.

V. POLICE POWER

Health regulations are authorized under the police power of the city. Police power is

the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits.

16 C.J.S., Constitutional Law, §174 (1956). This power has been delegated by the Commonwealth to the city through G.L. c.111, §31 and other statutes. "It is the right and duty of a state possessing the police power to pass laws for the preservation of the public health," 16 C.J.S., Constitutional Law, § 183, and the public safety, Id., §184

A. REGULATION MUST BE REASONABLE

The police power was defined by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53, 85 (1853) as

...the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws...as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

And in 6 McQuillan, Municipal Corporations, §24.28 (1930), it is stated:

An exercise of the police power is valid where the subject to which the regulation relates is within the scope of the legislative power, the ends sought to be attained are appropriate, and the regulations prescribed are reasonable and have a rational basis.

"A measure enacted purportedly under the police power is

presumably valid, and the burden of proof of the contrary is in one asserting it." Id.

B. ANTICIPATING DANGER

As noted above, under G.L.c.111, §143, "an entire occupation may be prohibited if it is conceivable that there might be circumstances where the exercise of that occupation might become a nuisance." Moysenko v. Board of Health of North Andover, 347 Mass. 305, 308 (1964). The same idea is expressed in Town of North Hempstead v. Exxon Corp., 53 N.Y. 2d 747, 439 N.Y.S. 2d 342, 421 N.E. 2d 834, 837 (1981) (Fuchsberg, J., concurring), as follows:

...it is entirely proper for a Legislature to anticipate a danger and to provide against it before it materializes (citations omitted)... specific legislative findings as to need were not required for, if any state of facts, known or hypothesized, could justify the law, the court's power of inquiry ended (United States v. Caroline Prods. Co., 304 U.S. 144, 151, 82 L.Ed 1234, (1938)...

Action was brought challenging a town ordinance prohibiting the operation of self-service gas stations. The Court held that the ordinance had a rational basis and was not unconstitutional. A copy of the opinion is attached.

I am also attaching copies of the following cases:

Cohen v. Bredehoeft, 290 F. Supp. 1001 (S.D. Tex., 1968)

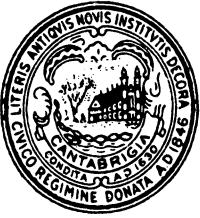
Upholding ordinance prohibiting fireworks within the city.

City of Douglas v. Tri-Co. Fertilizer, Inc., 519 P 2d 724
(Kan., 1974)

City had statutory authority to prohibit storage of anhydrous ammonia.

Commonwealth v. Parks, 155 Mass. 531 (1892)

Upholding Somerville ordinance prohibiting blasting
without permit from board of aldermen (per Holmes, J.)



CITY OF CAMBRIDGE
DEPARTMENT OF HEALTH AND HOSPITALS
1493 CAMBRIDGE STREET
CAMBRIDGE, MASSACHUSETTS 02139
498-1349

MELVIN H. CHALFEN, M.D.
COMMISSIONER

March 9, 1984

Mr. Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Dear Mr. Healy:

I have received the communication from you transmitting the opinion of the City Solicitor in regard to the powers of the Commissioner of Health and Hospital under G.L. chapter 111, section 31, 122 and 143. Section 143 seems to be most applicable in its provisions concerning activities "harmful to the inhabitants" and "dangerous to the public health".

To determine whether these provisions of section 143 are applicable in this particular instance (A.D. Little laboratory) I need a rational and reasonable basis upon which to make that determination. To define whether there is a substantial health risk to the public were an accident to occur requires a hazard assessment.

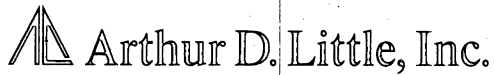
The way to acquire such an assessment is not difficult. Standard methodologies have been available for years. The calculations are straightforward. The assessments are done by appropriate engineering firms. I have contacted a firm which has world wide experience with hazard assessments and will keep you informed of progress which I expect to be rapid.

Yours sincerely,

Melvin H. Chalfen, M.D.
Commissioner

MHC:vls

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OFFICE OF THE
ATTORNEY GENERAL



February 16, 1984

Mr. Robert W. Healy, City Manager
City of Cambridge
795 Massachusetts Avenue
Cambridge, MA 02139

Dear Mr. Healy:

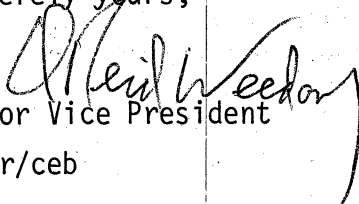
We are in receipt of your letter of February 15 enclosing the Council's order of February 13, 1984 concerning Arthur D. Little.

That order and the previous one of February 6 came as surprises, given that we agreed at a Council meeting on October 24, 1983 to cooperate with the city's proposed scientific advisory committee.

We are operating a carefully-designed toxic materials laboratory which exceeds all present standards and sets a new safety level for such facilities. It has been inspected for safety on several occasions by cognizant federal authorities. Although it is not clearly required, the facility has also been inspected by numerous local officials. The Massachusetts Department of Public Health issued a report stating: "It is concluded from the review of the design of this facility that utilization of state of the art equipment should minimize contamination of the environment and reduce the risk of hazard to human health." We continue to permit other official inspection.

The Council requested on February 13 a ninety-day moratorium on work on chemical warfare agents in our laboratory. We are anxious to cooperate, but we do have two existing contracts with the Department of Defense which we cannot unilaterally stop without being held in default and subject to penalty. However, in a spirit of cooperation, we are willing to agree not to undertake any work on new contracts involving chemical warfare agents for a thirty-day period from February 13 in order to permit a dialogue with the scientific advisory committee, which we urge be established promptly. In view of the reviews already completed, thirty days should be adequate for the committee's review of the situation with respect to this particular laboratory. We would be pleased to work with the committee over a longer period on standards for handling toxic materials.

Sincerely yours,


Senior Vice President

DRWJr/ceb

Brussels	Madrid	São Paulo	Wiesbaden
Houston	Paris	Tokyo	
London	Rio de Janeiro	Toronto	
Los Angeles	San Francisco	Washington	

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FEB 21 1 56 PM '84
OFFICE OF THE
CITY MANAGER



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
Tel. 498-9011

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

March 12, 1984

To the Honorable, the City Council:

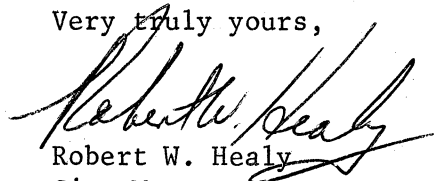
I am enclosing a copy of an opinion from the City Solicitor's Office relative to the Powers of the Commissioner of Health & Hospitals as related to the testing of "nerve gas" at Arthur D. Little, Inc., a copy of Commissioner Melvin Chalfen's proposal to determine if the applicable statutes cited in the City Solicitor's opinion can reasonably be invoked, and a copy of Arthur D. Little's response to the City Council relative to the Council's request for a ninety-day moratorium on such testing.

Essentially, the City Solicitor's opinion states that the Board of Health (Commissioner) may have the power to either require siting approval or prohibit activities that are "harmful to the inhabitants" and/or "dangerous to the public health" by regulation.

Since the statute requires such action to be reasonable, the Commissioner intends to conduct an independent hazard assessment to determine whether the above statutory wording applies before invoking this power.

The Arthur D. Little response indicates their willingness to invoke a 30-day moratorium on any new contracts on chemical warfare agents in their laboratory.

Very truly yours,


Robert W. Healy
City Manager

RWH/mbf
Encs.

Agenda Item Number Eleven

5-154
Re: power of the Commissioner of Health
& Hospitals as it relates to the testing
of "nerve gas".

In City Council,

March 12, 1984

3/12/84

Placed on File -
see Order Adopted
on this subject