Recd at 6PM 8/6/79

MEMORANDUM

TO: Cambridge City Council

FROM: David E. Sullivan

RE: Proposed ordinance to regulate removal of controlled rental units from market

DATE: August 6, 1979

This memorandum is in support of the proposed city ordinance to regulate removal of controlled rental units from the market. The City Council ordered the proposed ordinance to a second reading on June 25, 1979, and defeated a motion to reconsider that vote at a special meeting on July 16. After this public hearing, the ordinance will be before the Council for final ordination. See G.L. ch. 43, § 23; Cambridge City Code § 1-4.

The memorandum will first describe the emergency which necessitates the ordinance and will summarize its provisions. Next, the power of the City Council to pass the ordinance will be established. Finally, the memorandum will show that the ordinance is substantively constitutional.

I. THE ORDINANCE IS NECESSARY TO MEET A WORSENING HOUSING EMERGENCY.

The ordinance is addressed to an acute emergency facing Cambridge, which is daily growing more serious. Cambridge Board of Assessors records indicate that in recent years master deeds under G.L. ch. 183A have been recorded at the registry of deeds to convert to condominiums apartment buildings containing about 2,000 rental units. Rent Control Board data show that at least 1,400 of these apartments are covered by rent control. In addition, hundreds of additional controlled units have been removed by

demolition -- especially for townhouse construction -- and by conversion to commercial, office, or academic use. In short, more than 10 percent of the approximately 22,000 controlled rental units in the city have been removed from the rental market since the city first adopted rent control by accepting the then state enabling act, 1970 Mass. Acts ch. 842. The vacancy rate is now officially estimated at one half of one percent.

Condominium conversions have, of course, caused the greatest difficulties for the rental market, both because of their sheer numbers and because of the resultant hardships imposed on existing tenants, many of whom are elderly. See Cambridge Community Development Department, Condominium Conversions in Cambridge: A Profile of New Owners and Former Tenants 3 (1978). Since the price of most condominium units -- between $20,000 and $60,000 -- exceeds what most low- and moderate-income tenants can afford to pay, the obvious effect is to aggravate the increasingly-severe shortage of decent affordable rental housing. See generally Uniform Condominium Act § 4-110 & comments 1, 3; Rohan, The "Model Condominium Code" -- A Blueprint for Modernizing Condominium Legislation, 78 Colum. L. Rev. 587, 599-600 (1978).

It was the declared purpose of both the 1970 Act and its Cambridge successor, 1976 Mass. Acts ch. 36, approved and drafted by this Council, to alleviate this "substantial and increasing shortage of decent rental housing accomodations especially for families of low and moderate income" (section 1 of both Acts). This purpose can simply no longer be carried out unless legislation like the present ordinance is passed soon.

Both Acts, of course, not only regulated rents but also

restricted evictions to an enumerated set of grounds set forth in section 9(a). Under section 9(a)(10) of the 1970 Act, which permitted eviction "for any other just cause . . . not in conflict with the provisions and purposes of . . . this act," the Supreme Judicial Court permitted a condominium developer to evict all tenants in a building in order to sell their apartments as condominium units. Zussman v. Rent Control Board, 367 Mass. 561, 326 N.E.2d 876 (1975). The 1976 Act overruled that statutory construction as to Cambridge by adding the following sentence to section 9(a)(10): "Recovery of possession in order to convert an apartment to a condominium unit shall not be a valid reason to recover possession of a controlled rental unit."

The Cambridge Rent Control Board nevertheless interpreted the 1976 Act to permit a condominium developer instead to sell individual units to purchasers, who, once they had obtained record title, could then legally evict the tenants anyway. Cambridge Rent Control Board policy, June 30, 1977. This is supposedly made possible by section 9(a)(8) of the Act, which permits eviction by a "landlord," here the purchaser, who "seeks to recover possession in good faith for use and occupancy of himself" or of immediate family members.

This policy has apparently allowed conversions and resulting displacements of tenants to continue unabated. See Cambridge Community Development Department, Condominium Conversions in Cambridge: A Profile of New Owners and Former Tenants 1 (1978). The problem seems to be that present tenants simply cannot be expected to remain for any appreciable time under existing protections, especially in an atmosphere of harassment and

uncertainty. See Cambridge Rent Control Board reg. 50-11, 50-12 (regulating attempts to deceive tenants into leaving). When these tenants do eventually leave, the apartment is permanently removed from the rental market. The Board of Assessors records show that about 1500 of the 2,000 unit conversions have occurred in the two and a half years since the beginning of 1977.

This City Council was made aware of the worsening situation during extensive public hearings in 1977 and 1978. In response, it has voted four times to file home rule petitions with the state Legislature under section 8(1) of the Home Rule Amendment, Mass. Const. amend. art. 2. Orders, Feb. 13, 1978 (H. 6007 (1978)); Dec. 4, 1978 (H. 5507 (1979)); June 11, 1979; June 25, 1979 (H. 6668 (1979)). Each of these bills has sought to amend section 9(a)(8) of the 1976 Act to overrule the above Rent Control Board condominium eviction policy and thus to protect existing rent-controlled tenants against eviction at the hands of unit purchasers. The first two attempts, to protect all tenants in this situation, met with defeat in the Legislature. The two more-recent bills would apply only to restricted classes of tenants -- respectively, those in buildings where there are not at least 40 percent of existing tenants who have agreed to buy their units, and those 62 years old or older -- and their suceess in the Legislature is uncertain at this time.

Such anti-eviction legislation is an extremely important first step, but even if it is successful, it can only serve as a temporary expedient to avert the worst hardships for present tenants threatened with dislocation. It does not address adequately the long-term damage to the supply of rental housing

which is so essential for preserving the city's low- and middle-income population. Salsberg, Brookline Buys Time, Boston Phoenix, May 15, 1979, at 24. That is the goal of the present ordinance -- not merely to protect existing tenants, but also to preserve the very supply of rental housing itself, and thereby to safeguard the interests of future tenants as well. It is based in part on section 1803(t) of the Santa Monica (California) city charter, which that city's voters adopted as part of a rent control initiative in April 1979. See N.Y. Times, April 15, 1979, at 1, col. 5.

Basically, the proposed ordinance would require anyone seeking to remove a rent-controlled apartment from the market first to obtain a permit from the Rent Control Board after a hearing. Removal is defined to include a purchaser's occupancy of a condominium unit, demolition, and substantial unnecessary renovation so as to prevent tenant occupancy. Standing to apply for a removal permit is deliberately made expansive to protect the rights of all concerned; thus, a condominium developer could apply for a permit for all units befcre they are sold. This would both put purchasers on notice as to the legality of their occupancy and also permit tenants to achieve protection at an early date; if the developer fails to apply for the permit, individual purchasers are free to do so later. Of course, this provision cannot and does not allow eviction proceedings to be brought any sooner than they may now -- namely after the unit deed is recorded -- nor does it foreclose a tenant from raising any issue at that time, including lack of good faith or incorrect procedure.

In deciding whether to grant a removal permit, the Board is instructed to consider only those factors relevant to the purposes of the Act: any resulting benefits to tenants protected by rent control; the hardships imposed on existing tenants, and any mitigating provisions by the applicant; and the impact on the shortage of decent affordable rental housing in Cambridge. The ordinance will remain in effect only as long as the housing emergency persists -- it will lapse whenever either the citywide vacancy rate exceeds 4 percent, or there are more rental apartments in the city than there were in 1970, when rent control began. It may be enforced both by criminal prosection and by civil action for an injunction or declaratory judgment.

It is important to note that, while this ordinance may be more comprehensive and efficacious than anti-eviction legislation in the sense discussed above, it is less intrusive from the perspective of the landlord-tenant relationship itself. Because it does not regulate rents or evictions, but merely the owner's activities concerning the property, it does not require approval by the state Legislature, as will be established in the next part. In this respect, it is analogous to the recently-passed "historic house" ordinance, which temporarily prohibits destruction of "significant" buildings. Ordinance No. 909 (Dec. 1978). This distinction is crucial, because it renders inapplicable to the proposed ordinance the City Solicitor's March 30, 1979 opinion that anti-eviction legislation requires approval by the state Legislature. Further light will no doubt be shed on all these issues by the forthcoming decision of Grace v. Town of Brookline, now pending in the Supreme Judicial Court.

II. THE CITY COUNCIL HAS POWER TO PASS THE ORDINANCE.

The source of the City Council's authority to pass the proposed ordinance is two-fold: the Home Rule Amendment to the state constitution, and the Cambridge Rent Control Act. Each of these authorities furnishes an independent basis for the exercise of the power.

A. The Home Rule Amendment authorizes the ordinance.

Section 6 of the Home Rule Amendment, Mass. Const. amend. art. 2, provides:

> 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. This section shall apply to every city or town, whether or not it has adopted a charter pursuant to section three.

See G.L. ch. 43B, § 13. Section 7 then provides that nothing in the Amendment

> shall be deemed to grant to any city or town the power . . . (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; . . .

unless the state Legislature affirmatively grants the power.

Certainly, nothing in Cambridge's charter, G.L. ch. 43, §§ 1-45, 93-116, denies the City Council the power to pass this ordinance. And the final part of this memorandum will demonstrate that the ordinance is "not inconsistent with the constitution . . . ." Therefore, in order to show that the ordinance is authorized by the Home Rule Amendment, it remains to establish, first, that the ordinance is not an attempt "to enact private or

civil law governing civil relationships except as an incident to an exercise of an independent municipal power" in violation of section 7(5), and, second, that it is "not inconsistent with . . . laws enacted by" the state Legislature under section 8, as required by section 6.

1. The ordinance does not violate section 7(5).

In order to show that the ordinance does not run afoul of section 7(5), its proponents must show either that it is not "private or civil law governing civil relationships" or that, if it is, then it does so only "as an incident to an exercise of an independent municipal power." This memorandum contends that the ordinance satisfies both these clauses.

The leading case interpreting the first clause is Marshal House, Inc. v. Rent Review and Grievance Board, 357 Mass. 709, 260 N.E.2d 200 (1970) (Marshal House I). There, the Supreme Judicial Court struck down a Brookline by-law which without state legislative authorization established a board to regulate rents and evictions, holding that it impermissibly governed "civil relationships" between landlords and tenants. Although not a model of clarity, see Schwartz, The Logic of Home Rule and the Private Law Exception, 20 U.C.L.A.L. Rev. 671, 695 (1973) (opinion "offers little guidance" concerning validity of other local enactments), the court's opinion seemed to focus on the board's power to reduce agreed-upon rents. The court noted that the "by-law thus purports to control the principal incentive to the landlord for entering into the relationship at all," characterizing it as a "power in effect to remake, in important respects, the parties' contract creating a tenancy." Id. at 715-16, 260

N.E.2d at 205-06. See Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (both reaching similar conclusions under federal Constitution's contract clause, discussed in part III.B.).

The present ordinance differs significantly. It does not regulate rents or evictions. As emphasized in the previous part, it controls only the owner's activities concerning the property -- occupancy, demolition, rehabilitation -- not any "relationships" with tenants or other citizens. Of course, the "ordinance may have some impact on civil relationships," Bloom v. City of Worcester, 363 Mass. 136, 146, 293 N.E.2d 268, 275 (1973) -- such as by tending to reduce evictions -- but that case is authority for the proposition that this alone will not invalidate it. Rather, this ordinance is analogous to ordinances requiring preservation of historic houses, or specifying permitted uses via zoning, or permitting occupancy only after compliance with housing codes. The Marshal House I court itself recognized the validity of local ordinances and by-laws "requiring landlords . . . to take particular precautions to protect tenants against injury from fire, badly lighted common passageways, and similar hazards." At 717-18, 260 N.E.2d at 206. To protect the class of Cambridge tenants against the lack of sufficient housing as this ordinance does is simply an extension of this recognized power to protect them against inadequate housing.

Another way of conceptualizing the validity of such local enactments is to view them as coming within the second clause of section 7(5) "as an incident to an exercise of an independent municipal power," namely the police power "to adopt (ordinances

and) by-laws for the protection of the public health, morals, safety, and general welfare . . . ." Marshal House, Inc. v. Rent Review and Grievance Board, 357 Mass. 709, 717, 260 N.E.2d 200, 206 (1970). See Board of Appeals v. Housing Appeals Committee, 363 Mass. 393, 359, 294 N.E.2d 393, 409 (1973) (recognizing general validity of zoning ordinances on this basis). The proposed ordinance meets the requirements of this second clause both for this reason, as just discussed, and also because it is "incident to" exercise of the power to control rents and evictions, which the state Legislature granted Cambridge under section 8 by enacting the Cambridge Rent Control Act, 1976 Mass. Acts ch. 36. The latter reason is discussed in section B. of this part.

2. The ordinance is "not inconsistent with" state law.

Even if it is not barred by section 7(5), the proposed ordinance must also not be "inconsistent with" any law enacted by the state Legislature under section 8. Three such section 8 laws can be imagined: the Zoning Act, the Condominium Act, and the Cambridge Rent Control Act. The memorandum will first establish the proper standard of inconsistency and then apply it to the ordinance in the context of each of these statutes.

To invalidate a local enactment as "inconsistent with" state law, it is not enough to show that the Legislature has also acted in the same area. "The mere existence of statutory provision for some matters possibly within the purview of the (local) rule does not render the rule invalid as repugnant to law." Boston Police Patrolmen's Association, Inc. v. City of Boston, 367 Mass. 368, 372, 326 N.E.2d 314, 318 (1975). Rather, "(t)he legislative intent

to preclude local action must be clear." Bloom v. City of Worcester, 363 Mass. 136, 155, 293 N.E.2d 268, 280 (1973) (footnote omitted) (upholding ordinance establishing city human rights commission despite coexistence of state anti-discrimination machinery). "If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances or by-laws on that subject." Id. at 156, 293 N.E.2d at 280-81 (footnote omitted). See Anderson v. City of Boston, 78 Mass. Adv. Sh. 2297, 2304-05, 380 N.E.2d 628, 633, stay granted on other grounds, 99 S.Ct. 50 (Brennan, J., in chambers), motion to vacate stay denied mem., 99 S.Ct. 346 (1978), appeal dismissed, 99 S.Ct. 822 (1979) (striking down ordinance funding campaign to support state ballot measure, after concluding Legislature occupied field of campaign finance by enacting G.L. ch. 55).

None of the three statutes mentioned above expressly prohibits adoption of local ordinances. Therefore, the inquiry must be whether the respective purposes of these laws can be achieved in the face of the proposed ordinance. An analysis of each follows.

(a) Zoning Act. The Zoning Act, G.L. ch. 40A, regulates the procedure for adopting local zoning ordinances in execution of the independent municipal power recognized in Board of Appeals v. Housing Appeals Committee, 363 Mass. 339, 359, 294 N.E.2d 393, 409 (1973), discussed above. Since in adopting the proposed ordinance, the City Council has not followed the procedure for adopting zoning ordinances under G.L. ch. 40A, § 5 -- including a planning board

hearing and report, and a two-thirds Council vote -- it might be claimed that the ordinance is procedurally invalid.

However, this is not a zoning ordinance. That is defined in G.L. ch. 40A, § 1A to include only an ordinance "adopted . . . to regulate the use of land, buildings and structures . . ." (emphasis added). Again, as emphasized in the first part, this ordinance does not regulate "use" any more than it governs "civil relationships"; instead, it controls only the owner's activities, like the other non-zoning "police power" ordinances mentioned before: historic preservation, certificate-of-occupancy, housing codes, and the like. Ironically, but for similar reasons, attempts in other states "to zone condominiums as a 'use' have not met with success in the courts." Rohan, The "Model Condominium Code" -- A Blueprint for Modernizing Condominium Legislation, 78 Colum. L. Rev. 587, 592 n.28 (1978) (collecting authorities). It is true that Goldman v. Town of Dennis, 78 Mass. Adv. Sh. 1236, 375 N.E.2d 1212 (1978) considered (and upheld) a zoning by-law, which operated to prohibit conversion of a rented cottage colony to a condominium, but that by-law was adopted because "the town . . . believe(d) that conversion of a cottage colony to single family use under condominium type ownership would encourage expansion of use beyond the short summer season", id. at 1238, 375 N.E.2d at 1214 (emphasis added); the present ordinance attempts no such limitation of use, whether in duration or otherwise, nor does it regulate the form of ownership. It is not a zoning ordinance, and so is not subject to G.L. ch. 40A.

(b) Condominium Act. The ordinance is also "not inconsistent with" the state Condominium Act, G.L. ch. 183A. That statute was

enacted to regulate the establishment of condominiums by imposing certain procedural requirements. That this, and not the encouragement of condominium ownership, was the legislative purpose is made clear by the Legislature's subsequent enactment of such legislation as 1974 Mass. Acts ch. 847, requiring a permit from the Board of Aldermen for conversion of certain Newton apartment buildings to condominiums, and of course 1976 Mass. Acts ch. 36, § 9(a)(10), the Cambridge provision discussed in the first part which prohibits evictions "to convert an apartment unit to a condominium unit". See Town of Milton v. Attorney General, 77 Mass. Adv. Sh. 1214, 1217, 363 N.E.2d 679, 681 (1977) (upholding by-law prohibiting self-service gasoline stations as consistent with state rule that such stations "shall be permitted" under certain conditions, since purpose of state rule was to "assure the safety" of, not to "encourage," such stations). And the Goldman case, in upholding the by-law which operated to prevent converting a rental cottage colony to a condominium, explicitly held that G.L. ch. 183A did not prevent adoption of such a by-law. 78 Mass. Adv. Sh. at 1237, 375 N.E.2d at 1213.

The proposed ordinance does not even go so far. It does not prevent conversion to condominiums as such in any case, nor does it regulate form of ownership. It does not interfere with the purpose or any specific provision of the Condominium Act. Of course, it may operate in some situations to prevent a condominium unit owner from occupying the unit, but in view of the above discussion of legislative purpose and case law, G.L. ch. 183A, § 4, entitling "(e)ach unit owner . . . to the exclusive ownership and possession of his unit" under certain conditions, must be read in context to

confer a right which runs only against the other unit owners and their organization mentioned in that section, and not against tenants to whom G.L. ch. 183A does not refer and with whom it is not concerned.

(c) Cambridge Rent Control Act. Finally, the ordinance does not run afoul of the Cambridge Rent Control Act, 1976 Mass. Acts ch. 36. Far from contradicting the Act, in fact, the ordinance is essential for carrying out its purposes and preventing its slow destruction, a point further elaborated in section B.

The argument that the ordinance contradicts the Act depends on serious misunderstandings both of the ordinance and of section 9(a)(8) and (9) of the Act. The latter provisions read:

> No person shall bring any action to recover possession of a controlled rental unit unless:
>
> . . .
>
> 8) the landlord seeks to recover possession in good faith for use and occupancy of himself or his (immediate family members); (or)
>
> 9) the landlord seeks to recover possession to demolish or otherwise remove the unit from housing use;
>
> . . .

The argument is that these words confer a right of possession in the indicated circumstances, and that denial of a removal permit under the ordinance will deprive the owner of this right in these cases. This contention is incorrect for a number of reasons.

First, as mentioned previously, the ordinance does not regulate evictions. It regulates the owner's activities concerning the property: occupancy, demolition, rehabilitation. Certainly, no one would claim that a Historical Commission finding that an apartment building is "significant," and thus cannot be demolished for at least six months, violates section 9(a)(9) of the Act --

although it might, at least temporarily, prevent tenants from being evicted under that paragraph. See Cambridge Rent Control Board reg. 59-01 (requiring landlord's affidavit that the building is to be demolished). Similarly, denial of a building permit for some violation of the zoning ordinance, or lack of a certificate of occupancy for violation of the state sanitary code (under a proposed ordinance) could prevent occupancy or rehabilitation -- and again perhaps incidentally prevent evictions -- but without contradicting the Act. The point is that what is regulated by the ordinance and by the Act are conceptually different, even though the subject matter is similar. See City of Revere v. Aucella, 369 Mass. 138, 144-46, 338 N.E.2d 816, 820-21 (1975), appeal dismissed on other grounds sub nom. Charger Investments, Inc. v. Corbett, 429 U.S. 877 (1976) (upholding local ordinance regulating conduct at licensed premises in face of state statute creating local licensing board to license same subject matter).

A second and related reason is that section 9(a) confers no right of possession in the circumstances it mentions; it merely forbids evictions in any other circumstances. In other words, it comprises a list of necessary but not sufficient conditions. This is made luminously clear by section 9(e), which provides:

> The provisions of this section shall be construed as additional restrictions on the right to recover possession of a controlled rental unit. No provision of this section shall entitle any person to recover possession of a unit.

This subsection is an unambiguous legislative declaration that there are other sources of restrictions on evictions beyond the Act. To the extent that the ordinance does restrict evictions, therefore, the Act does not pre-empt it. See John Donnelly & Sons, Inc. v.

Outdoor Advertizing Board, 369 Mass. 206, 212-15, 339 N.E.2d 709, 713-15 (1975) (upholding by-law prohibiting all off-premise signs as consistent with state statute authorizing Board to require that signs be located in non-residential districts). The City Council, which under section 8(1) of the Home Rule Amendment drafted the exact language of the Act, can hardly be presumed to have pre-empted itself.

Most importantly, the ordinance is designed to carry out the very purposes of the Act. See 1976 Mass. Acts ch. 36, § 5(c) (discussed in the next section). See also Taunton Greyhound Association, Inc. v. Town of Dighton, 77 Mass. Adv. Sh. 1525, 1529, 364 N.E.2d 1234, 1237 (1977) (upholding by-law requiring local police at racetrack as consistent with state statute requiring police on application of State Racing Commission, since by-law and statute were "in aid of the same purposes"); Town of Milton v. Attorney General, 77 Mass. Adv. Sh. 1214, 1217, 363 N.E.2d 679, 681 (1977) (upholding by-law prohibiting self-service gasoline stations as consistent with state rule that such stations "shall be permitted" under certain conditions, since purpose of both was assuring safety). These purposes, incorporated by subsection (a) of the ordinance, are stated clearly in section 1 of the Act: to remady "a substantial and increasing shortage of decent rental housing accomodations especially for families of low and moderate income and for elderly people on fixed income . . . (which otherwise) will produce serious threats to the public health, safety, and general welfare of the citizens of Cambridge . . . ."

The crucial case in establishing the legislative purpose behind the Cambridge Rent Control Act in the present context is

Mayo v. Boston Rent Control Administrator, 365 Mass. 575, 314 N.E.2d 118 (1974). There, the Supreme Judicial Court explained the purpose of the Cambridge Act's virtually-identical statewide predecessor, 1970 Mass. Acts ch. 842. The question presented was whether section 9(a)(10), permitting evictions for "any other just cause . . . not in conflict with the provisions and purposes of . . . this act," should be read to permit "evictions . . . not for necessary maintenance, but for optional upgrading of . . . apartments," so that the apartments could be returned to the market as "high-rent units." At 580, 314 N.E.2d at 122. In refusing to permit the evictions, the court looked to the substantially-similar language of section 1 of the 1970 Act for a statement of its purposes. The court concluded:

> From the plain language of § 1 it is clear that one of the principal purposes of the act is to preserve and expand the supply of housing for families of low and moderate income. . . . (T)his (planned rehabilitation) will remove the apartments from the low and moderate rental market. Presumably, this change will be permanent. The result would be in conflict with what is clearly a central purpose of the act.

At 580, 314 N.E.2d at 122.

As mentioned in the first part, the same court was asked the following year to apply the same principles to evictions of tenants so that their apartments could be sold as condominium units. The court refused to do so, permitting the evictions. Zussman v. Rent Control Board, 367 Mass. 561, 566-67, 326 N.E.2d 876, 878-79 (1975). The year after that decision, this City Council and the Legislature decisively overruled that anomalous holding, as far as Cambridge was concerned, by amending section 9(a)(10) of the new Cambridge Act. The legislative purpose must

now be unmistakably clear that the Mayo analysis is to be applied universally. The ordinance does no more than pursue that analysis to its logical conclusion -- by regulating removal of apartments from the low and moderate rental market in general, and not merely when they happen to be occupied by tenants who refuse to leave.

B. The Cambridge Rent Control Act further supports the validity of the ordinance.

The previous discussion in this part has shown that the ordinance is properly founded on section 6 of the Home Rule Amendment. But an independent source of authority exists in section 5(c) of the Cambridge Rent Control Act, which requires the Rent Control Board to "recommend to the city, for adoption, such ordinances as may be necessary to carry out the purposes of this act." The exact meaning of this provision is certainly unclear, and some dicta in the City Solicitor's March 30 opinion concerning anti-eviction legislation construe it narrowly.

Still, this provision supplies additional legal support for the ordinance's validity in at least three senses. First, it can be read broadly as a delegation of power (consistent with the Act's title: "enabling the city of Cambridge to continue to control rents and evictions" (emphasis added)) to the City Council, thus overcoming any problems under the Home Rule Amendment, except of course whether the ordinance is consistent with the Act itself. Second, even if viewed more narrowly, this language at least recognizes the City Council's inherent home rule powers to act here. Finally, it can also be seen as validating the ordinance under section 7(5) of the Home Rule Amendment, discussed earlier, "as an

incident to" the power granted by the Act, "enabling the city of Cambridge to continue to control rents and evictions."

In any event, there can be no doubt that this proposed ordinance is "necessary to carry out the purposes" of the Act, even in the strictest sense. Mayo identified "one of the principal purposes" to be "to preserve and expand the supply of housing for families of low and moderate income . . . ." 365 Mass. at 580, 314 N.E.2d at 122. The ordinance seeks only to begin to stem the tide which has already engulfed the Cambridge rental market, removing 2,000 or over 10 percent of the city's rent-controlled apartments. Without it, there will only be fewer and fewer rents to control.

III. THE ORDINANCE DOES NOT VIOLATE ANY SUBSTANTIVE CONSTITUTIONAL PROVISION.

The preceding part has confirmed the procedural validity of the proposed ordinance. A number of substantive constitutional arguments against it can also be imagined. These, in other words, could be raised against it even if it were a statute passed by the Legislature.

First, it could be claimed that the ordinance deprives persons of property without due process of law, in violation of the fourteenth amendment to the federal Constitution and of articles 1, 10, and 11 of the state constitution's Declaration of Rights. Second, the ordinance might be said to take private property for public use without just compensation, in violation of the federal fifth amendment, made applicable by the fourteenth, and of article 10 of the Declaration of Rights. Third, the ordinance might impair

impair the obligation of contracts protected by article I, section 10, clause 1 of the federal Constitution. Finally, it could be argued that the ordinance denies the equal protection of the laws, in violation of the federal fourteenth amendment and of articles 10 and 11. This memorandum will show that each of these claims is unfounded, and that therefore the ordinance would be constitutional if enacted in the context of the present housing emergency described above.

A. The test under the due process and takings clauses is whether the owner has been deprived of all reasonable uses or substantially the entire value of the property, or a reasonable return on investment.

For over half a century, courts have uniformly and consistently held that legislatures, in the exercise of their "police power" to protect the public health, safety, morals, and welfare, may regulate the use of private property in the interest of the community as a whole. "(T)he enjoyment of private property may be subordinated to reasonable regulations that are essential to the peace, safety, and welfare of the community." Consolidated Cigar Corp. v. Department of Public Health, 77 Mass. Adv. Sh. 1419, 1428, 364 N.E.2d 1202, 1207 (1977). And courts have given the widest possible scope to economic legislation like the present ordinance. Courts will simply not interfere with this regulation unless it becomes "an unreasonable exercise of power having no rational relation to the public safety, public health, or public morals." Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 233, 284 N.E.2d 891, 898 (1972), cert. denied, 409 U.S. 1108 (1973); Maider v. Town of Dover, 1 Mass. App. Ct. 683, 687, 306 N.E.2d 274, 277

(1974) (both quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

More specifically, the Supreme Judicial Court, in a recent line of cases largely involving zoning by-laws, has elaborated a clear standard under the due process and takings clauses, which the ordinance clearly meets.

Thus, in Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 111, 206 N.E.2d 666, 671 (1965), the court set forth a standard to guide the trial court on remand by quoting this sentence from Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938): "An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property." (emphasis original) See Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964).

The court reaffirmed that regulation would be upheld so long as it left the owner with some reasonable use of the property in MacGibbon v. Board of Appeals, 356 Mass. 635, 641, 255 N.E.2d 347, 352 (1970), where, citing Volpe and Arverne Bay, it held the test to be "whether the power to regulate . . . is exercised in such a manner and to such an extent that it deprives the . . . land of all practical value to (the owners) or to anyone acquiring it, leaving them only with the burden of paying taxes on it." The Appeals Court stated the converse of this principle in Maider v. Town of Dover, 1 Mass. App. Ct. 683, 688, 306 N.E.2d 274, 278 (1974), where it said, "The fact that he may not be able to put the land to its most profitable use is not sufficient reason to invalidate the (regulation)."

In Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 232-37, 284 N.E.2d 891, 898-900 (1972), cert. denied, 409 U.S. 1108 (1973), the Supreme Judicial Court applied these principles to their full extent by upholding a flood-plain zoning by-law which prevented the owner of land from erecting any structure, residential or otherwise, on his property. In this landmark case, the court decided that the availability of even such seemingly-inconsequential uses as recreation meant that the owner "has not been deprived of all beneficial uses of its property," 362 Mass. at 235, 284 N.E.2d at 899, although the court recognized that a "substantial diminution in value" had occurred. Id. at 236, 284 N.E.2d at 900. See Monaghan v. Town of North Reading, 79 Mass. App. Ct. Adv. Sh. 1102 (1979) (applying Turnpike Realty standard to uphold zoning by-law prohibiting construction of any building, including a residence, while permitting only "woodland, grassland, or farm" uses). And in John Donnelly & Sons, Inc. v. Outdoor Advertizing Board, 369 Mass. 206, 339 N.E.2d 709 (1975), the court upheld as constitutional a town by-law prohibiting all off-premise signs in the town. The court held that mere aesthetic considerations fully justified the regulation, even though it required removal of twenty-two existing billboards.

The federal cases are in complete accord. For example, in South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678-80 (1st Cir. 1974), the United States Court of Appeals for the First Circuit upheld an EPA regional air quality control plan which required a 40 percent reduction in available off-street parking spaces at Logan Airport, including some in a garage then under construction. Holding that no violation of the due process,

takings, or contract clauses had occurred, the court pointed out that the plan would "abrogate, for the future only, expectations (the owner) may have acquired in the past. But all changes in the law dash expectations when they make tomorrow's rules different from yesterday's . . . ." Id. at 678. The court again stated the rule of the above Massachusetts decisions: "If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner." Id.

Most significantly, an important decision just last Term by the United States Supreme Court fully supports this rule. In Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), the owner of the Grand Central Terminal challenged a local landmarks preservation law which prevented it from building a tall modern of ice building on top of the existing terminal. The Supreme Court held that the law did not violate either the takings clause or the due process clause, because although the owner might have suffered substantial losses as a result, it could still obtain a "'reasonable return' on its investment." Id. at 136. See The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 222-32 (1978) (owner must show that regulation deprives him of reasonable return or investment-backed expectations). In upholding the regulation, the Court considered it sufficient that "the law does nct interfere with what must be regarded as (the owner's) primary expectation concerning the use of the parcel," namely the existing use as a railroad terminal. Id.

In fact, although the courts have always recognized that "if regulation goes too far it will be recognized as a taking," Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), they have

consistently sustained diminutions in value amounting to more than 75 percent. L. Tribe, American Constitutional Law 460 n.3 (1978). See B. Ackerman, Private Property and the Constitution 136-45 (1977).

B. The ordinance clearly meets this judicial standard.

The ordinance does not even come close to exceeding the constitutional limit, as to either of the two principal classes it adversely affects: condominium unit purchasers, and building owners who wish to convert, demolish, or renovate. Unit purchasers, for the reasons discussed in the first part, will take either with the knowledge that they cannot occupy or at worst with notice that they may not be able to do so. In either case, the market will automatically reduce the purchase price to reflect these restrictions; since the purchaser will obtain exactly what he paid for, no taking at all will have occurred as to him. (For this reason, among others, the ordinance also does not impair the obligation of contracts in violation of U.S. Const. art. I, § 10, cl. 1. See Northwestern National Life Insurance Co. v. Jordan, 447 F. Supp. 856 (D. Nev. 1978). The ordinance benefits tenants, who are not parties to any purchase-and-sale contracts which might be collaterally affected. Cf. Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).)

A unit purchaser for whom a removal permit is denied will then be in the same position as any other landlord who owns rental property as an investment. He is guaranteed by section 7 of the Act a "fair net operating income" from it. Of course, this arrangement has been explicitly upheld as constitutional in

Marshal House, Inc. v. Rent Control Board, 358 Mass. 686, 266 N.E.2d 876 (1971) (Marshal House II). See Niles v. Boston Rent Control Administrator, 78 Mass. App. Ct. Adv. Sh. 240, 374 N.E.2d 296, further appellate review denied sub nom. Westbrook Village Trust v. Edgerton, 78 Mass. Adv. Sh. 1090 (1978).

The denial of a removal permit under the ordinance would also not unconstitutionally take property from the developer or owner of the building. First, the diminished value of the owner's holdings -- which results from his inability to demolish or renovate, and from his presumably increased difficulty in finding willing condominium unit purchasers, and thus a lower sale price -- will not even approach a substantial portion of the building's value, let alone virtually all of it. Second, the permit denial not only lives the owner with some reasonable use, but it is the existing use as rental property, for which the owner will continue to receive the rental income stream under the "fair net operating income" formula, upheld as constitutionally sufficient in Marshal House II. See Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 136 (1978). Finally, no restrictions at all are placed on the alienation of the property, either to a buyer of the entire building or to purchasers of individual condominium units.

Furthermore, similar restrictions on an owner's personal use of real property have been upheld in the past, even without the previous notice to unit purchasers afforded by this ordinance. In Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 180, 90 N.E.2d 25, 27 (1949), the highest court of New York state upheld a statute which, in a housing emergency, denied a landlord the "power to

withdraw his property from the rental (housing) market," in that case to demolish the apartment building and use the land for commercial purposes, so long as it did not deprive him of "a reasonable return upon (his) property." See in re Departement of Buildings, 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964); Suppus v. Bradley, 278 A.D. 337, 105 N.Y.S.2d 48 (1st Dept. 1951).

In 1970, the New York City Council, faced with a threat to evict a number of existing tenants by a charitable institution which had bought their apartment building to house its own staff, passed legislation to prevent issuance of certificates of eviction in that situation. A state Supreme Court justice, relying on the Loab Estates case, upheld that legislation. Watchtower Bible and Tract Society v. Altman, 65 Misc.2d 891, 319 N.Y.S.2d 345 (Spec. Term, Kings Cty. 1971). That case is quite similar to the present situation of a condominium unit purchaser denied a removal permit, except that now the purchaser will take with notice of the restriction, eliminating even a constitutional doubt.

It is true that Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950), struck down a Puerto Rican ststute which prevented an owner from evicting commercial tenants for his own use. However, the interests here, involving the residential housing of low- and moderate-income tenants during a declared housing emergency, are undoubtedly more weighty constitutionally. Moreover, that 2-1 decision was over the strong dissent of the renowned Chief Judge Calvert Magruder, who argued that no such unconstitutional taking had occurred, and his view would certainly prevail today in view of the legal developments discussed above. And again, unlike unit purchasers here, the owner in Rivera had

taken without notice of the subsequent restriction.

C. The ordinance does not deny equal protection.

The equal protection argument against the ordinance is even less likely to succeed. The ordinance will place landlords who are condominium unit purchasers in a class separate from other landlords, by sometimes preventing them occupying units which they own. However, the City Council could properly conclude that these "landlords" are in fact different for several reasons. See Newell v. Rent Board, 79 Mass. Adv. Sh. 1713, 1720 (1979) (the "problem may not exist at all or to the same degree in other landlord-tenant relationships").

First, condominium unit ownership is a unique interest with special arrangements made by statute. G.L. ch. 183A. Second, condominium unit purchasers are unique landlords in that most seek to reside in the unit, in a building where other residents may have other interests in the property, namely as tenants. Finally, the facts clearly indicate that condominium-unit-purchaser "landlords" pose a greater risk of removing rental housing from the market than does any other class.

The courts will almost never invalidate a legislative classification in the area of economic regulation, because the test is merely whether the classification is rationally related to some permissible governmental purpose. City of New Orleans v. Dukes, 427 U.S. 297 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). "(T)he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

The classifications drawn here easily meet this test. They are no different in principle from the rent control "coverage" distinctions under section 3(b)(6) of the Act between owner-occupants of three-or-fewer-unit dwellings and other landlords, which the Supreme Juducial Court had no difficulty upholding in Marshal House II. 358 Mass. at 694-97, 266 N.E.2d at 882-84. See Newell v. Rent Board, 79 Mass. Adv. Sh. 1713, 1720-21 (1979) (upholding singling out of mobile home parks for rent control in Peabody); Goldman v. Town of Dennis, 78 Mass. Adv. Sh. 1236, 1239-40, 375 N.E.2d 1212, 1214 (1978) (upholding ban on conversion of cottage colonies to condominiums but not other forms of multiple ownership).

CONCLUSION

It is respectfully submitted that the proposed ordinance to regulate removal of controlled rental units from the market is fully valid, as a measure necessary to protect citizens and the Cambridge economy from a dire housing emergency. The City Council has power to pass the ordinance under the Home Rule Amendment and the Rent Control Act. To do so would not represent a deprivation of due process, a taking without just compensation, an impairment of contracts, or a denial of equal protection. This honorable City Council should now pass the ordinance to be ordained without delay.

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