



(extras to be put in with Comm #18)

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OFFICE OF CITY CLERK
CITY OF CAMBRIDGE
Dec 29 3 34 PM '83
INTEROFFICE CORRESPONDENCE
CAMBRIDGE, MASS.

To Paul E. Healy **Date** December 28, 1983

From Russell B. Higley *R B H* **Reference**

Subject ORDINANCE NO. 1002 - ESTABLISHMENT OF NEIGHBORHOOD CONSERVATION DISTRICTS AND PROTECTED LANDMARKS

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And I believe that §100.4 is also relevant:

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From Russell B. Higley RBH Reference
Subject ORDINANCE NO. 1002 - ESTABLISHMENT OF NEIGHBORHOOD
CONSERVATION DISTRICTS AND PROTECTED LANDMARKS

In response to your letters of November 22 and December 13, I have reviewed the above Ordinance, and have found the following error:

In subsection (14) (p.15), the first two lines should read as follows:

The provisions of subsection (j) of this section 2-147 (relative to procedures for demolition permits for...

This Ordinance raises two broad questions:

1. Subsection (11) states: "Any person aggrieved... may appeal to the Superior Court..." Query: Does the City, under its home rule power, have the power to confer jurisdiction of these appeals on the Superior Court?

Although this question is not free from doubt, my reading of recent Supreme Judicial Court cases leads me to the belief that this power would probably be upheld.

2. The Ordinance contains restrictions on the power of the Building Commissioner to issue building permits

and demolition permits. See, e.g., subsections (5) and (7).

Regarding building permits, the State Building Code (§ 114.1) states:

The building commissioner...shall examine... all applications for permits....If he is satisfied that the proposed work conforms to the requirements of this code and all pertinent law applicable there- to, he shall issue a permit. (emphasis supplied).

is

The question/whether this Ordinance falls within the scope of "all pertinent law applicable there- to." In this connection, I note that §100.2 of the State Building Code (scope) states:

100.2 Scope: These regulations, in accordance with Chapter 802 of the Acts of 1972 as amended, shall control: a) the construction, reconstruction, alteration, repair, demolition, removal, inspection, issuance and revocation of permits or licenses, installation of equipment, classification and definition of any building or structure and use or occupancy of all buildings and structures and parts thereof or classes of buildings and structures and parts thereof; b) the rehabilitation and maintenance of existing buildings; c) the standards or requirements of materials to be used in connection therewith, including but not limited to provisions for safety, ingress and egress, energy conservation and sanitary conditions; d) the establishment of reasonable fees for the issuance of licenses and permits in connection therewith; except as such matters are otherwise provided for in the Massachusetts General Laws Annotated, or in the rules and regulations authorized for promulgation under the provisions of this code. (emphasis supplied)

And I believe that §100.4 is also relevant:

100.4 Code remedial: This code shall be construed to secure its expressed intent which is to insure public safety, health and welfare insofar as they are affected by building construction through structural strength, adequate egress facilities,

sanitary conditions, equipment, light and ventilation and fire safety; and, in general, to secure safety to life and property.

The underlined exception in §100.2 would seem to indicate that the issuance of building permits is to be governed only by the Code itself, general laws, and rules and regulations authorized under the Code. There is no mention of ordinances.

Although I have not found any case in point, Shriners' Hospital for Crippled Children v. Boston Re-development Authority, 4 Mass. App. Ct. 551 (1976) is instructive. There, the BRA granted permission for developers of a parcel of land in Boston to deviate from certain requirements of the State Building Code, and this action was challenged by nearby property owners, who argued that the State Building Code Appeals Board (G.L.c.23B, §23) had the exclusive power to grant such deviations. The BRA relied on St. 1960, c.652, §13, which gave the BRA the power to grant deviations "from any...building...code... in effect in Boston...."

In holding that the BRA did not have the power to grant deviations from the Building Code, the Court relied on St. 1972, c.802, §§67 and 75. Section 67 directed the State Building Code Commission to promulgate the State Building Code effective January 1, 1975. Section 75 states:

All by-laws and ordinances of cities and towns or regulations promulgated by any state boards, commissions, agencies or departments or any special acts...in conflict with the state building code shall cease to be

effective on January first, (1975)...

The Court concluded:

The above quoted sections, together with the whole of c.802 and its subsequent amendments, evince a clear legislative intent...to create uniform standards throughout the Commonwealth for the construction of buildings and materials used therein and to provide both a uniform enforcement procedure and an exclusive appeals procedure.

4 Mass. App. Ct. at 560-561.

See also Board of Appeals of North Andover v. Housing Appeals Committee, 4 Mass. App. Ct. 676 (1976); 7 McQuillan, Municipal Corporations, §24.510 (1981).

I note further that St. 1972, c.802, §75 also provides that

...in the event of a conflict between the provisions of the code and a statute, ordinance or by-law regulating any historic district, regional historic district or architecturally controlled district, provisions of any such statute, ordinance or by-law regulating exterior architectural features within such district shall prevail.

The question here is whether Ordinance No. 1002 is "in conflict with" the State Building Code. I think this question can be argued both ways. If we want to obtain a formal opinion, we can get one from:

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1 Ashburton Place (Room 2133)
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cc: Mr. Robert Healy
Mr. Joseph Cellucci

Comm. from Russell B. Higley, City Solicitor
transmitting a review of Ordinance No. 1002
Re: Establishment of Neighborhood Conserva-
tion Districts & Protected Landmarks.

In City Council,

January 9, 1984

1/9/1984

Referred to the
Ordinance Committee
when constituted -