

M E M O R A N D U M

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CAMBRIDGE, MASS.

TO: Russell B. Higley, City Solicitor

FROM: David E. Sullivan

RE: Immunity and indemnification of city councillors for
their votes

DATE: July 18, 1979

At its special meeting of July 16, 1979, the City Council voted not to reconsider its June 25 vote ordering to a second reading a proposed ordinance to regulate the removal of controlled rental units from the market. Before the meeting, each councillor had received a letter dated July 16 from William H. Walsh, of the law firm of Ferraro & Walsh, claiming on behalf of his client Harlow Properties, Inc. that the proposed ordinance was illegal, and threatening to sue for personal damages any councillor who voted for it. The City Council requested your opinion regarding its members' liability and indemnification under these circumstances.

This memorandum does not address the substantive legality of the proposed ordinance, which I drafted; in my opinion, the ordinance is legal, and I expect to submit a detailed memorandum on that subject as soon as the Supreme Judicial Court decides Grace v. Town of Brookline, probably in August. Instead, this memorandum will assume, for the sake of argument only, that the proposed ordinance is illegal, and will consider the liability of a city councillor who votes for such an illegal ordinance. This memorandum takes the position that in these circumstances: (1) no tort has occurred; (2) in any case, there is no liability; and (3) in any event, the city may probably indemnify.

1. No tort.

Very simply, Mr. Walsh's letter does not so much as suggest what tort a city councillor might commit by voting in good faith for an ordinance which is eventually held illegal. It is difficult to imagine a theory under which one could even claim that tortious conduct had occurred, and thus it is not possible to construct an argument against the proposition. Certainly, the failure to mention what tort might be involved tends to increase the likelihood that a complaint would not survive a motion to dismiss, for this reason alone.

2. No liability.

Even if there is some tort which one can commit by casting a vote on the floor of the City Council, there is no liability for it on the part of either the city or any councillor. The leading authority on the law of torts states that members of legislative bodies, specifically including municipal councils, have "absolute protection" against liability when in the course of their duties. W. Prosser, Handbook of the Law of Torts 988 & n.80 (4th ed. 1971).

This is the law in Massachusetts. Under chapter 258 of the General Laws, inserted by 1978 Mass. Acts ch. 512, § 15, neither the city nor its "employee," defined by G.L. ch. 258, § 1 to include a city councillor, is liable for any discretionary act within the scope of office, such as a vote cast in a legislative body. If a vote cast during a duly held meeting is not within the scope of a city councillor's office, it is difficult to imagine what is. If so, a councillor is doubly protected under the statute. First, under G.L. ch. 258, § 2, the councillor is absolutely protected against personal liability for any "negligent

or wrongful act or omission . . . , " provided only that he or she reasonably cooperate with the city in its defense of any action brought against it. More importantly, though, G.L. ch. 258, § 10(b) completely protects both the city and the councillor from liability for "the exercise or performance (of) . . . a discretionary function or duty . . . whether or not the discretion involved is abused". That this includes a vote for an illegal ordinance is emphasized by subsection (a) of the same section, which insulates even the due-care enforcement of "any municipal ordinance . . . whether or not such . . . ordinance . . . is valid". And, since Mr. Walsh's letter seems to imply that some kind of intentional tort is involved, it is also noteworthy that subsection (c) provides complete immunity against "any claim arising out of an intentional tort"

In Whitney v. City of Worcester, 77 Mass. Adv. Sh. 1713, 1724-30, 366 N.E.2d 1210, 1216-18 (1977), the Supreme Judicial Court discussed at length the language of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976), which later found its way into G.L. ch. 258, § 10 (b): quoted above. Contrary to Mr. Walsh's letter, which states the Whitney test as "whether the act was undertaken for the common good", that test was precisely the one abandoned in Whitney (of course, this is not to say that this City Council vote could not easily meet that old test as well). The court stated that, if the Legislature did not act in 1978, it would judicially impose a new rule immunizing all discretionary government acts, regardless of the nature of the governmental enterprise involved. Of course, the Legislature did act in 1978, and it did so in the language of section 10(b), quoted above, virtually

repeating the language of the federal statute relied on in Whitney for the new rule. In short, it is clear that the Legislature meant to codify the new Whitney rule in section 10(b), and thus that opinion can be read as an explanation of the new statute.

The Whitney court clearly indicates several times the broad immunity to be afforded municipal legislative activity, as opposed to the tortious execution of policies. (Incidentally, contrary to Mr. Walsh's letter, the City Council has no responsibility whatever for "enforcement" of the ordinance, either by its terms or under the city's Plan E charter, G.L. ch. 43, §§ 97, 103-107.) "(T)he appropriate dividing line falls between those functions which rest on the exercise of judgment or discretion and represent planning and policymaking and those functions which involve the implementation and execution of such governmental policy or planning." 77 Mass. Adv. Sh. at 1724, 366 N.E.2d at 1216.

When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability. "To inquire into such decisions in a tort suit might 'jeopardiz(e) the quality and efficiency of government itself,' and endanger the creative exercise of political discretion and judgment through 'the inhibiting influence of potential legal liability asserted with the advantage of hindsight.'"

Id. at 1726, 366 N.E.2d at 1216 (quoting Spencer v. General Hospital, 425 F.2d 479, 488 (D.C. Cir. 1969) (Wright, J., concurring) (quoting Elgin v. District of Columbia, 337 F.2d 152, 154-55 (D.C. Cir. 1964))). Finally, the court lists the following questions as relevant in applying the test:

Was the injury-producing conduct an integral part of governmental policymaking or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental process? Could a

judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternative remedy available to the injured individual other than an action for damages?

77 Mass. Adv. Sh. at 1727-28, 366 N.E.2d at 1217. The questions all suggest their own answers in the present context.

Thus, it is clear that this City Council vote is immune from liability under the Whitney test, as codified in G.L. ch. 258, § 10(b). And this immunity applies not only to the city, but to the councillors, the individual officers, as well. 77 Mass. Adv. Sh. at 1728-30, 366 N.E.2d at 1217-18.

3. Probable indemnity.

If one nevertheless makes the further leap of assuming that, despite all of the above, a councillor is found liable for some tort, the city may almost certainly indemnify the councillor against any personal loss. Contrary to Mr. Walsh's letter, indemnity is not determined according to G.L. ch. 258, § 2, which as discussed above protects "employees" including councillors from liability. Rather, G.L. ch. 258, § 9 permits the city to indemnify employees against any liability for intentional tort or violation of civil rights within the scope of official duties, unless the violation of civil rights was "grossly negligent, willful or malicious" And an emergency bill, S. 1945, now on the Governor's desk and effective July 20, 1979 if signed, will probably soon add G.L. ch. 258, § 13, extending the permissible indemnity to cover negligent or reckless torts as well as intentional ones.

CONCLUSION

The law is designed to afford complete protection to local legislators in just the present situation. Not only have they committed no tort, but even if they have they are absolutely immune from liability; and even if they are not the city may almost certainly indemnify them against any personal loss.

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