



CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

(617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

DONALD A. DRISDELL
DEPUTY CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

SEVERLIN B. SINGLETON, III
BIRGE ALBRIGHT
GAIL S. GABRIEL
LEGAL COUNSEL

February 26, 1988

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

RE: Opinion regarding a proposed order
relative to the former St. Mary's Gym

Dear Mr. Healy:

I am providing an opinion as to the liability of the attached proposed Council Order, which was Calendar Item No. 6 at the Council Meeting of February 1.

The proposed order recites that "AD-INC has apparently purchased the former St. Mary's gym from the Boston Archdiocese" and that the City Council, "a number of City non-profit agencies" and "Neighborhood 4 residents" are in favor of having the gym used for neighborhood recreation purposes. After resolving that the Council inform AD-INC of its wishes, the proposed order further resolves:

That the City Council inform all City boards and commissions that it is the policy of the City Council that no discretionary variances or permits be issued the new owner unless they ensure that a substantial portion of this building be set aside for neighborhood recreation.

Finally the proposal orders:

That the City Manager...is requested...to negotiate these arrangements on behalf of the City and the several non-profit agencies involved while keeping the neighborhood 4 Coalition informed and involved as appropriate.

I assume that the reference to "boards and commissions" is intended to refer to the Board of Zoning Appeal (BZA) and the Planning Board, since these are the only boards or commissions which issue variances or permits. The reference may also include the Historical Commission (CHC), which issues certificates of appropriateness.

The proposed order raises at least two questions in my mind:

- A. Would it violate 42 USC, section 1983?
- B. Would it violate the uniformity principle embodied in G.L. c. 40A, section 4?

A. 42 USC, section 1983

42 USC, section 1983 reads, in part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper redress.

It is clear that local governments may be sued under section 1983.

Monell v. Department of Social Services, 436 US 658 (1978).

To recover under section 1983, a plaintiff must allege and prove two essential elements: (1) that the conduct in question occurred under color of state law; and (2) that this conduct deprived the plaintiff of rights, privileges or immunities secured by the U.S. Constitution or federal law.

(1) Under Color of State Law

To state a cause of action under section 1983, a plaintiff must allege that a deprivation of federal rights occurred "under color of any statute, ordinance, regulation, custom or usage" of a state. It is clear to me that the proposed Council order would be an action taken under color of State law.

(2) Deprivation of Constitutional Rights

Section 1983 provides a cause of action for persons deprived of "rights, privileges, or immunities secured by the Constitution and laws". Thus, if a plaintiff alleges facts constituting a deprivation under color of law of a right secured by the 14th Amendment, he satisfies the prima facie requirements for a section 1983 case. Monroe v. Pape, 365 US 167, 171 (1961).

The 14th Amendment provides, in part, that "No State shall... deny to any person within its jurisdiction the equal protection of the laws". The word "State" includes municipalities. See, e.g., Lovell v. Griffin, 303 U.S. 444, 450 (1933); Palmer v. Thompson, 403 US 217, 220 (1971); Rathkopf, The Law of Zoning and Planning, section 801.

The proposed Council order would establish a Council policy that the BZA, the Planning Board and the CHC discriminate against AD-INC regarding variances and permits. In my opinion, such discrimination would violate the Equal Protection Clause of the 14th Amendment and could constitute grounds for judicial relief against any decision by these bodies. See 8A McQuillin, Municipal Corporation, section 25, 310 (1986); Arlington Heights v. Metropolitan Housing Corporation, 429 US 252 (1977). Moreover, such

Mr. Robert W. Healy
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discrimination could constitute grounds for an action to recover money damages from the City and members of the City Council.

(B) The Uniformity Principle

General Laws, c. 40A, section 4 states:

Any zoning ordinance... which divides cities... into districts shall be uniform within the district for each class or kind of structures or uses permitted.

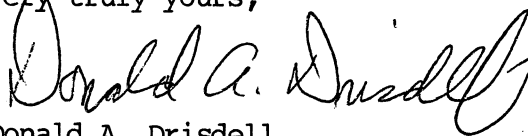
"If the effect of a zoning ordinance... is to single out one parcel of land within a district and impose restrictions upon it which are less or more onerous than those imposed upon the remaining portions of... the same zoning district, there is a lack of uniformity which will invalidate the ordinance as to that parcel." 18 M.P.S., Randall and Franklin, Municipal Law, section 611, p. 474 (1982).

The proposed Council order is really a form of inverse spot zoning, i.e. "singling out a parcel of land for special treatment as compared to other parcels in the same zoning district". Canteen Corporation v. Pittsfield, 4 Massachusetts Appeals Court 289, 293 (1976). See Schertzer v. Somerville, 345 Massachusetts 747, 751-752 (1963).

Conclusion

In my opinion, the proposed Council order would violate the Equal Protection Clause of the 14th Amendment and the uniformity principle of G.L. c. 40A, section 4.

Very truly yours,


Donald A. Drisdell

DAD/kam



City of Cambridge

(Calendar Item No. 6)

-1.-

IN CITY COUNCIL

~~February 14, 1988~~

February 8, 1988

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CITY DEPARTMENT

COUNCILLOR DUEHAY

- WHEREAS: AD-INC has apparently purchased the former St. Mary's Gym from the Boston Archdiocese; and
- WHEREAS: The Cambridge City Council and a number of City non-profit agencies had urged the Archdiocese to sell this facility to a non-profit coalition of human service agencies to be used for badly needed neighborhood recreation; and
- WHEREAS: Neighborhood 4 residents have repeatedly urged the City to take the appropriate steps to have this facility used for recreation purposes; therefore be it
- RESOLVED: That this City Council inform AD-INC of its wishes underscoring the needs of the neighborhood for recreation; and be it further
- RESOLVED: That the City Council inform all City boards and commissions that it is the policy of the City Council that no discretionary variances or permits be issued the new owner unless they ensure that a substantial portion of this building be set aside for neighborhood recreation; and be it further
- ORDERED: That the City Manager be and hereby is requested and authorized to negotiate these arrangements on behalf of the City and the several non-profit agencies involved while keeping the Neighborhood 4 Coalition informed and involved as appropriate.

2/1/88 - CHARTER RIGHT EXERCISED BY COUNCILLOR WALTER J. SULLIVAN
2/8/88 - REFERRED TO THE HEARING ON FEBRUARY 29, 1988.



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
TEL. 498-9011

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

February 29, 1988

To the Honorable, the City Council:

With respect to City Council Order No. 1 of February 8, 1988
(Calendar Item No. 6 of February 8, 1988) relative to the former St. Mary's
Gym, enclosed please find copy of the opinion of Donald A. Drisdell, Deputy
City Solicitor.

Very truly yours,

Robert W. Healy
City Manager

RWH/mbf
Enc.

Agenda Item No. 9 *S-132*

Re: enclosed opinion of the City Solicitor on
the former St. Mary's Gym.

In City Council,

February 29, 1988

*Referred to the Hearing
Placed on file*