

Hayes, Clark, Hunt and Embry

ATTORNEYS AT LAW

STEPHEN S. CLARK
BRUCE J. EMBRY
FREDERICK B. HAYES, III
WILLIAM J. HUNT

MARISA A. CAMPAGNA

P.O. BOX 206
43 THORNDIKE STREET
BULFINCH SQUARE
CAMBRIDGE, MASSACHUSETTS 02141
617 494-4800
TELECOPIER 617 494-1522

November 29, 1989

Joseph Connauton, Clerk
City of Cambridge
Cambridge City Hall
2nd floor
795 Massachusetts Ave
Cambridge, MA

RE: Home Rule Petition

Dear Mr. Connauton:

The recent decision of the Massachusetts Supreme Judicial Court in the case of Alex Steinbergh et al. v. Rent Control Board of Cambridge et al. has important and clear ramifications concerning the prior status of condominium units in the City of Cambridge as well as the likelihood that any future statute or Ordinance, modeled after the now prohibited Section C 1/2, can withstand challenge.

In the Steinbergh decision, the Court was explicit that the City of Cambridge had no independent municipal authority to enact Section C 1/2. As the Court noted, Cambridge, as any other municipality, may only exercise those powers which have been affirmatively granted by the Legislature. Since Cambridge lacked an affirmative grant of power to pass Section C 1/2, the power, if it existed at all, must be implied from those powers which the City was granted to control rents and evictions. Flynn v. Cambridge 388 Mass. 152 (1981). However, the City was required to demonstrate that the restrictions on the sale of individual condominium units were "necessary" to carry out the purposes expressed in the Rent Control Act. Without such "necessity" Cambridge had and has no such power.

The Court easily rejected the City's claim of necessity. "We have little trouble in concluding that the regulatory mechanism established in Section C 1/2 is not necessary to the achievement of rent control objectives." Steinbergh, at Page 7. In support of its conclusion the Court noted that neither the presence nor

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absence of Section C 1/2 changed the rent control status of units whose sale it attempted to regulate. Regardless of Section C 1/2, the units in question were, and are, rent controlled units. Tenants may not be evicted for owner occupancy under any circumstances. Moreover, tenants may not be evicted for any reason nor may any rents be increased unless the Rent Control Board approves: "Subsection C 1/2 creates no change in the legal status of the units to which it applies, let alone a change that can be deemed "necessary" to the furtherance of rent control objectives." Steinbergh at 8. In short, Section C 1/2 has no impact on rent control whatsoever.

In rejecting the Board's argument, the Court dismissed various arguments that were advanced by the Board that the current Ordinance and Rent Control Act are difficult to enforce. The Court concluded that the Board had more than ample enforcement provisions including the power to enjoin illegal condominium sales, the right to seek fines and imprisonment, civil damages and declaratory relief. In short, the current Ordinance and Rent Control Act provide the Rent Control Board with more than sufficient mechanisms to assure that units are not lost. Or, in the words of the Court: "It appears to us that the more likely solution lies in more effective utilization of existing enforcement procedures." Steinbergh, at page 10. The Board and the City already have sufficient power to enforce the rent control laws and the Ordinance. Section C 1/2 is not "necessary" to the preservation of rent control.

Even the general counsel for the Rent Control Board has acknowledged that C 1/2 is not necessary. In an interview with the Cambridge Chronicle dated November 21, 1989 Patricia Cantor, commenting on the demise of Section C 1/2, is clear that rent control will survive without the invalid section. "[I]t's not the end of the world." Ms. Cantor goes on to state that the Rent Board now will initiate new regulations to insure that illegal owner-occupancy does not occur. Ms. Cantor apparently agrees with the Court: rent control will continue without Section C 1/2.

In light of this clearly admitted lack of "necessity" it is perplexing that the Cambridge City Council would now consider asking that Section C 1/2 be reinstituted. More perplexing is that this consideration would take place in light of the inevitable court challenges to follow.

In the event the legislature were to enact the proposed Home Rule Amendment, that legislation will be immediately challenged in the Massachusetts Courts. And, given the language of the Supreme Judicial Court in the Steinbergh decision, that

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legislation will be defeated at great cost to the taxpayers of this City.

The United States Supreme Court in the case of Nollan v. The California Coastal Commission, 483 U.S. 825 (1987) made clear that a governmental regulation which restricts the use of private property may be considered to be an illegal "taking" of private property, requiring compensation from the government, if that regulation does not "substantially advance" a legitimate state interest. If the restriction does not so substantially advance the State interest and does not have the required "nexus" between the State interest and that which is sought to be regulated, the regulation is nothing more than a "out and out plan of extortion".

In Steinbergh, the Court has already ruled that Section C 1/2 is not "necessary" to rent control. It is inconceivable that the Court will later reverse itself and rule that the identical language passed by the Legislature, now magically "substantially advances" rent control. The more predictable result is a finding by the Court that the legislative action was in violation of both the Massachusetts and the United States Constitutions and constitutes a "taking" of private property which requires compensation from the government. The ensuing financial impact upon the City of Cambridge would, of course, be enormous.

A suit which seeks compensation for the loss of interest payments on the difference between the actual value of the premises if not so regulated and the value of the premises as allegedly restricted under Section C 1/2, multiplied by the number of units effected, would result in findings against the City of over two million dollars per year. Not only is this result a tragedy in a time of limited state and municipal resources, it is a certainty given the precedents in both the United States and Massachusetts Supreme Courts.

In an era of fiscal austerity where the burdens placed on every City agency continue to grow, let us resolve to use the offices of the City Council and the limited funds of the taxpayers, to directly engage those problems we confront and not waste precious resources on matters which have already been judicially resolved.

Sincerely,



Frederick B. Hayes, III

FBH:dar

9.5-812

Comm. from Hayes, Clark, Hunt and
Embry, 43 Thorndike St., regarding
the prior status of condominium
units in the city.

In City Council,

Dec. 4, 1989

Placed on file