

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
for the Commonwealth

SUFFOLK COUNTY

No. SJC-3300

SITTING, 1983

DAN PETEGORSKY,
Plaintiff

v.

CAMBRIDGE CITY COUNCIL,
Defendants

ON RESERVATION AND REPORT FROM A SINGLE JUSTICE

BRIEF OF THE SECRETARY OF THE COMMONWEALTH
AS AMICUS CURIAE

Thomas J. Curry
Staff Attorney
Department of the State Secretary
One Ashburton Place, Room 1701
Boston, Massachusetts 02108
Telephone: (617) 727-2832

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT OF INTEREST	2
ARGUMENT	
A city Council is required by G.L. c. 43, § 40 to place an initiative peti- tion, which is proper as to form and which constitutes a measure, on the ballot.	4
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<u>Barclay v. Deveau</u> , Mass. App. Ct. Adv. S. (1981) 167	5
<u>Bowe v. Secretary of The Commonwealth</u> , 320 Mass. 230 (1946)	10
<u>Dooling v. City Council of Fitchburg</u> , 242 Mass. 599 (1922)	8, 9
<u>Edwards v. Murphy</u> , 256 S.W. 2d. 470 (Tex. 1953)	11
<u>Evers v. Davoren</u> , No. J. 74-118 CI. (Mass. single justice Oct. 18, 1974)	2
<u>Fantini v. School Committee of Cambridge</u> , 362 Mass. 320 (1972)	7
<u>Foley v. Lawrence</u> , 336 Mass. 60 (1957)	9
<u>Gilet v. City Clerk of Lowell</u> , 306 Mass. 170 (1940)	9
<u>Gorman v. Peabody</u> , 312 Mass. 560 (1942)	8
<u>Horton v. Attorney General</u> , 269 Mass. 503 (1930)	10
<u>McCarthy v. Secretary of The Common- wealth</u> , 371 Mass. 667 (1977)	2, 12
<u>McKee v. City of Louisville</u> , 616 P.2d 969 (Colo. 1980)	11
<u>Moore v. School Committee of Newton</u> , 375 Mass. 443 (1978)	8
<u>Socialist Workers Party v. Davoren</u> , 378 F. Supp. 1245 (D. Mass. 1974)	2
<u>State Ex. Rel. Althouse v. City of Madison</u> , 255 N.W. 2d 449 (Wis. 1977)	11
<u>Ware v. Cannon</u> , 248 So. 2d 19 (La. App. 1971)	11

Statutes

G.L. c. 9, § 2	2
G.L. c. 43, § 37	4, 5, 6, 7, 8
G.L. c. 43, § 40	4, 5, 6, 7, 10, 12

Other Authorities

5 McQuillin, <u>Municipal Corporations</u> § 16.51 (3rd. ed. 1981)	12
5 McQuillin, <u>Municipal Corporations</u> § 16.67 (3rd. ed. 1981)	8
1A Sands, <u>Sutherland Statutory Construction</u> § 25.04 (4th ed. 1972)	5

ISSUE PRESENTED

Does the Cambridge City Council have a legal obligation to place the Nuclear Free Cambridge Initiative on the ballot.

STATEMENT OF INTEREST

The Secretary of the Commonwealth is the chief elections officer of Massachusetts. He is required by law "to carry out the laws relative to primaries and elections." G.L. c. 9, § 2. See Evers v. Davoren, No. J 74-118 CI, at 2 (Mass. single justice Oct. 18, 1974). Cf. McCarthy v. Secretary of the Commonwealth, 371 Mass. 667, 669, 681 n.15 (1977) (commending "Secretary for his cooperation in attempting to make... unmanageable statutes operate in a constitutional manner in the best interest of the public"); Socialist Workers Party v. Davoren, 378 F. Supp. 1245, 1248 (D. Mass. 1974) ("The Secretary is the state official ultimately charged with administration of the election laws; his statement of position is definitive unless a state court, or the state Attorney General...should disagree.")

Accordingly, the Secretary of the Commonwealth has filed this brief as amicus curiae in an effort to assist the court in construing the statutes involved. He has an interest in the validity and correctness of his own advisory letter interpreting this subject. He asserts the interest of all qualified Massachusetts citizens in the free exercise of their right to vote. Finally, he is concerned here with effective

enforcement of the local initiative laws.

The Secretary is satisfied with the statement of the case which appears in the brief of plaintiffs.

ARGUMENT

A CITY COUNCIL IS REQUIRED BY G.L. c. 43, § 40 TO PLACE AN INITIATIVE PETITION, WHICH IS PROPER AS TO FORM AND WHICH CONSTITUTES A MEASURE, ON THE BALLOT.

This case concerns the extent of a city council's duty to place an initiative petition on the ballot under G.L. c. 43, § 40. The statute provides:

If an initiative petition is signed by registered voters equal in number to at least eight per cent but less than fifteen per cent of the total number of registered voters, and said measure be not passed without alteration within twenty days by the city council or the school committee, as provided in the preceeding section, such proposed measure, without alteration, shall be submitted by the city council to a vote of the registered voters of the city at the next regular municipal election. A proposed measure under this section or section thirty-nine shall become effective if it shall be approved by registered voters of the city equal in number to one third of the whole number thereof and also by a majority of voters voting on such measure, but not otherwise.

The relevant definitional provision is found at G.L. c. 43, § 37. It provides:

A petition conforming to the requirements hereinafter provided and requesting the city council to pass a measure, except an order granted under section seventy or seventy-one of chapter one hundred and sixty-four or chapter one hundred and sixty-six, or requesting the school committee to pass a measure, therein set forth or designated, shall be termed an initiative petition, and shall be acted upon as herein after provided. In this and the eight following sections, "measure" shall mean an ordinance,

resolution, order or vote passed by a school committee, as the case may be.

The Secretary submits that G.L. c. 43, § 40 imposes a mandatory duty upon a city council to place an initiative petition, which is proper as to form and which constitutes a measure under G.L. c. 43, § 37, on the ballot regardless of the measure's substantive validity or constitutionality. This contention is amply supported by the statutory language and case law.

It is a well established principle of statutory construction that "[u]nless the context otherwise indicates, the use of the word \"shall\" indicates a mandatory intent." Barclay v. Deveau, Mass. App. Ct. Adv. Sh. (1981) 167, 174, Aff'd. Mass. Adv. Sh. (1981) 2307, Citing 1A Sands, Sutherland Statutory Construction, § 25.04 (4th ed. 1972).

In G.L. c. 43, § 40, the word "shall" is employed to describe the course of action to be taken by a city council upon receipt of a properly certified initiative petition. The statute provides that if an initiative petition containing the properly certified signatures of at least eight percent but less than fifteen percent of the total number of the city's registered voters is not passed within twenty days, the proposed measure "...shall be submitted by

the city council to a vote...at the next regular municipal election." G.L. c. 43, § 40, (emphasis supplied). No other alternative course of action is provided. These statutory provisions indicate a clear and unequivocal intent that a city council's duty to place a properly certified initiative measure before the electorate is mandatory. The mandatory duty imposed by G.L. c. 43, § 40, necessarily precludes the exercise of any discretion by a city council. Accordingly, a city council is required to place an initiative petition on the ballot if it is properly certified and if it is a measure as defined by G.L. c. 43, § 37.

It is contended that the initiative petition in the present case is proper as to form and that it is a measure within the meaning of G.L. c. 43, § 37. As such the mandatory duty imposed upon a city council by G.L. c. 43, § 40, requires that the Nuclear Free Cambridge Initiative be submitted by the Cambridge City Council to the electorate on the November ballot.

The record in the present case clearly indicates that the Nuclear Free Cambridge Initiative Petition (the text of which appears at A. 21-22) is properly certified. Of the approximately 5,783 signatures submitted by the proponents to the Cambridge Elections Commission (A. 18), 4,589 were duly certified as being valid signatures of Cambridge voters. The

latter figure constitutes more than eight percent but less than fifteen percent of Cambridge's registered voters. (A. 19). Nevertheless, the Cambridge City Council, at its August 8, 1983 session, failed to order the initiative to be placed on the ballot. (A. 19). Accordingly, the Nuclear Free Cambridge Initiative Petition was properly certified in accordance with G.L. c. 43, § 40, and as such the Cambridge City Council is under a mandatory duty to place the initiative on the ballot unless it does not constitute a measure.

It is further contended that the Nuclear Free Cambridge Initiative is a "measure" within the meaning of G.L. c. 43, § 37, notwithstanding the serious questions which have been raised concerning its substantive validity and constitutionality.

The term "measure", as defined by G.L. c. 43, § 37, has been construed to contain a possible distinction between legislative and executive acts; the latter being excluded subjects for initiative and referendum. Fantini v. School Committee of Cambridge, 362 Mass. 320, 323 (1972) (the appointment or removal of particular school officials would be an executive act and not a measure subject to a referendum). An initiative or referendum proposal is legislative where it is "A sweeping determination of municipal

policy". Moore v. School Committee of Newton, 375 Mass. 443, 447 (1978) citing Gorman v. Peabody, 312 Mass. 560, 564-565 (1942). Moreover, a leading authority has stated that "...An act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body." 5 McQuillin Municipal Corporations, § 16.67 (3rd ed. 1981).

The Secretary maintains that in the instant case, the Nuclear Free Cambridge Initiative can only be characterized as a legislative act. The text of the initiative (A. 21-22), and its stated purpose in particular, clearly indicates that the initiative proposes a new, broad statement of policy which contains specific and comprehensive means for regulating nuclear weapons facilities in Cambridge. Therefore, the Nuclear Free Cambridge Initiative is a measure within the meaning of G.L. c. 43, § 37.

Moreover, the mere possibility that the subject of the proposed initiative, if enacted, may be ultimately beyond the power of the city council to enact directly, does not necessarily prevent it from being a measure. However, in Dooling v. City Council of

Fitchburg, 242 Mass. 499 (1922) a referendum proposal protesting certain orders of the city council awarding contracts for a building project, which left nothing to the discretion of the mayor but to sign the contracts, was held not to be a measure. In so holding the court stated that "measure" was "...necessarily limited to subjects vested by law in the city council. It cannot have been the purpose of the General Court to require or permit the initiative or referendum or the initiative...touching subjects wholly outside the field of authorized action by the city council." 242 Mass. at 601. See Also Foley v. Lawrence, 336 Mass. 60 (1957); Gilet V. City Clerk of Lowell, 306 Mass. 170 (1940) (initiative and referendum proposals which are improper as to form are not measures within the jurisdiction of a city council). This broad language however, serves only to draw the distinction between legislative acts which are within the jurisdiction of a city council from executive acts which are outside the scope of a city council's authority. The referendum in Dooling, supra, was an executive act, and as such it was not a lawmaking activity within the jurisdiction of the Fitchburg City Council. Accordingly, it has no application to the initiative petition in the present case, which as noted above, purports to be nothing other than legislation.

Furthermore, the substantive validity or constitutionality of a properly certified initiative measure does not justify a city council's refusal to place the measure on the ballot. It is a well established principle that the substantive validity or constitutionality of a proposed initiative measure may not be judicially challenged prior to its enactment. Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247 (1946); Horton v. Attorney General, 269 Mass. 503, 513 (1930). In Bowe, supra, it was stated:

"By the initiative, the people, like the General Court, may enact measures that violate the fundamental and supreme law of the Constitution and that consequently have no force or effect. But no court can interfere with the process of legislation, either by the General Court or by the people, before it is completed, to prevent the possible enactment of an unconstitutional measure." 320 Mass. at 247.

The Secretary contends that the above stated principle is equally applicable to a city council considering whether to place a properly certified initiative measure under G.L. c. 43, § 40 on the ballot. It would produce an anomalous result to permit a city council, a legislative body, to withhold a properly certified initiative measure on the grounds that it deems the measure to be substantively invalid or unconstitutional from the ballot where the judiciary is precluded from making such a

determination. Accordingly, it is submitted that under G.L. c. 43, § 40, a city council is required to place a certified initiative petition before the electorate regardless of its alleged invalidity or unconstitutionality.

Likewise, other jurisdictions have also concluded that a city council may not refuse to submit a properly certified initiative petition on the ballot, solely on the grounds that the measure would be invalid if enacted. State Ex. Rel Althouse v. City of Madison, 255 N.W. 2d 449 (Wis. 1977); McKee v. City of Louisville, 616 P. 2d 969 (Colo. 1980); Edwards v. Murphy, 256 S.W. 2d 470 (Tex. 1953), But see, Ware v. Cannon, 248 So. 2d 19 (La. App. 1971).

Other considerations as well argue in favor of this contention. Permitting a city council to refuse to place a properly certified initiative on the ballot because of its questionable validity would have the unwarranted effect of placing an almost insurmountable burden upon the proponents of initiative measures to justify the merits of a measure prior to its enactment. It is more appropriate to place the burden of showing the invalidity of an initiative measure on those parties adversely affected by the measure after its enactment. cf.

McCarthy v. Secretary of the Commonwealth, 371 Mass. 667, 684 (1977) (The Secretary is in the better position to bear the burden of showing that a candidate filing nomination petitions is not entitled to a place on the ballot once the candidate's total number of signatures exceeds the number required by law).

Moreover, the interpretation of G.L. c. 43, § 40, advocated by the Secretary would be consistent with the general principle that grants of power to "...adopt municipal legislation by the exercise of initiative or referendum are to be liberally construed, to the ends of permitting rather than preventing its object." 5 McQuillin, Municipal Corporations, § 16.51 (3rd. ed. 1981). Permitting a city council to refuse to place a properly certified initiative measure on the ballot because the council deems it to be substantively invalid or unconstitutional would unduly limit the people's right to propose important legislation by the initiative.

Therefore, the Secretary respectfully submits that the Cambridge City Council is required by G.L. c. 43, § 40 to place the properly certified Nuclear Free Cambridge Initiative on the November ballot regardless of its ultimate substantive validity or constitutionality.

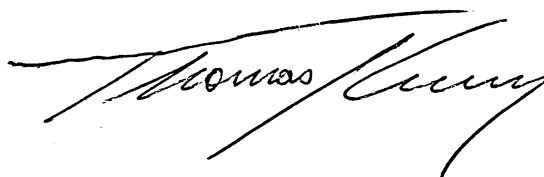
CONCLUSION

The Plaintiff's prayer for relief should be granted.

Respectfully submitted,

MICHAEL JOSEPH CONNOLLY
SECRETARY OF THE COMMONWEALTH

By his Attorney,

A handwritten signature in cursive script, appearing to read "Thomas J. Curry".

Thomas J. Curry
Staff Attorney
Department of the State Secretary
One Ashburton Place, Room 1701
Boston, Massachusetts 02108
Telephone: (617) 727-2832

DATED: September 7, 1983



CAMBRIDGE CITY COUNCIL

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

(617) 498-9094

David E. Sullivan
City Councillor

September 16, 1985

To the Honorable, the City Council:

As you know, I intend to move reconsideration of the Council's September 9 vote not to place on the city election ballot the question of adopting the "anti-pornography" initiative measure proposed by the initiative petition of Mary Gabrielle Bernard and others. I do so because, although I believe the proposed ordinance is blatantly unconstitutional and bad policy as well, I also believe that the city charter requires that the question appear.

For the information of my colleagues, I attach a copy of the brief of the Secretary of the Commonwealth as amicus curiae in Petegorsky v. Cambridge City Council. I am sure you remember that this case involved the "Nuclear Free Cambridge" initiative of 1983, and presented virtually identical issues. The Supreme Judicial Court never decided the merits of that case, because the City Council eventually decided to place that question on the ballot.

I thought my colleagues might find the official views of the Commonwealth's chief elections officer persuasive. (Although the Secretary employs me, I am not speaking on his behalf here.) I particularly wish to call the City Council's attention to pages 10-12 of the Secretary's brief, which takes the position that "a city council is required to place a certified initiative petition before the electorate regardless of its alleged invalidity or unconstitutionality." (At page 11)

I hope this information is helpful.

Sincerely,

David E. Sullivan
David E. Sullivan

B-734

Comm. from Councillor David Sullivan Re: his motion to reconsider the Council vote of September 9, 1985 on the vote not to place on the ballot a question of adopting the anti-pornography question on the initiative petition of Mary Gabrielle Bernard & others & enclosing a copy of the Petegorsky v. Cambridge City Council case.

9/16/85

Proceed on File

In City Council,

September 16, 1985

9/16/1985

Reference to the Petition
on the Initiative
under Reconsideration -
which failed
on Roll Call 35-1