

James W Headley
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86 Henry Street
Cambridge MA 02139
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1992 DEC 29 AM 9:08

CAMBRIDGE MA.

December 23, 1992

City Councillor's of Cambridge
City Council Office
795 Mass Ave
Cambridge MA 02139

Dear City Councillors:

Re: Pepita Soto vs Cambridge Rent Control Board
Superior Court Civil Action

As you may know, the Rent Control Board has filed an appeal of this Superior Court Decision (copy of the Decision is Attached).

The purpose of this note is to ask the City Council to reconsider this appeal.

First we would like you to know a little about us and this case. Our family has been residents and property owners in Cambridgeport for 8 years. Jim owns and operates a convenience store in Arlington and Pepita works for WGBH. Our two sons are in public schools and we are active in our community, mostly in support of making our public schools work.

In 1987, our two 1st Floor tenants bought condos and moved out. We rented both apartments to a family with children the same ages as ours who really needed an affordable larger apartment in a family setting and with our permission our tenants rejoined the two apartmnets. Since we felt that joining the two units was for a good cause and that we were not charging more than was legally allowed, we never reported the change to Rent Control.

We had known from the previous owner that the first floor had been partitioned into two units without getting the proper zoning or building permits. We also knew that zoning laws would only allow a three unit building. So when Ordinance 1093 was adopted in 1989, we came forward to openly resolve an apparently common situation (at least in our neighborhood); residential use that was inconsistent with city permits and records.

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Without boring you with the details, we have spent 3 years and roughly \$10,000 out of our pockets to reach the decision of the Superior Court. The appeals process will take another one and a half years and cost us another \$5,000.

We believe that the Rent Board has had ample time and opportunity to present their viewpoint. We also believe that it is unfair that we should have to endure additional time and considerable expense to again answer their arguments in this case.

Therefore, we are requesting that the City Council review the Rent Board's appeal before more time and money is spent and see if it is really necessary or productive to argue this case anymore.

Thank-you for your consideration of this matter.

Sincerely,


James W Headley & Pepita Soto

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SE 4
COPY 101
SUPERIOR COURT
CIVIL ACTION
NO. 92-0090

✓
PEPITA SOTO¹

vs.

CAMBRIDGE RENT CONTROL BOARD²

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiffs, Pepita Soto and James Headley (collectively "plaintiffs"), have appealed under c. 30A from a decision of the Cambridge Rent Control Board ("rent control board") which held that: (1) the plaintiffs' home at 86 Henry Street in Cambridge is a four unit dwelling; and (2) the plaintiffs are not entitled to a removal permit for the fourth unit. The plaintiffs allege that they were incorrectly denied a removal permit for the fourth unit at Henry Street because the Cambridge Rent Control Board misinterpreted the plain language of Ordinance 1093. In response, the Cambridge Rent Control Board contends that its decision must be upheld since it was correct as a matter of law and was within their discretionary authority.

¹ James Headley.

² Zoning Board of Appeals.

BACKGROUND

In 1986, the plaintiffs purchased a four-family dwelling located at 86 Henry Street in Cambridge ("Henry Street"). Henry Street was originally constructed as a three-family dwelling. Sometime between 1961 and 1963, it was converted into a four-family dwelling when the owners partitioned the first floor into two units. The owners who constructed the partition never obtained the proper zoning permits, and Henry Street remained legally zoned as only a three family dwelling. In the 1970's, when rent control went into effect, Henry Street was registered as a four-family dwelling. Thus, in 1986 when the plaintiffs purchased Henry Street, it was a four-family dwelling and was registered as such with the Cambridge Rent Control Board, but was legally zoned as only a three-family dwelling. In 1987, the plaintiffs removed the partition on the first floor unit, thus converting Henry Street back into a three-family dwelling. The plaintiffs, however, did not request a removal permit from the rent control board for the fourth unit when they removed the partition.

On December 26, 1989, the Cambridge City Council enacted Ordinance 1093 in an attempt to reconcile the inconsistencies between the number of units in certain buildings and both the number of units allowed by the zoning and building codes, and the units recorded in current rent control records. A few weeks

after its enactment, the Cambridge City Council repealed Ordinance 1093. The plaintiffs and other property owners, however, had already filed for hearings to obtain a reclassification of their properties under Ordinance 1093. In a decision dated August 21, 1992, the Superior Court (Gershengorn, J.) ruled that the repeal of Ordinance 1093 was not retroactive and that the owners of those properties who had filed for a removal permit prior to the repeal of the Ordinance were entitled to a hearing and ruling under Ordinance 1093. Collins v. City of Cambridge, Middlesex Civil Action No. 90-85 (August 21, 1991).

Pursuant to the Collins decision, the rent control board gave the plaintiffs a hearing, the purpose of which was to interpret Ordinance 1093 and determine how it would effect the status of Henry Street. On December 9, 1991, the Rent Control Board issued a final decision which: (1) ruled that Henry Street was a four unit dwelling for the purposes of rent control's records; and (2) denied the plaintiffs a removal permit for the fourth unit. The plaintiffs have appealed that decision, under c. 30A, arguing that the Rent Control Board's interpretation of the plain language of Ordinance 1093 was incorrect as a matter of law, and that a removal permit should be granted.

DISCUSSION**I. Standard of Review for an Appeal under G.L. c. 30A**

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. Merisme v. Bd. of Appeals on Motor Vehicle Liab. Policies & Bds., 27 Mass. App. Ct. 470, 474 (1989); Faith Assembly of God v. State Bldg. Code Comm'n, 11 Mass. App. Ct. 333, 334 (1981), citing Almeida Bus Lines, Inc. v. Dep't of Pub. Util., 348 Mass. 331, 342 (1965). In reviewing the agency decision, the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. Seagrams Distillers Co. v. Alcoholic Beverages Control Comm'n, 400 Mass. 713, 721 (1987); Quincy Hospital v. Labor Rel. Comm'n, 400 Mass. 745, 748-749 (1987); Dohoney v. Dir. of Div. of Emp. Sec., 377 Mass. 333, 337 n.3 (1979); Bd. of Selectmen of Marion v. Labor Rel. Comm'n, 7 Mass. App. Ct. 360, 361 (1979). Findings of fact will be upheld if supported by "substantial evidence," Capezzuto v. State Ballot Law Commission, 407 Mass. 949, 952 (1990), and the reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Voc. School Dist. v. Labor Rel. Comm'n, 386 Mass. 414, 420-421 (1982), citing Olde Towne Liquor Store, Inc., v. Alcoholic Beverage Comm'n, 372 Mass. 152, 154 (1977). By contrast, conclusions of law or questions of

law are reviewable by the court and in that sense are subject to de novo judicial review. Cappezuto, supra at 952; Haley v. Commissioner of Public Welfare, 394 Mass. 466, 476 (1985). The present case is subject to de novo review because it involves a question of law: the proper interpretation of Section 8.44.020 of the Cambridge Municipal Code as amended by Ordinance 1093.

II. Interpretation of the Plain Language of Ordinance 1093.

Section 8.44.020, as amended by Ordinance 1093, states in relevant part:

C. **"Controlled rental unit"** means any unit included in the definition under Section 3(b) of the Act.³

[Ordinance 1093]

- (i) For those properties cited below which were rehabilitated or repaired and thereby reconfigured, or **any property in which the number of residential units was changed either by merger or dividing**, or any property in which the number of residential units was changed by the owner occupying more than one unit and thereby changing the use (i.e. from lodging house to single residence), **all such activities to be substantially completed prior to August 31, 1988, then the legal number of units in the property shall be the largest number of units which does not exceed any of the following: the Zoning Code, the State Building Code and the current rent control records. (emphasis added).**

³ Section 3(b) defines rental units as "all rental units," subject to six enumerated exceptions.

Construing Ordinance 1093 requires a three-step analysis. First the Court must determine whether Henry Street is even governed by Ordinance 1093. Assuming that it is, the Court then must apply the criteria set forth in Ordinance 1093 to determine how many "legal units" exist at Henry Street. Finally, the Court must consider, in light of its own determination concerning the application of Ordinance 1093, whether the Rent Control Board properly denied the plaintiffs a removal permit for Henry Street's fourth unit.

A. Does Ordinance 1093 Apply to Henry Street?

Ordinance 1093 governs "any property in which the number of residential units was changed either by merger or dividing." It is an uncontested fact that Henry Street was changed both by merger and dividing. The owners in the early 1960's divided the first floor into two units, and, in 1987, the plaintiffs merged those two units into one unit. Thus, Henry Street is governed by Ordinance 1093, and this Court must now determine if the Rent Control Board properly interpreted Ordinance 1093 when determining the new "legal number" of units at Henry Street.

B. How many "Legal Units" Exist at Henry Street

The number of "legal units" in buildings which have been changed by either merger or division, is redefined by Ordinance

1093 as:

"the largest number of **units**" which does not exceed the Zoning Code, the State Building Code and the current rent control records."

Applying these words to determine the rent control status of Henry Street requires this Court first to interpret the meaning of the word "units" as it is used in Ordinance 1093. Once the word "units" is defined, this Court must compare the number of "units" at Henry Street to the codes/records to determine whether that number of units exceeds the largest number of units permissible under those codes/records.

1. Interpretation of "Units"

The word "units", as it appears in bold print in the following section of the Ordinance, must be interpreted in a manner which is logical, given the other words and sentences in the paragraph. Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 316 (1991).

". . . all such activities to be substantially completed prior to August 31, 1988, then the legal number of units in the property shall be the largest number of **units** [existing after the substantial completion of the aforementioned mergers or divisions substantially completed prior to August of 1988] which does not exceed any of the following: the Zoning Code, the State Building Code and the current rent control records. (emphasis added).

The most logical interpretation of the word "units" is indicated in brackets; the largest number of "physical" units existing in the building after the previously mentioned mergers or divisions. The defendants would have this Court interpret "units" to mean the largest number of units on record at rent control, provided that that number does not violate the codes/records. Such an interpretation is not supported by the plain language of ordinance. The word "units" clearly refers to the number of units actually in the building as described in the preceding sentences which refer to the physical renovations to the building. It would be illogical to rule that the word "units" is defined by the words "current rent control records" which appear not only at the end of the entire paragraph, but also after a colon.⁴ See Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 123 (1986) (modifying clause is confined to last antecedent unless subject matter or dominant purpose requires different interpretation).

In addition, the plain language of Ordinance 1093 evidences

⁴ The words "current rent control records" refers to the word "following."

"[T]he legal number of units shall be the largest number of **units** which does not exceed any of the **following**: the Zoning Code, the State Building Code and the current rent control records."

It would be arbitrary to rule that any of the words following the colon referred to a word other than the word "following."

that it sought to achieve consistency between the actual physical number of units in the buildings and codes and rent control records, without violating existing codes and rent control regulations.⁵ See Casey v. Massachusetts Electric Co., 392 Mass. 876, 880 (1984) (statutory language is principle source of insight into legislative purpose).⁶ For that reason, the Ordinance applies to all buildings which have been changed by mergers or divisions prior to August 31, 1988. The last completed activity prior to 1988 will be the starting point for determining the building's future status, and it will be that number of units which cannot exceed the number of units allowed by the codes and rent control records.

In the present case, the parties agree that the last renovation to Henry Street occurred in 1987 when the plaintiffs converted Henry Street back into a three-family dwelling. Thus, the legal number of units at Henry Street shall be the largest

⁵ A review of the rent control regulations indicates that the rent control board cannot take any action concerning a removal permit, rent adjustment, or certificate of eviction, if a unit is unregistered. If rent control records do not list a unit, it is unregistered. Thus, the reason Ordinance 1093 fails to make legal any units not listed in rent control records is that it does not want to violate its own policies as established in regulations series nos. 20 and 21.

⁶ Contrary to the plaintiffs' assertion, Ordinance 1093 is not an amnesty act. The Ordinance merely seeks to achieve consistency between the physical number of units in buildings which have been changed and the rent control records.

number of units existing on the premises in August of 1988 (three units), provided that that number does not exceed the maximum number of units of permissible under the codes/records.

2. The Number of Units Permitted by the Zoning Code, the State Building Code, and Current Rent Control Records

The next step is to determine whether the three units existing on August 31, 1988 exceed in number, the largest number of units permitted under "the Zoning Code, the State Building Code and the current Rent Control Records." The parties disagree as to which "Zoning Code" Ordinance 1093 refers. There are two logical interpretations: (1) the Zoning Code in effect when Ordinance 1093 was enacted; or (2) the Zoning Code in effect at the time the petition for a hearing was filed. Either choice refers to the same Zoning Code, and the parties agree that the largest number of permissible units for Henry Street under that Zoning Code is three. Because the physical number of units (three) does not exceed the number of units permissible under the Zoning Code, that code does not affect Henry Street. The Zoning Code, therefore, does not necessitate that this Court make an adjustment to the number of physical units currently existing at

Henry Street.⁷

Likewise, the three units existing in Henry Street do not exceed the largest number permitted by either the Building Code or current rent control records. First, the parties have not alleged that three units is in violation of the Building Code. Second, the current rent control records list Henry Street as a four unit dwelling. Thus, the number of "legal units" at Henry Street is three units, and it will be that number of units that is considered when determining the rent control status of Henry Street.

C. Denial/Issuance of a Removal Permit

The final step in the analysis is to determine whether the Rent Control Board properly denied the plaintiffs a removal permit. Removal permits are necessary when an owner wishes to remove a "controlled unit" from the market. See c. 52, § 8.44.040. This court must therefore determine: (1) how many "controlled units" exist at Henry Street; and (2) whether the plaintiffs were entitled to removal permits for any of those units.

⁷ The parties disagree as to whether the decision of the zoning board concerning Henry Street is determinative of the legal number of units under the Zoning Code. Given this Court's interpretation of Ordinance 1093, that issue is irrelevant.

Based upon this Court's interpretation of the plain language of Ordinance 1093, Henry Street contains three "legal units." In order to determine how many of those units are "controlled units," this Court must look to the "Definitions" section of chapter 52 § 8.44.020; the rent control regulations promulgated to regulate the removal of controlled housing units from the market. That definition section, which incorporates the definition section of c. 36 § 3, states in relevant part:

Chapter 52
An act Regulating Condominium Conversion and Other
Removals of Controlled Rental Units in the City of Cambridge

Chapter 8.44
Rent Control

8.44.020 Definitions

C. "Controlled rental unit" means any unit included in the definition under Section 3(b) of the Act [c. 36].

Section 3.

(b) **Controlled rental units," all rental units except:**

- (6) the rental units in an owner-occupied two or three-family house.

Under the plain language of this definition section of the rent control act, all three units at Henry Street are subject to rent control, but are exempted if Henry Street is owner-occupied. In the present case, the parties do not dispute that Henry Street is

an owner-occupied dwelling. Accordingly, there is no need to file for a removal permit under c. 52 § 844.040 in the present case.⁸

ORDER

For the foregoing reasons, it is hereby ORDERED that the decision of the Rent Control Board is set aside and judgment shall enter for the plaintiffs as follows:

- (1) the legal number of units located at 86 Henry Street in Cambridge, under the current rent control regulations an interpretation of which includes Ordinance 1093, is three; and
- (2) none of those three units are "controlled units," under the current rent control regulations, during any period of time that 86 Henry Street is owner-occupied.


Gordon L. Doerfer,
Justice of the Superior Court

DATED: October /6 , 1992

⁸ The discretion granted to the rent control board in Fragopoulos v. Rent Control Board of Cambridge, 408 Mass. 302 (1990), is inapplicable to the present case because it is unnecessary for the plaintiffs to file for a removal permit.

Consent Comm. # 2

8-15

Comm. from James W. Headley and Pepita Soto requesting the City Council to reconsider the appeal filed by the Rent Control Board regarding the premises located at 86 Henry Street.

In City Council,

January 4, 1993

Referred to the
City Manager for
report.
Copy sent to City Mgr
1/5/93 *ole*