

Consent Communication #6

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TELECOPIER COVER SHEET

DATE / TIME : October 20, 2000  
TO: Margaret Drury, City Clerk  
Cambridge City Hall  
795 Massachusetts Ave  
Cambridge, MA 02139  
TELECOPIER NUMBER: (617) 349-4269 Tel: (617) 349-4269  
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SENT BY: C. Peter R. Gossels, Esq.  
CASE NAME: Epstein/Shady Hill Square  
COMMENTS:

Copy of the first page of letter dated October 19, 2000 addressed to the Members of the City Council, which was faxed in its entirety to your office on Thursday, October 19th.

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**C. PETER R. GOSSELS**

ATTORNEY AT LAW

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WAYLAND OFFICE BY APPOINTMENT: 32 HAMPSHIRE ROAD · WAYLAND · MASSACHUSETTS 01981 · 978 942 1111

TELETYPE: 617 742 5734

October 19, 2000

To the Members of the City Council  
of the City of Cambridge  
City Hall, 2nd Floor  
795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Re: Cambridge Historical Commission  
Landmark Designation Study Report  
Shady Hill Square

I have been retained by Henriette W. Epstein, who owns Lot 3 (numbers 4 and 5) and Lot 8A ("the Center"), Shady Hill Square ("the Square") to persuade the members of the City Council to vote against the order proposed by the Cambridge Historical Commission in its Landmark Designation Study Report pursuant to the provisions of G. L. c. 40C and Chapter 2.78, 180F of the Cambridge City Code.

In support of her position, Mrs. Epstein hereby submits the following information:

A. Material Facts.

1. She is a senior citizen who has been a resident of the Square and paid all of the real estate taxes on said properties since she purchased the entire Square on July 12, 1968.
2. Mrs. Epstein relies on the income from her investments to earn her living.

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SENT BY:

C. Peter R. Gossels, Esq.

CASE NAME:

*Epstein/Shady Hill Square*

COMMENTS:

Dear Ms. Drury:

In accord with our conversation this morning, kindly duplicate and distribute a copy of the letter enclosed to and among the members of the City Council.

Thank you.

C. Peter R. Gossels

THE DOCUMENT ACCOMPANYING THIS TRANSMISSION CONTAINS INFORMATION FROM THE LAW FIRM OF WESTON, PATRICK, WILLARD & REDDING, P.A. WHICH IS CONFIDENTIAL, LEGALLY PRIVILEGED AND INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ON THIS TRANSMISSION SHEET. IF YOU ARE NOT THE RECIPIENT NAMED ABOVE, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION, OR CONDUCT BASED ON THE CONTENTS OF THIS TELECOPIED INFORMATION IS STRICTLY PROHIBITED AND THAT OUR DOCUMENTS SHOULD BE RETURNED TO THIS FIRM IMMEDIATELY. IF YOU HAVE RECEIVED THIS TRANSMISSION IN ERROR, PLEASE NOTIFY US BY TELEPHONE IMMEDIATELY SO THAT WE CAN ARRANGE FOR THE RETURN OF THE ORIGINAL DOCUMENTS TO US AT NO COST TO YOU.

Members of the City Council  
Re: Shady Hill Square

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3. Although the original developers of the Square, who are quoted in the Study Report, told the *Cambridge Chronicle* in 1915 that they were planning to construct a community of congenial housing for Harvard's teaching staff, the property was in fact neglected, the buildings run down and the Center had become a sandpit by the mid-1960s when Mr. and Mrs. Epstein purchased all of the Square from an heir of the developers.

4. Instead of collecting rent from their neighbors, as the original developers and their family had done, the Epsteins gave the residents of Lots 1, 2, 4, 5, 6 and 7 an opportunity to purchase their respective lots for approximately \$40,000.00, a price substantially below their fair market value in 1970. I represented the Epsteins when they sold those lots.

5. The "privatization" of the Square led the residents to improve their properties and, in many cases, to sell their properties at prices far higher than the Epsteins had paid for the entire Square only thirty-one years ago. One of the twelve units at the Square, for example, was put on the market in 1993 for \$595,000.00. There are other examples: 2A Shady Hill Square is assessed at \$781,500.00, No. 3 is assessed at \$723,400.00, No. 10 is assessed at \$708,500.00 and No. 11 is assessed at \$738,000.00.

6. When Mrs. Epstein notified her fellow residents of the Square in the Fall of 1998 that she must soon sell the Center of the Square at its fair market value (\$600,000.00 more or less) to augment her declining resources, they declined to buy the Center, even though she offered to pay two-eleventh of the price. See the correspondence annexed as Exhibits A and B.

7. Instead, they asked the Cambridge Historical Commission to initiate a study of the Square for landmark designation in the hope that such a designation by the City Council would keep the Center from being developed as a house lot. If they shall succeed in their effort to persuade the City to deprive Mrs. Epstein of the use of her property, the neighbors would continue to enjoy the green space that is taxed to Mrs. Epstein at no cost to themselves and they will be able to sell their own property for far more money than if the Center were developed.

8. None of the residents of Shady Hill Square are members of the Harvard faculty or any other faculty.

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9. It is interesting to note that none of the residents asked the Commission to landmark the Square before Mrs. Epstein offered to sell the Center to them at market value.

10. It is also interesting to note that the effort by the neighbors to use the power of the City of Cambridge to take the Center from Mrs. Epstein reflects the fact that the Square is not the congenial community for Harvard's teaching staff that the developers envisioned.

B. Mrs. Epstein respectfully asks the members of the City Council to vote against the order proposed in the Landmark Designation Study Report filed by the Cambridge Historical Commission for the following reasons:

1. The provisions of Article III, Sections 2.78.140, 2.78.180 and 2.78.220 of the Code of the City of Cambridge are so vague and ambiguous that their meaning can only be guessed at. *Smith v. Goguen*, 415 U. S. 566 (1974) and *Grayned v. Rockford*, 408 U. S. 104 (1972). What, after all, are

“sites and structures which constitute or reflect distinctive features of the architectural, cultural, political, economical or social history of the City”?

Was John Worthington Ames a “famous architect? (See Section 2.78.180.) And if he was, has the Commission recommended the “landmarking” of any of his other buildings with a building lot adjacent thereto?

Were Harvard president, Conant, who lived in the Square for a time in the 1920s (he subsequently lived in other places in Cambridge), and architect Robert Kennedy, who lived there in the 1950s, and poet Simon Kuznets, who lived there in the 1960s, “historic persons” as that term is used in Section 2.78.180? And should Mrs. Epstein be deprived of all economically beneficial use of her building lot worth at least \$600,000.00 and at least twice that with a home there, because the aforesaid “historic persons” lived there for a time? And does the Commission plan to “landmark” any other buildings where those persons lived?

2. If the City Council were designate Shady Hill Square as a protected landmark, it will have failed to insure that uniformity of standards and enforcement with

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respect to the implementation of Chapter 2.78.180 of the City Code. Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565 (1996).

Why hasn't the Council designated "Larchwood" on Brattle Street, or any of the many other buildings designed by John Worthington Ames described on pages 13 and 14 of the Study Report as landmarks?

Why hasn't the Council designated any of the four other "Garden City" residential developments as a landmark?

Why was Shady Hill Square singled out for landmarking?

3. If the Proposed Order drafted by the Historical Commission were to be approved, the Council would be engaged in arbitrary and capricious conduct for the reasons set forth above. Framingham Clinic, Inc. v. Board of Selectmen of Southborough, 373 Mass 279 (1977). Moreover,

a. At page 3 of its Report, the Study Commission admit that

"The major issue confronting Shady Hill Square is the long term preservation of the courtyard area at the center of the development, an area intended to be and historically maintained as open space . . . The uncertain status of the courtyard and the desire to see it protected as open space insofar as possible gave rise to the current landmark designation study."

The study then ignores the fact that their finding that this "courtyard" is, in fact, a 10,500 square foot building lot that could support "perhaps two dwellings with . . . a total of 5,250 square feet of development" (page 2) and stresses the architectural features of the houses in the Square that will not be affected if the Council shall decide that the Square should not be landmarked.

b. At pages 1, 3, 11, 12, 13 and 15, the Report cites and quotes at length from documents and news reports generated in 1915 to prove that the Square is "historically and architecturally significant", even though uncontroverted evidence was

Members of the City Council  
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presented to the Commission that the developers did not carry out their announced intentions to provide affordable housing for "Harvard's (junior) teaching staff, the instructors at Tech and families of students." There was evidence presented to the Commission that the developers leased apartments to those who could afford the rents and allowed the Square to deteriorate to such an extent that Mrs. Epstein, who purchased the Square from them, had to landscape the "dust bowl" that the Center had become before subdividing the Square thirty years ago. There was also uncontroverted evidence presented to prove that there are no junior faculty living in the Square. Therefore,

- (1) If "the purpose of landmark designation . . . is . . . to: preserve, conserve and protect the . . . heritage of the City and to improve the quality of its environment through . . . conservation and maintenance of . . . site and structures which constitute or reflect distinctive features of the architectural, cultural, political, economic or social history of the City . . .", how can the Council justify the designation of the Square as a historic landmark where the site was never used as the developers intended, despite their numerous statements to the press about their good intentions?
  - (2) Where the Center has never been owned by anyone other than the owner of Lot 3, how can the Council justify the landmarking of the Square in order to "reestablish the Center as a common amenity", especially where there was no evidence presented to the Commission as to what rights the developers had granted to their tenants to use the Center between 1915 and 1968? (See pages 19 and 20.)
- c. The "landmarking" of the Square would constitute an illegal public taking for a private purpose, thereby allowing the neighbors to enjoy Mrs. Epstein's property at her expense without cost to themselves.

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- d. But the most remarkable aspect of the Study Report is the discussion at pages 16 and 17 where the Study Commission admits that it recommends the landmarking of Mrs. Epstein's building lot because the City will not spend the money to buy it. Then in order to discourage Mrs. Epstein from suing the City if it shall "landmark" her building lot, the Study Commission states at page 17

"Nor is it clear that a future Commission if presented with a proposal to construct a dwelling on (the Center) that was architecturally consistent and harmonious with the existing dwellings, might find such a proposal appropriate."

If such a building might be deemed appropriate by the Commission in the future, how can the Commission justify the "landmarking" of the Square, when building on the Center would negate the whole purpose of the study and its recommendations, which was to assure "the long-term preservation of the courtyard . . . as open space."

4. Mrs. Epstein submits that the "landmarking" of Shady Hill Square as recommended by the Commission will constitute a taking under the Fifth Amendment of the Constitution of United States and similar provision of the Massachusetts Constitution, because it will deprive her completely of the use of the Center. Lucas v. South Carolina Coastal Council, 505 U. S. 1003, 1027, 1029 (1992):

The Order proposed states that:

"No construction activity can take place within (Shady Hill Square) . . . without the issuance of a Certificate of Appropriateness (by the Historical Commission, which shall be guided by Section VII of Study Report).

Section VII provides as follows (pages 19 and 20):

"The center lot of Shady Hill Square should be maintained as open space . . . If in the future, the Commission finds that a

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building (in the center) could be appropriate . . . , then such building . . . should not extend beyond the rear walls of the properties at 1 Shady Hill Square and 36 Holden Street. . .”.

The rear walls of the properties at 1 Shady Hill Square and 36 Holden Street are approximately 44 feet easterly from Holden Street. Therefore, the owner of the Center could never construct a building more than twenty-four feet deep pursuant to Section VII of the Study Report, because the current zoning ordinance requires a twenty foot set-back from Holden Street.

At page 17 of its Study Report, the Historical Commission relies on District Intown Properties Limited Partnership v. District of Columbia, 23 F. Supp. 2d 30 (D. D.C. 1998) to defend itself against Mrs. Epstein's argument that the landmarking of Shady Hill Square would constitute an unlawful taking, but we submit that the facts of this case differ significantly from those in the District of Columbia case and that it is , therefore, not controlling in Massachusetts. A copy of my letter to Mrs. Epstein dated May 17, 2000 is annexed hereto as Exhibit C.

5. Even if it were argued that “landmarking” the Center would provide some benefit to Mrs. Epstein's other property, she submits that such landmarking would violate her constitutional rights, because it would deprive her of any economically beneficial use. Lopes v. Peabody, 417 Mass. 299, 304-307 (1994).

6. Mrs. Epstein respectfully submits that the City of Cambridge will not be able to use the Commission's Report to protect itself from the valid charge that it will have used its municipal powers, not to advance the legitimate lawful interests of the City, but to enrich the private residents of the Square at the expense of Mrs. Epstein, especially where the Council has given no indication as to what the owner of the Center has to do in order to obtain “a Certificate of Appropriateness, Hardship or Non-Applicability as the case may be.” See page 21 and Celco Partnership v. Town of Douglas, F.Supp. (U.S.D.C. Mass. 1999) cited in 28 Massachusetts Lawyers Weekly 951 (January 3, 2000). A copy of a synopsis of said opinion is annexed hereto as Exhibit D.

#### Concluding Remarks

The Study Commission Report before you tonight was not prompted by a comprehensive survey of the sites and structures in Cambridge which constitute or reflect distinctive features

Members of the City Council  
Re: Shady Hill Square

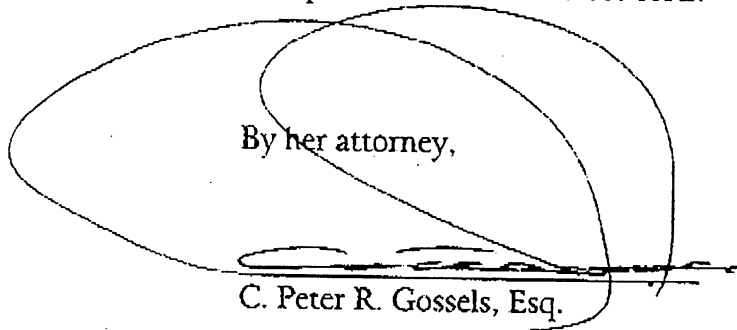
October 19, 2000  
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of the architectural, cultural, political, economic or social history of the City. And if Shady Hill Square were such a site, the Council would have landmarked it many years ago.

The current study was, in fact, prompted and driven by a request from some of Mrs. Epstein's neighbors to the City to prevent her from selling the Center to a developer so that they could enjoy her open space without having to buy the property from her. Your adoption of its recommendations would, therefore, constitute an unlawful taking, because it deprives Mrs. Epstein of any economically beneficial use of her property without advancing the legitimate interests of the City of Cambridge. See Lopes, above at page 305.

As a long term resident and investor in the City of Cambridge, who made it possible for her neighbors to own their homes and benefit from the rapidly escalating property values referred to at page 3 of the Study Report, Mrs. Epstein respectfully asks the Commission to vote against the adoption of the order proposed in said Report for the reasons set forth above.

By her attorney,



C. Peter R. Gossels, Esq.

CPRG:dy

cc: Mrs. Henriette W. Epstein

P.S. This letter would have been considerably shorter if I had received notice of the fact that you would act on the Study Report of the Commission prior to this morning.

CPRG

**C. PETER R. GOSSELS**

ATTORNEY AT LAW

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WAYLAND OFFICE BY APPOINTMENT: 32 HAMPSHIRE ROAD · WAYLAND · MASSACHUSETTS 01776 · 508/358-7450

TELECOPIER 617-742-5734

October 28, 1998

Jane Rabe, Esq.  
3 Shady Hill Square  
Cambridge, Massachusetts 02138

Re: Shady Hill Square

Dear Ms. Rabe:

You may recall that I represented the Epsteins when they purchased Shady Hill Square in 1969 and made it possible for the residents of the community to purchase their own homes at a reasonable price. They also retained title to the Center (Lot 8A) to preserve the light, space and beauty that their neighbors around the Square have enjoyed for the last thirty years.

Henny, as you now know, is no longer able to bear this expensive burden alone and I have advised her to sell the Center to augment her declining resources, unless the neighbors at Shady Hill Square are willing and able to purchase the Center as tenants-in-common or otherwise.

Henny tells me that you may have retained a lawyer to explore just such an arrangement.

I would, therefore, welcome a call from you and/or your attorney in the near future to discuss your proposal to purchase the Center.

Yours sincerely,  


CPRG:dy

cc: Dr. Henriette Wenkart Epstein

EXHIBIT A

DENNIS W. TOWNLEY  
DIRECT LINE: 617-428-3537  
DTOWNLEY@HILLBARLOW.COM

November 13, 1998

Dr. Henriette Wenkart Epstein  
4 Shady Hill Square  
Cambridge, MA 02138

Dear Henny:

We, your neighbors, have conferred about how we can keep the Shady Hill Square "center" or "green" as open space for the benefit of all of the homeowners on the Square and the larger community. The center of Shady Hill Square was designed in 1915 to be open space, and it has been maintained that way for over eighty years. During at least the last twenty-five years, we and our predecessors have used the center freely, openly and without restriction. We have also maintained, and paid others to maintain, the green.

We understand from you and your lawyer that you share our objective of preserving the green as open space, but that you believe that you have to sell the center "to augment [your] declining resources". We have considered this point and address it in our proposal. We are prepared to enter into an arrangement that includes cash to you of \$150,000 and tax benefits which should shelter this amount and could provide additional tax shelter to you to the extent that you have income against which to offset the tax benefits. Our proposal would eliminate entirely any continuing obligation (characterized by your lawyer as a "burden") for taxes or maintenance on the green. We note, however, that you are not separately taxed on the center and that your contribution to maintenance is purely voluntary and is pro-rata with your neighbors.

In arriving at the cash component of the consideration, we established a condition that each neighbor in our group will contribute more or less equally. This is important to us because it preserves the strong sense of community that we enjoy. We have discussed this issue extensively and have polled our group of neighbors with the result that each house (10 in number - not including your two houses) will contribute approximately \$150,000. As you know, some of your neighbors are retired and living on fixed incomes. The contributions of some of those neighbors will be supplemented by others to the extent necessary to arrive at the total sum offered.

We did not consider only our collective ability to pay for the green in arriving at our cash consideration. We also made an assessment of the value of the green to a potential purchaser who does not live on the Square. As you know, the "green" is encumbered by certain deed restrictions, including restrictions on construction, which continue until December 31, 2000. We

**EXHIBIT B**

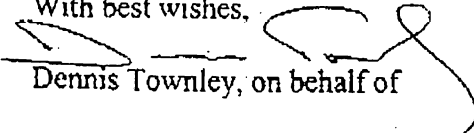
Henriette Epstein  
November 13, 1998  
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are informed by counsel and by the City of Cambridge that the roadway can neither be built upon nor counted for determining what development may be permitted. The green is also subject to the zoning restrictions for Zoning District A-2 which, among other things, establish set-backs from the roads, height and open space restrictions. No zoning variance will be granted without the unanimous consent of your neighbors. In addition, the green is subject to city and other regulatory restrictions and to potential claims of others, including your neighbors, all of which taken together, lead us to the conclusion that the fair present value of the green is \$180,000 (\$150,000 plus \$30,000 for your two houses).

But we have not stopped at offering a cash purchase price alone. We have investigated and are currently discussing with a number of not-for-profit and municipal organizations a plan that would preserve the green against development in perpetuity. While we have not settled on an approach, we believe that with your help we can structure a transaction that would involve an outright gift of, or a conservation easement on, the green that could afford you significant tax benefits in addition to the cash purchase price. The fact that Shady Hill Square is listed in the National Register of Historic Places will facilitate this approach. We have discussed this matter with, and have received at least tentative expressions of interest from, the Trust for Public Land and the City of Cambridge. We are also considering other conservation organizations and the possibility of forming a 501(c)(3) not-for-profit entity to hold the land. If you are interested in this concept, we would promptly engage, at our cost, a lawyer who is an expert in this field to guide us through the process, with the objective of maximizing your benefits from such a transaction and preserving for all of us the benefits of open space.

We look forward to discussing this proposal with you and your lawyer. We are prepared to move expeditiously to a formal agreement along the lines described in this letter. We would like to have your response by December 15, 1998. We are united in our commitment to preserving the green as open space and hope that you share this primary objective.

With best wishes,

  
Dennis Townley, on behalf of

Cara Feldberg and Philip Bannatyne  
Monica and Tomas Hexner  
Jerzy Soltan  
Judy and Dennis Townley  
Lisa and Howard Van Vleck

Natalie Frohock and Natalie Tarbet  
Jane and Ted Rabe  
Carol and Dennis Thompson  
Deborah Valenze and Michael Gilmore

cc: C. Peter R. Gossels, Esq. (by hand)

**C. PETER R. GOSSELS**

ATTORNEY AT LAW

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WAYLAND OFFICE BY APPOINTMENT: 32 HAMPSHIRE ROAD · WAYLAND · MASSACHUSETTS 01778 · 508/358-7428

TELECOPIER 617/742-5734

May 17, 2000

Dr. Henriette Wenkart Epstein  
40 Central Park South  
Apartment No. 6D  
New York, New York 10019

Re: Shady Hill Square

Dear Henny,

Herewith enclosed, as promised is a copy of District Intown Properties, LLP v. District of Columbia, 23 F. Supp. 2d. 30 (1998), which is referred to at page 17 of the Study Report dated December 28, 1999 prepared by the staff of the Cambridge Historical Commission. This decision was affirmed on December 17, 1999 by the United States Court of Appeals at 198 F. 3<sup>d</sup> 874. A copy of that decision is also enclosed.

I believe that this case can be distinguished from your case for the following reasons:

1. Properties purchased a parcel of real estate consisting of an apartment building and adjacent landscape lawn in 1961 long after the District of Columbia had enacted the Shipstead-Luce Act (1930s). In 1987, a movement developed to landmark the property. On June 30, 1998, Properties subdivided its parcel into nine lots (Lots 106 through 114). On December 30, 1998, Properties applied for building permits to construct townhouses on Lots 107 through 114. On March 2, 1989, a landmark designation was filed. It was approved on May 17, 1989. On July 19, 1989, the District denied Properties' application for building permits.

You purchased Shady Hill Square on July 12, 1968, a subdivision of eight lots including the unnumbered center lot, which was duly recorded on March 26, 1915, five years before the enactment of the first Zoning Enabling Act in Massachusetts (1920 Mass. Acts 601, § 2), which was completely recodified as G. L. c. 40, §§ 25-30A in 1933.

On December 31, 1970, you conveyed Lots 2, 4 and 6 to Dolores I. Mann. You

**EXHIBIT C**

Dr. Henriette Wenkart Epstein  
Re: Shady Hill Square

May 17, 2000  
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conveyed Lot 1 to the Griffiths on July 19, 1972, Lots 5A to Rowley on June 15, 1972, Lot 5B to the Alfaros on October 2, 1972 and Lot 7 to the Hexners on May 27, 1971, retaining Lot 3 and the Center for yourself.

Unlike "the landscaped lawn" adjacent to Properties' apartment building, the Center of Shady Hill Square has been a separate building lot since 1915, prior to the enactment of zoning in Massachusetts and adoption by Cambridge of City Ordinance 1002 in 1983, which allowed for the establishment of neighborhood conservation districts and protected landmarks. This was admitted in the Report of the Commission (page 2) which stated:

"(The Center) if developed as of right, appears to constitute a single building lot which could support one or perhaps two dwellings with ... a total of 5,250 square feet of development."

Accordingly, the Center can not be deemed a single lot with Lot 3, as was the property in Washington, especially where you have allowed the neighbors to enjoy the Center, but not Lot 3.

2. Properties also lost its appeal, because:
  - a. It "presented no evidence to show that (landmarking the entire parcel had) deprived the property as a whole of all economically beneficial use."
  - b. It "propounded no evidence that the lawn's economic value was totally destroyed ... nor did (it) offer evidence of the plots' fair market value after its construction permits were denied."
  - c. It "offered no evidence that (landmarking) would render (the Center) unprofitable to maintain" in view of the income that Properties derives from its apartment building. (In your case that might be the income that you derive from your tenant.)
  - d. It "did not present sufficient evidence that it had a reasonable investment-backed expectation to develop the lawn into (townhouses)", because it had waited twenty-seven years before it subdivided its parcel.
  - e. Properties "could have reasonably expected (that the landmarking ordinance would) affect its rights of development.

We are prepared, of course, to order an appraisal from Mr. Waterman that may help us to prove that the economic value of the Center will be destroyed by a decision of the City Council to landmark the property and that it will, therefore, be unprofitable to maintain.

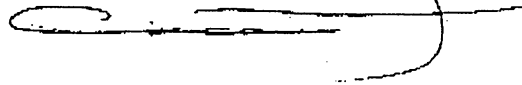
Dr. Henriette Wenkart Epstein  
Re: Shady Hill Square

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Since Cambridge did not enact its landmarking ordinance until 1983, you can certainly testify that you bought the Center in 1968 as an investment that you intended to develop as an income producing property in your senior years without having any idea that such development might some day be forbidden by an ordinance that was not enacted until fifteen years after you bought the property.

With every best wish,

Sincerely,



CPRG.dy  
Enclosures

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January 3, 2000

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the "forced seller" doctrine enunciated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

*Jacobs, et al. v. Winthrop Financial Associates, et al.* (Lawyers Weekly No. 03 246 29) (13 pages) (Young, C.J.) (1518) Attorneys were Mark S. Williams, John J. Dignity and Barbara L. Moore (Civil Action No. 99-CV-11363-WGY).

## Zoning

### Permit Denial -

#### Telecommunications Tower

Where a defendant town and its codefendant building commissioner and zoning board denied the plaintiff a permit and variance to construct a 190-foot telecommunications tower, the defendants violated provisions of the federal Telecommunications Act.

#### Discussion

The Federal Communications Commission licenses (Personal Wireless Service) carriers under the Telecommunications Act, 47 U.S.C. §332(c). Local governments

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retain control over the placement of communications towers subject to five limitations. They are as follows.

"(7) Preservation of local zoning authority

"(A) General authority

"Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local gov-

ernment or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) Limitations

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

thereof (i) shall not unreasonably discriminate among providers of functionally equivalent services; and (ii) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Com-

Continued on PAGE 6

EXHIBIT D

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# THE WEEK'S OPINIONS

## U.S. DISTRICT COURT

Continued from PAGE 5

mission's regulations concerning such emissions.

"(c) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (b) may petition the Commission for relief."

"[Plaintiff] Celco Partnership doing business as Bell Atlantic Mobile argues that the zoning board decision violates §§322C(7)(B)(iii) and (iii) of the ZCA. Specifically, BAM argues that the denial of the permit 'has] the effect of prohibiting the provision of personal wireless services' in Douglas. Moreover, BAM argues that the ZBA's opinion does not comply with the Act's requirement that it be 'in writing and supported by substantial evidence contained in a written record.'

"BAM's second argument is dispositive. The ZBA's opinion fails to identify any reason whatsoever for the denial of BAM's petition, much less support it with substantial evidence. It simply states that while the ZBA unanimously agreed that BAM had satisfied two of the criteria for a special permit, as to the third, [the Board] was divided on ... whether [the] granting of the requested relief would nullify or substantially derogate from the intent and purpose of the Bylaw."

"Recognizing that the ZBA's written decision is insufficient to satisfy §322C(7)(B)(iii), the Town relies on [one zoning board member's] affidavit for exigency. But as BAM counters, the ZCA's goal of achieving expedited review of tower-siting decisions would be totally frustrated if a Town were permitted to conceal its reasons for denying a permit until forced to do so during the discovery phase of the litigation.

"As a fallback position, the Town argues that the reason for the ZBA's rejection of the petition is clear even without the [unmentioned] affidavit because the statement [the Board is divided on ... whether the] granting of the requested relief would nullify or substantially derogate from the intent and purpose of the Bylaw 'alludes to citizen complaints about the visual impact of the tower. There is no indication in the record, however, that [the zoning board member who produced the affidavit] voiced aesthetic concerns at the hearing or expressed agreement with citizens who did."

"Drawing the last arrow from its quiver, Douglas argues that the ZBA's rejection of one petition cannot be construed as an outright ban on all PWS towers. This argument was addressed by Judge Boudin in *Amherst, N.H. v. Omnipoint Comm.*, 1173 F.3d 9 (1st Cir. 1999).

"On appeal, the town argues that this 'effect' provision was never intended to constrain individual town-permitting decisions but was directed only against 'general' bans, whether explicit or implicit. There is some nominal conflict in the case law on this point, but the quarrel is more one of language than substance. Obviously, an individual denial is not automatically a forbidden prohibition violating the 'effects' provision. But neither can we rule out the possibility that — based on language or circumstances — some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service.

## WHAT WE COVER

Lawyers Weekly publishes summaries of cases from the following courts and agencies:

- U.S. Supreme Court - appeals originating in Massachusetts or the 1st U.S. Circuit Court of Appeals.
- 1st U.S. Circuit Court of Appeals - every published case. Included in this issue are decisions through last Wednesday.
- U.S. District Court - every published case.
- U.S. Bankruptcy Court - all cases provided by the court.
- U.S. Bankruptcy Appellate Panel - every published case.
- U.S. Magistrate Judges - all cases provided by the court.
- Supreme Judicial Court - every published case. Included in this issue are decisions issued through last Wednesday.
- Appeals Court - every published case. Included in this issue are decisions issued through last Wednesday.
- Superior Court - cases provided by individual judges and lawyers.
- Appellate Division of the District Court and Boston Municipal Court - every case.
- Land Court - cases provided by the court.
- Probate and Family Court - cases provided by individual judges and lawyers.
- Trial Division of the District Court and Boston Municipal Court - cases provided by individual judges and lawyers.
- Housing Court - cases provided by individual judges and lawyers.
- Juvenile Court - cases provided by individual judges and lawyers.
- Appellate Tax Board - all decisions.
- Labor Relations Commission - all full decisions.
- Massachusetts Commission Against Discrimination - select decisions of the full commission and individual commissioners.
- Attorney General - all opinions provided by the attorney general's office.
- MBA Ethics Committee - all decisions.
- BBA Ethics Committee - all decisions.
- Department of Industrial Accidents - select decisions of the appellate division.
- Department of Environmental Protection - decisions provided by the department and its hearing officers.
- Other Agencies - select decisions from other administrative agencies.

"Suppose, for example, that in denying an individual permit, the town zoning authority announces that no towers will ever be allowed or sets out criteria that no one could meet. The fact that the ban is embodied in an individual decision does not immunize it. It is no answer to point to the requirement that individual decisions be based on 'substantial evidence,' for this surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself (e.g., for setbacks, conditions for variances, special exception requirements) ...

"If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will almost certainly exist for the denial. ... In that event, the regulation is unlawful under the statute's 'effect' provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

"In this case, Amherst has not formally banned towers ... but rather required prior permission case by case. And on this record, there is no showing of such fixed hostility by the Board that one can conclude that further applications would be useless ...

"Unlike in *Omnipoint*, where the town Bylaw permitted a tower to be sited in either of two zoning districts, the Douglas Bylaw does not allow a tower to be sited anywhere in Douglas. Again, Judge Boudin's comments are pertinent.

"Omnipoint's stronger claim under the 'effect' provision is that even if it might propose other solutions, once has any real prospect of success before the Board because an applicant can satisfy local requirements. In a nutshell, the Amherst ordinance seemingly requires some form of permission (special exception, variance or otherwise) for any system; the requirements for a variance under state law can be made very severe by insisting that no alternative responsible use for the land exists; and special exceptions under the Amherst ordinance have conditions so broad and general that a hostile Board might be able to find substantial evidence for every negative ruling.

"The concern should not be overstated,

since special exceptions are a matter of right where the conditions are met, and the state courts are available to review the denial of any special exception or variance. Still, Omnipoint's claim is not frivolous. Possibly it would have a difficult time showing conclusively that there is no other use for the sites (allegedly the requirement for a use variance) or that the towers are completely compatible with the rural image that the town seeks to foster (allegedly an element in the special exception regime). The rather mechanical application of these concepts by the Board in its March 1998 decision lends support to this concern, and the district court's own decision rested largely on the view that the Board could and likely would reject alternative proposals ...

"Under federal law, the town can control the siting of facilities but — as several Board members admitted — it cannot preclude wireless service altogether. Nor, in the face of a vigilant district court, can the town exhaust applicants by requiring successive applications without giving any clue of what will do the trick ...

"Unlike in *Omnipoint*, there is nothing in this record to indicate that the ZBA questioned the appropriateness of the location of the proposed tower or suggested alternate designs or heights, the kinds of clues that might instruct a petitioner in the ways it might satisfy a town's legitimate objections. The decision of the ZBA therefore cannot stand.

"For the foregoing reasons, plaintiff's motion for summary judgment is allowed. The ZBA is ordered to issue the necessary variances and permits to allow construction of the BAM tower on the Chestthrough hill site."

*Celco Partnership v. Town of Douglas, et al.* (Lawyers Weekly No. 02 248-991 (8 pages) (Stearns, J.) (USDC) (Civil Action No. 98-11249-RGS).

## U.S. BANKRUPTCY COURT

### Bankruptcy Judicial Lien - 'Marshaling'

Where a creditor seeks to enforce a judicial lien against a Chapter 7 debtor who owns a \$176,000 residence and a rental property also worth \$176,000, the lien is unenforceable because it would fully lea-

pair the debtor's entire the estate.

An American hypothec \$522,000 is sold to a debtor. The debtor acquires the property debt. He the flex would be calculated in the mortgage only on the total amount (\$365,000) not on the exempt property by \$370,000.

The court's decision is a victory for the plaintiff. The court's decision is a victory for the plaintiff. The court's decision is a victory for the plaintiff.

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Consent Communication #6

A communication was received from C. Peter R. Gossels, Esq. on behalf of Mrs. Henriette W. Epstein, owner of Shady Hill Square, in opposition to the Historical Commission's recommendation to designate Shady Hill Square as an historical landmark.

In City Council October 23, 2000

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**TELECOPIER COVER SHEET**

DATE / TIME : October 20, 2000  
TO: Margaret Drury, City Clerk  
Cambridge City Hall  
795 Massachusetts Ave  
Cambridge, MA 02139  
TELECOPIER NUMBER: (617) 349-4269 Tel: (617) 349-4260  
TOTAL NUMBER OF PAGES: Two (2)  
(INCLUDING COVER SHEET)  
SENT BY: C. Peter R. Gossels, Esq.  
CASE NAME: Epstein/Shady Hill Square  
COMMENTS:

Copy of the first page of letter dated October 19, 2000 addressed to the Members of the City Council, which was faxed in its entirety to your office on Thursday, October 19th.

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**C. PETER R. GOSSELS**

ATTORNEY AT LAW

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October 19, 2000

To the Members of the City Council  
of the City of Cambridge  
City Hall, 2nd Floor  
795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Re: Cambridge Historical Commission  
Landmark Designation Study Report  
Shady Hill Square

I have been retained by Henriette W. Epstein, who owns Lot 3 (numbers 4 and 5) and Lot 8A ("the Center"), Shady Hill Square ("the Square") to persuade the members of the City Council to vote against the order proposed by the Cambridge Historical Commission in its Landmark Designation Study Report pursuant to the provisions of G. L. c. 40C and Chapter 2.78, 180F of the Cambridge City Code.

In support of her position, Mrs. Epstein hereby submits the following information:

A. Material Facts.

1. She is a senior citizen who has been a resident of the Square and paid all of the real estate taxes on said properties since she purchased the entire Square on July 12, 1968.

2. Mrs. Epstein relies on the income from her investments to earn her living.

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MICHAEL J. SALTSMAN**TELECOPIER COVER SHEET**

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TELECOPIER NUMBER: (617) 349-4269 Tel: (617) 349-4260

TOTAL NUMBER OF PAGES:  
(INCLUDING COVER SHEET)

SENT BY: C. Peter R. Gossels, Esq.

CASE NAME: *Epstein/Shady Hill Square*

COMMENTS:

Dear Ms. Drury:

In accord with our conversation this morning, kindly duplicate and distribute a copy of the letter enclosed to and among the members of the City Council.

Thank you.

C. Peter R. Gossels

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Members of the City Council  
Re: Shady Hill Square

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3. Although the original developers of the Square, who are quoted in the Study Report, told the *Cambridge Chronicle* in 1915 that they were planning to construct a community of congenial housing for Harvard's teaching staff, the property was in fact neglected, the buildings run down and the Center had become a sandpit by the mid-1960s when Mr. and Mrs. Epstein purchased all of the Square from an heir of the developers.

4. Instead of collecting rent from their neighbors, as the original developers and their family had done, the Epsteins gave the residents of Lots 1, 2, 4, 5, 6 and 7 an opportunity to purchase their respective lots for approximately \$40,000.00, a price substantially below their fair market value in 1970. I represented the Epsteins when they sold those lots.

5. The "privatization" of the Square led the residents to improve their properties and, in many cases, to sell their properties at prices far higher than the Epsteins had paid for the entire Square only thirty-one years ago. One of the twelve units at the Square, for example, was put on the market in 1993 for \$595,000.00. There are other examples: 2A Shady Hill Square is assessed at \$781,500.00, No. 3 is assessed at \$723,400.00, No. 10 is assessed at \$708,500.00 and No. 11 is assessed at \$738,000.00.

6. When Mrs. Epstein notified her fellow residents of the Square in the Fall of 1998 that she must soon sell the Center of the Square at its fair market value (\$600,000.00 more or less) to augment her declining resources, they declined to buy the Center, even though she offered to pay two-eleventh of the price. See the correspondence annexed as Exhibits A and B.

7. Instead, they asked the Cambridge Historical Commission to initiate a study of the Square for landmark designation in the hope that such a designation by the City Council would keep the Center from being developed as a house lot. If they shall succeed in their effort to persuade the City to deprive Mrs. Epstein of the use of her property, the neighbors would continue to enjoy the green space that is taxed to Mrs. Epstein at no cost to themselves and they will be able to sell their own property for far more money than if the Center were developed.

8. None of the residents of Shady Hill Square are members of the Harvard faculty or any other faculty.

Members of the City Council  
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9. It is interesting to note that none of the residents asked the Commission to landmark the Square before Mrs. Epstein offered to sell the Center to them at market value.

10. It is also interesting to note that the effort by the neighbors to use the power of the City of Cambridge to take the Center from Mrs. Epstein reflects the fact that the Square is not the congenial community for Harvard's teaching staff that the developers envisioned.

B. Mrs. Epstein respectfully asks the members of the City Council to vote against the order proposed in the Landmark Designation Study Report filed by the Cambridge Historical Commission for the following reasons:

1. The provisions of Article III, Sections 2.78.140, 2.78.180 and 2.78.220 of the Code of the City of Cambridge are so vague and ambiguous that their meaning can only be guessed at. *Smith v. Goguen*, 415 U. S. 566 (1974) and *Grayned v. Rockford*, 408 U. S. 104 (1972). What, after all, are

“sites and structures which constitute or reflect distinctive features of the architectural, cultural, political, economical or social history of the City”?

Was John Worthington Ames a “famous architect? (See Section 2.78.180.) And if he was, has the Commission recommended the “landmarking” of any of his other buildings with a building lot adjacent thereto?

Were Harvard president, Conant, who lived in the Square for a time in the 1920s (he subsequently lived in other places in Cambridge), and architect Robert Kennedy, who lived there in the 1950s, and poet Simon Kuznets, who lived there in the 1960s, “historic persons” as that term is used in Section 2.78.180? And should Mrs. Epstein be deprived of all economically beneficial use of her building lot worth at least \$600,000.00 and at least twice that with a home there, because the aforesaid “historic persons” lived there for a time? And does the Commission plan to “landmark” any other buildings where those persons lived?

2. If the City Council were designate Shady Hill Square as a protected landmark, it will have failed to insure that uniformity of standards and enforcement with

Members of the City Council  
Re: Shady Hill Square

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respect to the implementation of Chapter 2.78.180 of the City Code. Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565 (1996).

Why hasn't the Council designated "Larchwood" on Brattle Street, or any of the many other buildings designed by John Worthington Ames described on pages 13 and 14 of the Study Report as landmarks?

Why hasn't the Council designated any of the four other "Garden City" residential developments as a landmark?

Why was Shady Hill Square singled out for landmarking?

3. If the Proposed Order drafted by the Historical Commission were to be approved, the Council would be engaged in arbitrary and capricious conduct for the reasons set forth above. Framingham Clinic, Inc. v. Board of Selectmen of Southborough, 373 Mass 279 (1977). Moreover,

a. At page 3 of its Report, the Study Commission admit that

"The major issue confronting Shady Hill Square is the long term preservation of the courtyard area at the center of the development, an area intended to be and historically maintained as open space . . . The uncertain status of the courtyard and the desire to see it protected as open space insofar as possible gave rise to the current landmark designation study."

The study then ignores the fact that their finding that this "courtyard" is, in fact, a 10,500 square foot building lot that could support "perhaps two dwellings with . . . a total of 5,250 square feet of development" (page 2) and stresses the architectural features of the houses in the Square that will not be affected if the Council shall decide that the Square should not be landmarked.

b. At pages 1, 3, 11, 12, 13 and 15, the Report cites and quotes at length from documents and news reports generated in 1915 to prove that the Square is "historically and architecturally significant", even though uncontroverted evidence was

Members of the City Council  
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presented to the Commission that the developers did not carry out their announced intentions to provide affordable housing for "Harvard's (junior) teaching staff, the instructors at Tech and families of students." There was evidence presented to the Commission that the developers leased apartments to those who could afford the rents and allowed the Square to deteriorate to such an extent that Mrs. Epstein, who purchased the Square from them, had to landscape the "dust bowl" that the Center had become before subdividing the Square thirty years ago. There was also uncontroverted evidence presented to prove that there are no junior faculty living in the Square. Therefore,

- (1) If "the purpose of landmark designation . . . is . . . to: preserve, conserve and protect the . . . heritage of the City and to improve the quality of its environment through . . . conservation and maintenance of . . . site and structures which constitute or reflect distinctive features of the architectural, cultural, political, economic or social history of the City . . .", how can the Council justify the designation of the Square as a historic landmark where the site was never used as the developers intended, despite their numerous statements to the press about their good intentions?
  - (2) Where the Center has never been owned by anyone other than the owner of Lot 3, how can the Council justify the landmarking of the Square in order to "reestablish the Center as a common amenity", especially where there was no evidence presented to the Commission as to what rights the developers had granted to their tenants to use the Center between 1915 and 1968? (See pages 19 and 20.)
- c. The "landmarking" of the Square would constitute an illegal public taking for a private purpose, thereby allowing the neighbors to enjoy Mrs. Epstein's property at her expense without cost to themselves.

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- d. But the most remarkable aspect of the Study Report is the discussion at pages 16 and 17 where the Study Commission admits that it recommends the landmarking of Mrs. Epstein's building lot because the City will not spend the money to buy it. Then in order to discourage Mrs. Epstein from suing the City if it shall "landmark" her building lot, the Study Commission states at page 17

"Nor is it clear that a future Commission if presented with a proposal to construct a dwelling on (the Center) that was architecturally consistent and harmonious with the existing dwellings, might find such a proposal appropriate."

If such a building might be deemed appropriate by the Commission in the future, how can the Commission justify the "landmarking" of the Square, when building on the Center would negate the whole purpose of the study and its recommendations, which was to assure "the long-term preservation of the courtyard . . . as open space."

4. Mrs. Epstein submits that the "landmarking" of Shady Hill Square as recommended by the Commission will constitute a taking under the Fifth Amendment of the Constitution of United States and similar provision of the Massachusetts Constitution, because it will deprive her completely of the use of the Center. Lucas v. South Carolina Coastal Council, 505 U. S. 1003, 1027, 1029 (1992):

The Order proposed states that:

"No construction activity can take place within (Shady Hill Square) . . . without the issuance of a Certificate of Appropriateness (by the Historical Commission, which shall be guided by Section VII of Study Report).

Section VII provides as follows (pages 19 and 20):

"The center lot of Shady Hill Square should be maintained as open space . . . If in the future, the Commission finds that a

Members of the City Council  
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building (in the center) could be appropriate . . . , then such building . . . should not extend beyond the rear walls of the properties at 1 Shady Hill Square and 36 Holden Street. . . .

The rear walls of the properties at 1 Shady Hill Square and 36 Holden Street are approximately 44 feet easterly from Holden Street. Therefore, the owner of the Center could never construct a building more than twenty-four feet deep pursuant to Section VII of the Study Report, because the current zoning ordinance requires a twenty foot setback from Holden Street.

At page 17 of its Study Report, the Historical Commission relies on District Intown Properties Limited Partnership v. District of Columbia, 23 F. Supp. 2d 30 (D. D.C. 1998) to defend itself against Mrs. Epstein's argument that the landmarking of Shady Hill Square would constitute an unlawful taking, but we submit that the facts of this case differ significantly from those in the District of Columbia case and that it is , therefore, not controlling in Massachusetts. A copy of my letter to Mrs. Epstein dated May 17, 2000 is annexed hereto as Exhibit C.

5. Even if it were argued that "landmarking" the Center would provide some benefit to Mrs. Epstein's other property, she submits that such landmarking would violate her constitutional rights, because it would deprive her of any economically beneficial use. Lopes v. Peabody, 417 Mass. 299, 304-307 (1994).

6. Mrs. Epstein respectfully submits that the City of Cambridge will not be able to use the Commission's Report to protect itself from the valid charge that it will have used its municipal powers, not to advance the legitimate lawful interests of the City, but to enrich the private residents of the Square at the expense of Mrs. Epstein, especially where the Council has given no indication as to what the owner of the Center has to do in order to obtain "a Certificate of Appropriateness, Hardship or Non-Applicability as the case may be." See page 21 and Cellco Partnership v. Town of Douglas, F.Supp. (U.S.D.C. Mass. 1999) cited in 28 Massachusetts Lawyers Weekly 951 (January 3, 2000). A copy of a synopsis of said opinion is annexed hereto as Exhibit D.

#### Concluding Remarks

The Study Commission Report before you tonight was not prompted by a comprehensive survey of the sites and structures in Cambridge which constitute or reflect distinctive features

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Re: Shady Hill Square

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of the architectural, cultural, political, economic or social history of the City. And if Shady Hill Square were such a site, the Council would have landmarked it many years ago.

The current study was, in fact, prompted and driven by a request from some of Mrs. Epstein's neighbors to the City to prevent her from selling the Center to a developer so that they could enjoy her open space without having to buy the property from her. Your adoption of its recommendations would, therefore, constitute an unlawful taking, because it deprives Mrs. Epstein of any economically beneficial use of her property without advancing the legitimate interests of the City of Cambridge. See Lopes, above at page 305.

As a long term resident and investor in the City of Cambridge, who made it possible for her neighbors to own their homes and benefit from the rapidly escalating property values referred to at page 3 of the Study Report, Mrs. Epstein respectfully asks the Commission to vote against the adoption of the order proposed in said Report for the reasons set forth above.

By her attorney,



C. Peter R. Gossels, Esq.

CPRG:dy

cc: Mrs. Henriette W. Epstein

P.S. This letter would have been considerably shorter if I had received notice of the fact that you would act on the Study Report of the Commission prior to this morning.

CPRG

**C. PETER R. GOSSELS**

ATTORNEY AT LAW

84 STATE STREET · BOSTON · MASSACHUSETTS 02109 · 617/742-9310

WAYLAND OFFICE BY APPOINTMENT: 32 HAMPSHIRE ROAD · WAYLAND · MASSACHUSETTS 01778 · 508/358-7400

TELESCOPIER 617/742-5734

October 28, 1998

Jane Rabe, Esq.  
3 Shady Hill Square  
Cambridge, Massachusetts 02138

Re: Shady Hill Square

Dear Ms. Rabe:

You may recall that I represented the Epsteins when they purchased Shady Hill Square in 1969 and made it possible for the residents of the community to purchase their own homes at a reasonable price. They also retained title to the Center (Lot 8A) to preserve the light, space and beauty that their neighbors around the Square have enjoyed for the last thirty years.

Henny, as you now know, is no longer able to bear this expensive burden alone and I have advised her to sell the Center to augment her declining resources, unless the neighbors at Shady Hill Square are willing and able to purchase the Center as tenants-in-common or otherwise.

Henny tells me that you may have retained a lawyer to explore just such an arrangement.

I would, therefore, welcome a call from you and/or your attorney in the near future to discuss your proposal to purchase the Center.

Yours sincerely,

CPRG:dy

cc: Dr. Henriette Wenkart Epstein

**EXHIBIT A**

DENNIS W. TOWNLEY  
DIRECT LINE: 617-428-3537  
DTOWNLEY@HILLBARLOW.COM

November 13, 1998

Dr. Henriette Wenkart Epstein  
4 Shady Hill Square  
Cambridge, MA 02138

Dear Henny:

We, your neighbors, have conferred about how we can keep the Shady Hill Square "center" or "green" as open space for the benefit of all of the homeowners on the Square and the larger community. The center of Shady Hill Square was designed in 1915 to be open space, and it has been maintained that way for over eighty years. During at least the last twenty-five years, we and our predecessors have used the center freely, openly and without restriction. We have also maintained, and paid others to maintain, the green.

We understand from you and your lawyer that you share our objective of preserving the green as open space, but that you believe that you have to sell the center "to augment [your] declining resources". We have considered this point and address it in our proposal. We are prepared to enter into an arrangement that includes cash to you of \$150,000 and tax benefits which should shelter this amount and could provide additional tax shelter to you to the extent that you have income against which to offset the tax benefits. Our proposal would eliminate entirely any continuing obligation (characterized by your lawyer as a "burden") for taxes or maintenance on the green. We note, however, that you are not separately taxed on the center and that your contribution to maintenance is purely voluntary and is pro-rata with your neighbors.

In arriving at the cash component of the consideration, we established a condition that each neighbor in our group will contribute more or less equally. This is important to us because it preserves the strong sense of community that we enjoy. We have discussed this issue extensively and have polled our group of neighbors with the result that each house (10 in number - not including your two houses) will contribute approximately \$150,000. As you know, some of your neighbors are retired and living on fixed incomes. The contributions of some of those neighbors will be supplemented by others to the extent necessary to arrive at the total sum offered.

We did not consider only our collective ability to pay for the green in arriving at our cash consideration. We also made an assessment of the value of the green to a potential purchaser who does not live on the Square. As you know, the "green" is encumbered by certain deed restrictions, including restrictions on construction, which continue until December 31, 2000. We

**EXHIBIT B**

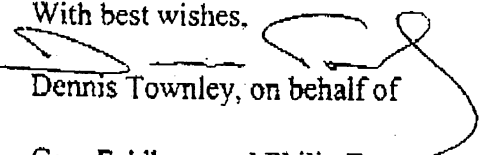
Henriette Epstein  
November 13, 1998  
Page 2

are informed by counsel and by the City of Cambridge that the roadway can neither be built upon nor counted for determining what development may be permitted. The green is also subject to the zoning restrictions for Zoning District A-2 which, among other things, establish set-backs from the roads, height and open space restrictions. No zoning variance will be granted without the unanimous consent of your neighbors. In addition, the green is subject to city and other regulatory restrictions and to potential claims of others, including your neighbors, all of which taken together, lead us to the conclusion that the fair present value of the green is \$180,000 (\$150,000 plus \$30,000 for your two houses).

But we have not stopped at offering a cash purchase price alone. We have investigated and are currently discussing with a number of not-for-profit and municipal organizations a plan that would preserve the green against development in perpetuity. While we have not settled on an approach, we believe that with your help we can structure a transaction that would involve an outright gift of, or a conservation easement on, the green that could afford you significant tax benefits in addition to the cash purchase price. The fact that Shady Hill Square is listed in the National Register of Historic Places will facilitate this approach. We have discussed this matter with, and have received at least tentative expressions of interest from, the Trust for Public Land and the City of Cambridge. We are also considering other conservation organizations and the possibility of forming a 501(c)(3) not-for-profit entity to hold the land. If you are interested in this concept, we would promptly engage, at our cost, a lawyer who is an expert in this field to guide us through the process, with the objective of maximizing your benefits from such a transaction and preserving for all of us the benefits of open space.

We look forward to discussing this proposal with you and your lawyer. We are prepared to move expeditiously to a formal agreement along the lines described in this letter. We would like to have your response by December 15, 1998. We are united in our commitment to preserving the green as open space and hope that you share this primary objective.

With best wishes,

  
Dennis Townley, on behalf of

Cara Feldberg and Philip Bannatyne  
Monica and Tomas Hexner  
Jerzy Soltan  
Judy and Dennis Townley  
Lisa and Howard Van Vleck

Natalie Frohock and Natalie Tarbet  
Jane and Ted Rabe  
Carol and Dennis Thompson  
Deborah Valenze and Michael Gilmore

cc: C. Peter R. Gossels, Esq. (by hand)

**C. PETER R. GOSSELS**

ATTORNEY AT LAW

84 STATE STREET · BOSTON · MASSACHUSETTS 02109 · 617/742-9310

WAYLAND OFFICE BY APPOINTMENT: 32 HAMPSHIRE ROAD · WAYLAND · MASSACHUSETTS 01778 · 508/358-7428

TELECOPIER 617/742-5737

May 17, 2000

Dr. Henriette Wenkart Epstein  
40 Central Park South  
Apartment No. 6D  
New York, New York 10019

Re: Shady Hill Square

Dear Henny,

Herewith enclosed, as promised is a copy of District Intown Properties, LLP v. District of Columbia, 23 F. Supp. 2d. 30 (1998), which is referred to at page 17 of the Study Report dated December 28, 1999 prepared by the staff of the Cambridge Historical Commission. This decision was affirmed on December 17, 1999 by the United States Court of Appeals at 198 F. 3<sup>d</sup> 874. A copy of that decision is also enclosed.

I believe that this case can be distinguished from your case for the following reasons:

1. Properties purchased a parcel of real estate consisting of an apartment building and adjacent landscape lawn in 1961 long after the District of Columbia had enacted the Shipstead-Luce Act (1930s). In 1987, a movement developed to landmark the property. On June 30, 1998, Properties subdivided its parcel into nine lots (Lots 106 through 114). On December 30, 1998, Properties applied for building permits to construct townhouses on Lots 107 through 114. On March 2, 1989, a landmark designation was filed. It was approved on May 17, 1989. On July 19, 1989, the District denied Properties' application for building permits.

You purchased Shady Hill Square on July 12, 1968, a subdivision of eight lots including the unnumbered center lot, which was duly recorded on March 26, 1915, five years before the enactment of the first Zoning Enabling Act in Massachusetts (1920 Mass. Acts 601, § 2), which was completely recodified as G. L. c. 40, §§ 25-30A in 1933.

On December 31, 1970, you conveyed Lots 2, 4 and 6 to Dolores I. Mann. You

**EXHIBIT C**

Dr. Henriette Wenkart Epstein  
Re: Shady Hill Square

May 17, 2000  
Page 2

conveyed Lot 1 to the Griffiths on July 19, 1972, Lots 5A to Rowley on June 15, 1972, Lot 5B to the Alfarnos on October 2, 1972 and Lot 7 to the Hexners on May 27, 1971, retaining Lot 3 and the Center for yourself.

Unlike "the landscaped lawn" adjacent to Properties' apartment building, the Center of Shady Hill Square has been a separate building lot since 1915, prior to the enactment of zoning in Massachusetts and adoption by Cambridge of City Ordinance 1002 in 1983, which allowed for the establishment of neighborhood conservation districts and protected landmarks. This was admitted in the Report of the Commission (page 2) which stated:

"(The Center) if developed as of right, appears to constitute a single building lot which could support one or perhaps two dwellings with ... a total of 5,250 square feet of development."

Accordingly, the Center can not be deemed a single lot with Lot 3, as was the property in Washington, especially where you have allowed the neighbors to enjoy the Center, but not Lot 3.

2. Properties also lost its appeal, because:

- a. It "presented no evidence to show that (landmarking the entire parcel had) deprived the property as a whole of all economically beneficial use."
- b. It "propounded no evidence that the lawn's economic value was totally destroyed ... nor did (it) offer evidence of the plots' fair market value after its construction permits were denied."
- c. It "offered no evidence that (landmarking) would render (the Center) unprofitable to maintain" in view of the income that Properties derives from its apartment building. (In your case that might be the income that you derive from your tenant.)
- d. It "did not present sufficient evidence that it had a reasonable investment-backed expectation to develop the lawn into (townhouses)", because it had waited twenty-seven years before it subdivided its parcel.
- e. Properties "could have reasonably expected (that the landmarking ordinance would) affect its rights of development.

We are prepared, of course, to order an appraisal from Mr. Waterman that may help us to prove that the economic value of the Center will be destroyed by a decision of the City Council to landmark the property and that it will, therefore, be unprofitable to maintain.

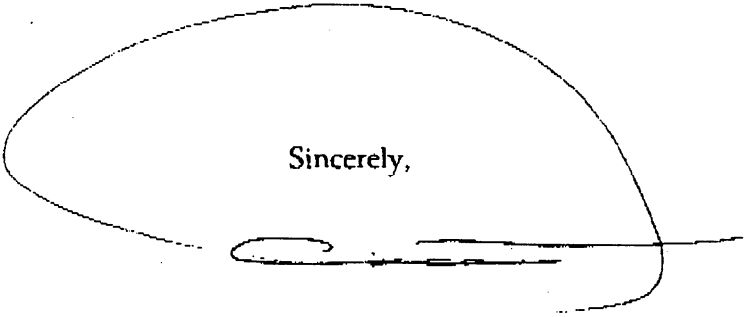
Dr. Henriette Wenkart Epstein  
Re: Shady Hill Square

May 17, 2000  
Page 3

Since Cambridge did not enact its landmarking ordinance until 1983, you can certainly testify that you bought the Center in 1968 as an investment that you intended to develop as an income producing property in your senior years without having any idea that such development might some day be forbidden by an ordinance that was not enacted until fifteen years after you bought the property.

With every best wish,

Sincerely,



CPRG:dy  
Enclosures

Cite this page 28 M.L.W. 951

January 3, 2000

Massachusetts Lawyers Weekly • 5

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# THE WEEK'S OPINIONS

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the "forced seller" doctrine enunciated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

*Jacobs, et al. v. Winthrop Financial Associates, et al.* (Lawyers Weekly No. 03 346 22) (13 pages) (Vaung, C.J.) (USDC) Attorneys were Mark S. Williams, John J. Donnelly and Barbara L. Moore (Civil Action No. 99-CIV-11363-WGY).

## Zoning

### Permit Denial -

#### Telecommunications Tower

Where a defendant town and its co-defendant building commissioner and zoning board denied the plaintiff a permit and variance to construct a 190-foot telecommunications tower, the defendants violated provisions of the federal Telecommunications Act.

#### Discussion

The Federal Communications Commission licenses (Personal Wireless Service) carriers under the Telecommunications Act, 47 U.S.C. §332(c). Local governments

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retain control over the placement of communications towers subject to five limitations. They are as follows.

"(7) Preservation of local zoning authority

"(A) General authority

"Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local gov-

ernment or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) Limitations

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

thereof (i) shall not unreasonably discriminate among providers of functionally equivalent services; and (ii) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall not on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Com-

Continued on Page 6

EXHIBIT D

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# THE WEEK'S OPINIONS

## U.S. DISTRICT COURT

Continued from PAGE 5

mission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentally thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief. . . .

[Plaintiff Celles Partnership doing business as Bell Atlantic Mobile] argues that the zoning board decision violates §§322C(7)(B)(iii) and (iii) of the TCA. Specifically, BAM argues that the denial of the permit "ha[d] the effect of prohibiting the provision of personal wireless services" in Douglas. Moreover, BAM argues that the ZBA's opinion does not comply with the Act's requirement that it be in writing and supported by substantial evidence contained in a written record.

BAM's second argument is dispositive. The ZBA's opinion fails to identify any reason whatsoever for the denial of BAM's petition, much less support it with substantial evidence. It simply states that while the ZBA unanimously agreed that BAM had satisfied two of the criteria for a special permit, as to the third, "[t]he Board was divided on . . . whether [the] granting of the requested relief would nullify or substantially derogate from the intent and purpose of the Bylaw."

Recognizing that the ZBA's written decision is insufficient to satisfy §322C(7)(B)(iii), the Town relies on [one zoning board member's] affidavit for exigency. But as BAM counters, the TCA's goal of achieving expedited review of tower-siting decisions would be totally frustrated if a Town were permitted to conceal its reasons for denying a permit until forced to do so during the discovery phase of the litigation.

As a fallback position, the Town argues that the reason for the ZBA's rejection of the petition is clear even without the [un-mentioned] affidavit because the statement "[t]he Board is divided on . . . whether [the] granting of the requested relief would nullify or substantially derogate from the intent and purpose of the Bylaw" alludes to citizen complaints about the visual impact of the tower. There is no indication in the record, however, that [the zoning board member who produced the affidavit] voiced aesthetic concerns at the hearing or expressed agreement with citizens who did.

Drawing the last arrow from its quiver, Douglas argues that the ZBA's rejection of one petition cannot be construed as an outright ban on all PWS towers. This argument was addressed by Judge Boudin in *Amherst, N.H. v. Omnipoint Comm.*, 1173 F.3d 9 (1st Cir. 1999).

On appeal, the town argues that this "effect" provision was never intended to constrain individual town-permitting decisions but was directed only against "general" bans, whether explicit or implicit. There is some merit to this argument in the case law on this point, but the quarrel is more one of language than substance. Obviously, an individual denial is not automatically a forbidden prohibition violating the "effect" provision. But neither can we rule out the possibility that — based on language or circumstances — some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service.

## WHAT WE COVER

Lawyers Weekly publishes summaries of cases from the following courts and agencies:

- U.S. Supreme Court - appeals originating in Massachusetts or the 1st U.S. Circuit Court of Appeals.
- 1st U.S. Circuit Court of Appeals - every published case. Included in this issue are decisions through last Wednesday.
- U.S. District Court - every published case.
- U.S. Bankruptcy Court - all cases provided by the court.
- U.S. Bankruptcy Appellate Panel - every published case.
- U.S. Magistrate Judges - all cases provided by the court.
- Supreme Judicial Court - every published case. Included in this issue are decisions issued through last Wednesday.
- Appeals Court - every published case. Included in this issue are decisions issued through last Wednesday.
- Superior Court - cases provided by individual judges and lawyers.
- Appellate Division of the District Court and Boston Municipal Court -

- every case.
- Land Court - cases provided by the court.
- Probate and Family Court - cases provided by individual judges and lawyers.
- Trial Division of the District Court and Boston Municipal Court - cases provided by individual judges and lawyers.
- Housing Court - cases provided by individual judges and lawyers.
- Juvenile Court - cases provided by individual judges and lawyers.
- Appellate Tax Board - all decisions.
- Labor Relations Commission - all full decisions.
- Massachusetts Commission Against Discrimination - select decisions of the full commission and individual commissioners.
- Attorney General - all opinions provided by the attorney general's office.
- MBA Ethics Committee - all decisions.
- BBA Ethics Committee - all decisions.
- Department of Industrial Accidents - select decisions of the appellate division.
- Department of Environmental Protection - decisions provided by the department and its hearing officers.
- Other Agencies - select decisions from other administrative agencies.

"Suppose, for example, that in denying an individual permit, the town zoning authority announces that no towers will ever be allowed or sets out criteria that no one could meet. The fact that the ban is embodied in an individual decision does not immunize it. It is no answer to point to the requirement that individual decisions be based on 'substantial evidence,' for this surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself e.g., for setbacks, conditions for variances, special exception requirements. . . .

If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban "in effect" even though substantial evidence will almost certainly exist for the denial. . . . In that event, the regulation is unlawful under the statute's "effect" provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

In this case, Amherst has not formally banned towers . . . but rather required prior permission case by case. And on this record, there is no showing of such fixed hostility by the Board that one can conclude that further applications would be useless. . . .

Unlike in *Omnipoint*, where the town Bylaw permitted a tower to be sited in either of two zoning districts, the Douglas Bylaw does not allow a tower to be sited anywhere in Douglas. Again, Judge Boudin's comments are pertinent.

"Omnipoint's stronger claim under the 'effect' provision is that even if it might propose other solutions, none has any real prospect of success before the Board because no applicant can satisfy local requirements. In a nutshell, the Amherst ordinance seemingly requires some form of permission (special exception, variance or otherwise) for any system; the requirements for a variance under State law can be made very severe by insisting that no alternative reasonable use for the land exists; and special exceptions under the Amherst ordinance have conditions so broad and general that a hostile Board might be able to find substantial evidence for every negative ruling.

The concern should not be overstated,

since special exceptions are a matter of right where the conditions are met, and the state courts are available to review the denial of any special exception or variance. Still, Omnipoint's claim is not frivolous. Possibly it would have a difficult time showing conclusively that there is no other use for the sites (allegedly the requirement for a use variance) or that the towers are completely compatible with the rural image that the town seeks to foster (allegedly an element in the special exception regime). The rather mechanical application of these concepts by the Board in its March 1998 decision lends support to this concern, and the district court's own decision rested largely on the view that the Board could and likely would reject alternative proposals. . . .

"Under federal law, the town can control the siting of facilities but — as several Board members admitted — it cannot preclude wireless service altogether. Nor, in the face of a vigilant district court, can the town exhaust applicants by requiring successive applications without giving any clue of what will do the trick. . . .

Unlike in *Omnipoint*, there is nothing in this record to indicate that the ZBA questioned the appropriateness of the location of the proposed tower or suggested alternate designs or heights, the kinds of clues that might instruct a petitioner in the ways it might satisfy a Town's legitimate objections. The decision of the ZBA therefore cannot stand.

For the foregoing reasons, plaintiff's motion for summary judgment is allowed. The ZBA is ordered to issue the necessary variances and permits to allow construction of the BAM tower on the Cheabrough hill site."

*Celles Partnership v. Town of Douglas, et al.* (Lawyers Weekly No. 02 248-99) (3 pages) (Sicins, J.) (USDC) (Civil Action No. 98-11249-RGS).

## U.S. BANKRUPTCY COURT

### Bankruptcy Judicial Lien - 'Marshaling'

Where a creditor seeks to enforce a judicial lien against a Chapter 7 debtor who owns a \$176,000 residence and a rental property also worth \$176,000, the lien is unenforceable because it would fully im-

pair the estate. A requisite of a judicial lien is that it be enforceable against the debtor's estate.

As an American hypothecation of \$522,000 is sold to a debtor, the debtor is required to pay the principal of \$261,000 and interest of \$261,000. The total amount of \$522,000 is to be paid by the debtor in 30 equal payments of \$17,400 per month.

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D. MARGARET DRURY  
CITY CLERK

DONNA P. LOPEZ  
DEPUTY CITY CLERK

**To:** The Honorable, the City Council  
**From:** D. Margaret Drury, City Clerk  
**Date:** October 23, 2000

**Re:** Communication of opposition to recommendation of Historical Commission for Shady Hill Square landmark designation from the attorney of Henriette Epstein, the owner of lots 67 and 72.

.....

Attached you will find a letter of opposition to Historical Commission's recommendations to designate Shady Hill Square as an historical landmark. The letter is from the Peter Gossells, attorney, on behalf of Henriette Epstein for the owner of lots 67 and 72 of Shady Hill Square.

At my suggestion, Attorney Gossells faxed a copy of this letter of opposition to the Clerk's Office on Thursday, October 19, 2000 at 4:30 p.m., in time for inclusion on the communication list of tonight's agenda. Unfortunately, the fax was overlooked by all of us in the Clerk's Office until late Friday afternoon, after the agendas had been delivered. The communication list has been corrected to include this item.

Consent Communication #6

S 354

A communication was received from C. Peter R. Gossels, Esq., on behalf of Mrs. Henriette W. Epstein, owner of Shady Hill Square, in opposition to the Historical Commission's recommendation to designate Shady Hill Square as an historical landmark.

*In City Council Oct. 23, 2000*

**PLACED ON FILE**