C. C. 106

City of Cambridge

Agenda # 3. Re; Riverfront District.

MASSACHUSETTS

In City Council October 1, 1973

		YEA	NAY	ABSENT	
	Mr. Clinton				
	Mr. Danehy				
	Mr. Duehay				
	Mrs. Graham				
	Mr. Moncreiff				
	Mr. Owens				
	Mr. Sullivan				
	Mr. Vellucci				
	Mayor Ackermann				

Memorandum of Law Re Proposed Riverfront District Zone Submitted to Cambridge City Council, Spring and Summer 1973

I. INTRODUCTION

The following legal review of the proposed riverfront district will consider the major legal objections to the amended text which have been raised by the various landowners in the new zone at past public hearings, with particular emphasis and elaboration on those facets of the proposal which appear to pose the most serious legal problems. Before discussing such specific issues, however, a few preliminary and general observations are in order. First, it should be noted that those provisions of the proposed riverfront zone which result in the exclusion of presently permitted commercial development and a reduction in residential density pose no inherent legal difficulties. Unlike some other states, the validity of an amendment to a zoning ordinance in Massachusetts does not depend upon whether the character or use of the area has changed since the enactment of the original ordinance (Lamarre v. Commissioner of Public Works of Fall River, 324 Mass. 542) but rather on whether there can be shown any substantial relationship between the amendment and furtherance of the general objectives of the zoning power. In other words, the test of validity of amendments to a zoning ordinance is similar to that applied to the ordinance itself, and is entitled to all the usual strong presumptions of validity of any local legislative act. See, Lanner v. The Board of Appeals of Tewksbury; 348 Mass. 220, Schertzer v. City of Somerville, 345 Mass. 747; Vogts v. Superintendent of Buildings of Cambridge, 355 Mass. 711. Thus, amendments which have involved substantial changes in maximum density requirements or permissible uses have frequently been sustained by

the courts through the application of these principles. In addition to the cases previously cited, examples are Simon v. Town of Needham, 311 Mass. 560 and Crall v. City of Leominster, Mass. (1972) 1167 (where the narrow scope of judicial review in this type of case is emphasized).

On the other hand, there are features of the proposal which are novel in the sense that they have neither been expressly provided for in the zoning enabling act (Chapter 40A) nor the subject of prior definitive Massachusetts litigation, viz, the design review procedures of Section 1.145 and the bonus provisions of Section 1.15. However, as will be discussed in detail below, a lack of a specific judicial or legislative imprimatur is far from fatal provided these innovative techniques involve permissible delegations of authority under Chapter 40A, Section 4, are in furtherance of permissible objectives of the police power under Chapter 40A, Sections 2 and 3 or the home rule amendment (Article 89), and do not run afoul of legislative or constitutional limitations on the local exercise of such power. Cases such as Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25 make it clear that local communities have considerable latitude in deciding how to best utilize this special permit power of Section 4, and very recent cases interpreting the 1966 home rule amendment (Article 89) suggest that the zoning power is an "independent municipal power which is subject only to a limitation that such power may not 'be exercised in a manner which frustrates the purpose or implementation of a general or specific law enacted by the legislature....'" Hanover v. Housing Appeals Committee, MAS (1973) 491 at 508. In my opinion, as a general matter there is no reason to believe that the use of either the bonus system or the design review process is per se improper in light of the foregoing

principles. To the contrary, with respect to the bonus provisions, in the recent case of Josephs v. Bd. of Appeals of Brookline, MAS (1972) 1405 we have at least an implied approval of bonus provisions although the legality of the various bonus procedures involved in the litigation was not directly challenged by the plaintiff. At issue were special permits for bonuses to increase floor area ratios for lots adjoining permanent public open recreation space and for lots in excess of 24,000 square feet. Although the Supreme Court held that the findings of the Board of Appeals and trial judge were inadequate, it remanded the case for further consideration, observing that these deficiencies resulted from inadequate presentation of evidence and that there was "probably nothing inherent---that will require a denial of these permits." id at 1414.

II. GENERAL CONSIDERATIONS

A major thesis of several of the principal landowners in the area, as presented at the hearing on June 13, 1973, and subsequently by legal memorandum submitted to Mr. Corcoran, is that the proposed rezoning restricts use as a matter of right (often referred to in the literature on bonus systems as the "residual" uses, see, e.g., note, Bonus for Incentive Zoning - Legal Implications, 21 Syracuse L.R. 895 at 897) to those per se inappropriate to the area or that are inappropriate to the area (by virtue of the maximum densities which are imposed) as a consequence of resulting economic considerations. For example the Rackemann , Sawyer and Brewster (hereinafter R.S.B.) memorandum of June 21, 1973 states:

> "Although the proposal allows certain uses as of right at a floor area ratio of 1.25, it is apparently demonstrable that these uses at these densities are not appropriate for the land to be placed in the district... Apart from public institutional uses, there are only four permitted uses in the proposed district, the first two of which, one-family detached dwellings and two-family semi-detached dwellings, are obviously inappropriate uses of the land as is demonstrated by the fact that virtually no one or two-family house construction has occurred in the entire riverfront - Cambridge community in thirty years. The other two allowed uses, namely, multi-family dwellings and dormitories, are not uses which can be made at a floor area ratio of 1.25, especially given the applicable dimensional and parking requirements, including a 20% usable open space requirement, which is the highest of any zone in the City. The only other district in the City which allows multi-family housing and has a lower floor area ratio (but not as high a usable open space requirement) is the residence C-1 zone which has a FAR of 1.75, as to which it should be noted that, to the best of our knowledge, no multi-family dwellings have been constructed in a C-1 zone in years without extensive variances or rezoning to a C-3 or other higher FAR zone."

It must be noted that the foregoing arguments tend to merge into the separate but related argument that the bonus system constitutes a "taking without just compensation" in that a basic premise of the "taking" argument is that the "matter of right" densities and uses are deliberately

placed at levels so low as not to be economically feasible and that the bonus provisions are thereby converted into "actual requirements" (see R.S.B. memo, page 2). Obviously, the second argument is substantially undercut if the first argument is not valid, although it may still be argued that the bonuses do not pertain to objectives which, although in the public interest, can be legitimately accomplished through police power regulations, and which should be accomplished, if at all, through an exercise of the eminent domain power. See, e.g., Volpe Construction Co. v. Department of Natural Resources, 349 Mass. 104.

Thus, as a threshold inquiry, it is obviously crucial to carefully assess the "residual" use and density regulations of the Riverfront zone with a view to determining whether any development is economically possible as a matter of right, and if so, will it be of a kind which is justifiable in terms of the traditional purposes and objectives of zoning. In this connection it would appear that there has evolved a gradual distortion of some of the salient objectives of the riverfront zone proposal, possibly as a consequence of public preoccupation with the more innovative aspects of the proposal - particularly the use of the development bonus. For example, the R.S.B. memorandum at various points argues that the "real intention of the proposal is to force landowners to provide subsidized housing, public open spaces, pedestrian access from the neighborhood to the riverfront, large apartment units, and design aesthetically satisfactory to the neighborhood...." Id. at 2. In support of this proposition the memo cites the planning board's Riverfront Development Policy and the Residence RF Zone which states (page 2) that "the above criteria would insure that some large family units, (2 to 4 bedrooms), at rent levels affordable by low and

moderate-income families, would be included in any housing development" and which discusses the desirability of compensating for the inability of the City to acquire land in the area for recreational purposes through purchase. Finally, the planning board's Policy Framework For Balanced Riverfront Development is cited for the proposition that a major objective "is to achieve a mixture of subsidies available from MHEFA for student housing and from HUD and/or MHFA for family housing and apply them to university owned land to provide housing badly needed." Although legally the courts will not be bound by such documents in determining the validity of zoning amendments (see, Simon v. Town of Needham, 311 Mass. 560, 565, 566 and Vagts v. Superintendent and Inspector of Buildings of Cambridge, 355 Mass. 711, 713, 714), the overall impression which such documents leave is unfortunate.

Clearly, a central concern of the proposal is the reduction in density or potential density, not only of the area subject to the new regulations, but over a longer span, of the entire city (it being my understanding that the Riverfront District is merely the first component in what will be a revised zoning ordinance for the entire City). The purposes section of the new district (Section 1.114) clearly reflects this objective in subsection (a) - "to promote the development of a moderate density residential area along the riverfront...." and Section (c) - "to protect and extend the existing moderate density neighborhood to the riverfront...." Since regulation of "density of population" is clearly a proper purpose of zoning (see, Chapter 40A, Section 2) the remaining question is whether the type of residential development that is economically feasible at a maximum residential density of 60 units per acre and an FAR of 1.25 would be so inappropriate to

the area as to require a court to conclude that it is arbitrary or unreasonable or without substantial relationship to the public health, safety, morals, or general welfare. Wilbur v. City of Newton, 302 Mass. 38. In dealing with this issue the landowners have placed great emphasis on the report prepared by the planning and development department which is interpreted to mean that 120 units per acre (i.e., that density possible only with maximum use of the bonus system) is the lowest density that represents "economic feasibility." See R.S.B. memo, page 3. However, in conversations with members of the planning department and the Housing Economics consultant, it appears that such a conclusion, although certainly not inconsistent with the language of the planning department report, is not an accurate reflection of the "economic feasibility study" upon which the report was based. If, as it appears, there is an adequate basis for believing that development at 60 units per acre is economically viable - at least with respect to luxury condominium development (a conclusion which is also supported by the comments by Jung/Brannen Associates at the Cambridge City Council meeting on June 13, 1973) -- then it becomes a question as to whether the fact that most "matter of right" development will be channeled in this direction would require the court to conclude that the legitimate objective of reducing density cannot be legally achieved if the result will be a severely limited range of development choices. Such a result seems to me to be unlikely, especially in view of the strong presumption in favor of local legislative action which has been previously discussed. Actually, it would appear unlikely that the issue would be considered in such stark terms; that is, without adding to the equation the ameliorating effect of the continuance of existing economically viable nonconforming uses as well as the impact of the bonus system itself. Clearly, the actual course of development of the area will be quite different

from the model of homogenous development at the "residual" density levels, posed for purposes of legal analysis. Rather, it will most likely consist of a smattering of such developments with the bulk of the zone either unchanged from current use patterns for a period of years (because of existing long-term leases and nonconforming use status) or developed through the use of the bonus system.

It should also be noted that the mere fact that land in the riverfront zone will be less valuable for future development if not subject to the new riverfront zone regulations, is not determinative as to whether the regulation "amounts to a taking of their property or rights therein, without compensation in violation of the Fourteenth Amendment to the Constitution of the United States, and the Constitution of the Commonwealth, the Declaration of Rights, Article 10. This involves the question whether the power to regulate under the zoning by-law is exercised in such a manner and to such an extent that it deprives the plaintiff's land of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it." MacGibbon v. Board of Duxbury, 356 Mass. 635, 641; Commissioner of Natural Resources v. S. Volpe & Co., Inc., 349 Mass. 104. Thus, in Turnpike Realty, Inc. v. Town of Dedham, Mass. A.S. (1972) 1303, which involved the validity of certain flood plain zoning regulations, the trial court had evidence before it that the value of the site was $431,000 prior to becoming subject to the by-law, and $53,000 after the by-law's enactment, a reduction in value of about 88%. The petitioner argued that the reduction was of such magnitude that the enactment of the by-law must be considered the equivalent of a taking without just compensation. The trial judge, in holding against the plaintiff's contention, stated: "Although there was a substantial diminution in value of the locus, the

mere decrease in the value of a particular piece of land is not conclusive evidence of an unconstitutional deprivation of property." The Mass. Supreme Court, in agreeing with the trial judge, cited with approval the language in Goldblatt v. Hempstead, 369 U.S. 590, 594 that "there is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant ... it is by no means conclusive, see Hadacheck v. Sebastian ... [239 U.S. 394], where a diminution in value from $800,000 to $60,000 was upheld."

Assuming that the first argument is valid (i.e., that a development as a matter of right is unlikely or not possible) the question then would become whether or not a regulation is valid which requires as a condition of any development, compliance with any or all the conditions which give rise to bonuses and use of a special permit procedure. In other words, would it be legal to zone an area in such a way that all multi-family construction requires a percentage of low and moderate income housing and where compliance with 50 foot setbacks and provision of pedestrian access as well as compliance with special permit and design review procedures would be a prerequisite to any development. Certainly, as will be discussed below, the latter approach involves far greater risks of invalidity, especially with respect to the Memorial Drive set backs and pedestrian access bonus conditions.

In discussing the various bonus conditions under either of these premises, it is desirable to first deal with the argument posed by the R.S.B. memorandum, page 4, that the riverfront proposal differs from typical bonus provisions in that "the usual function of bonus provisions is to allow increased density when the usual burdens upon a city or town of additional density are alleviated by the provisions of extra parking

space, utilities, open space, and the like ... [while] the RF provisions, in contrast, allow 60% of the bonus increases in density (FAR) for providing more density in the form of subsidized housing and larger units ..." - an obvious reference to the so-called "externalities" concept in support of the bonus system which has been described as follows:

> "The legal analysis of externalities attempts to prevent land use, or the activities thereon, from creating any external harm. That is, offensive factories should not be allowed to locate in residential areas because of the harm caused to neighboring properties. This thesis also provides that certain land uses have some external influences simply by reason of their existence. An office building, for example, is not offensive in the same way a slaughterhouse might be, but it does generate traffic and block light and air. These external influences can be measured in terms of cost, and the landowner or the developer can be required, under the extension of this thesis, to compensate for these externalities. This legal argument has been used to justify subdivision requirements, particularly park and school site dedication requirements. The argument has been that the development will create new demands for recreation space and school facilities and therefore the developer should be responsible for a proportion of the cost necessary in meeting these new demands. He must help pay for - or ameliorate - the external influences of his development.
>
> "This philosophy - of compensating for external influences - can be applied to bonus incentives, that is, to the rationale of granting bonuses to developers who agree to provide certain public amenities. The externalities argument is applicable only if a certain rationale is present in the construction of the bonus provisions: there must be a clèar relationship between the density bonus granted and the amelioration of the externality provided by the required amenity. If the increased density that is given as a bonus is clearly balanced with the amenity which will partially ameliorate that externality, the externality analysis can be used to justify the tradeoff. For example, if a developer agrees to provide a pedestrian arcade or to widen the sidewalk in front of his development (which would improve pedestrian circulation), the municipality can justify giving the developer a bonus of additional floor area. Although the additional floor area will create additional pedestrian traffic, the amenity will serve to offset the disadvantages of the increased floor area and still provide the amenity desired. The relationship between improving congestion problems (the pedestrian arcade) and regulating density (the FAR bonus) is clear in this instance." ASPO Report No. 259, Bonus Provisions in Central City Areas, 3, 4.

Thus, if the only legal justification for bonus (or as some would prefer, "incentive") systems was the externality argument, it is clear that the objections raised with respect to low and moderate income housing would be well taken. However, there is a second argument which has been used to support incentive techniques as a regulatory device, namely, the broadened general welfare concept which has emerged in recent years.

> " ... Broader than the externalities argument, the general welfare concept suggests that regulatory devices can require actions that enhance the environment, an extension of the traditional interpretation of the general welfare concept usually expressed in terms of protecting the health, safety, morals, and general welfare rather than in terms of promoting them.
>
> "Essentially, a developer under the broader interpretation, may be asked to absorb a reasonable cost for the benefit of others. Regulations may induce particular development to be undertaken because it is in the general interest that this be done. Consequently, an indication that the regulation is based on broad social objectives will add considerable support to the general welfare rationale. In these cases ameliorating external harm is not the issue, as it is in the externalities argument; rather it is the limitation of the use of one's property or a portion of it and the request to absorb certain costs for the benefit of others.
>
> "Requiring the developer to provide an amenity is tempered in part by the benefit that he receives from the amenity and the reduced cost afforded him through the bonus. The bonus is not arbitrary. The basic density limit (that maximum limit on both controls before the application of any bonus) which has been established on the basis of a police power and the protection of the health, safety, morals and general welfare can be relaxed in order to gain a net overall social benefit. It may be shown, in addition, that the production of certain amenities creates an environment that can support greater densities than would have otherwise been possible.
>
> "The general welfare argument is important in support of bonus provisions when the rationale between the bonus and the amenity is not clear, that is, when it cannot be supported by the externalities argument. Ordinances which grant bonuses for the development of certain uses must usually depend on the broader applicability of the general welfare argument. Providing a bonus for the inclusion of low and moderate-income housing should certainly find support in the argument that its

intent is to accomplish desirable social objectives. The general welfare analysis states that regulations can be used to further positive general welfare purposes.

> "It needs to be stressed, in conclusion, that bonus provisions are a perfectly justifiable regulatory device and have not, in fact, received much criticism nor been subject to court challenges. If bonus provisions are clearly understood and carefully drafted in light of this understanding, the provisions should not have trouble in the courts." id at 4, 5.

In considering the application of the bonus concept involved in the riverfront zone, it is obviously impossible to predict exactly how far the Massachusetts court will go in legitimizing regulatory schemes under the broadened interpretation of the police power which has evolved in recent years. As previously stated, we have only the Josephs case which deals with a bonus system in any form, although other cases such as Y.A. Dugout v. Board of Appeals of Canton, 357 Mass. 25 lend support to the general legality of such techniques under Chapter 40A, Section 4. The bonus system, as utilized by the riverfront zone, is essentially the grant of a special permit for changes in density subject to "conditions" which are specified in considerable detail in the ordinance itself. In Woods v. Newton, 311 Mass. 98 at 102 the Supreme Court indicated that the special permit procedure may be extended to dimensional regulations. What may pose a problem, of course, in any application of the special permit procedures of Section 4 are the adequacy of the standards by which the board of appeals is guided in the exercise of its discretion. In Smith v. Board of Appeals of Fall River, 319 Mass. 341 the court invalidated a local ordinance allowing the use of certain buildings for occupancy by as many as six families in any zone, subject to the grant of a permit by the board of appeals. The court said of the ordinance:

> It opened the door to discrimination not based on valid difference ... it purported to delegate to the board of appeals power to bring about situations where the regulations and restrictions would not be uniform ... it attempted to override the careful limitations upon the power to grant variances ... it attempted to delegate to the board of appeals ... a new power to alter the characteristics of zoning districts ... and it attempted to do this without furnishing any principles or rules by which the board should be guided, leaving the board unlimited authority to indulge in 'spot zoning' at its discretion or whim". Id. at 549.

See also Clark v. Board of Appeals of Newbury, 348 Mass. 407. In the instant situation, however, with the possible exception of the special design consideration bonus, there can be no serious objection that the standards are inadequate since the granting of the permit is subject to very specific standards in Section 1.16 as well as the more general requirements of Article 1, Section 5 and Chapter 40A, Section 4. See MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 637-639.

III. SPECIFIC BONUS PROVISIONS

A. §1.1551 Low and Moderate Income Housing. Turning to a discussion of the specific bonus conditions, the most important (as it accounts for the largest percentage increase in density) is the low and moderate-income housing issue. Here the basic question is whether or not the encouragement or promotion of low and moderate-income housing is a legitimate exercise of local zoning power. Recent cases leave little doubt that the answer is in the affirmative. In Board of Appeals of Hanover v. Housing Appeals Committee, Mass (1972) 491, where the court was called on to determine the validity of the Low and Moderate Income Housing Act (statute 1969, c. 774) a crucial argument of the opponents was that Chapter 774 was unconstitutional since the power to zone was "an independent municipal power" no longer subject to the control of a state legislature after the 1966 home rule amendment (Article 89). Although the court ultimately concluded that the legislature continues to have "supreme power" in zoning matters and that c. 774 was not unconstitutional, it reached that conclusion only after agreeing with the opponents that the "zoning power is one of the city or town's independent municipal powers included in Article 89, Section 6's broad grant of power to adopt ordinances or by-laws for the promotion of the public health, safety, and general welfare." Id. 508. The court pointed out that prior to the home rule amendment it had consistently adhered to "the general principle (popularly known as Dillon's rule) that municipal corporations possess 'and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation ... any fair, reasonable, substantial doubt concerning the existence of power is resolved by the

courts against the corporation and the power is denied.'" Id. at 504. However, the court concluded that the effect of Article 89 is to "repudiate the conception that all powers lie in the state except those expressly delegated to cities and towns." Id. at 506. Thus, the court concluded that "municipalities can pass zoning ordinances or by-laws as an exercise of their independent police power but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or specific law enacted by the legislature in accordance with section 8's provisions." Id at 508. The narrower question then, for our purposes, becomes whether the use of a special permit-type bonus system to promote low and moderate-income housing is in any way inconsistent with "general or special laws enacted by the legislature". A case which generally bears on this issue is Bloom v. City of Worcester, MAS (1972) 291 which involved the validity of a human rights commission established by a Worcester City ordinance. In responding to an argument that state legislation on this subject "preempted the subject" the court stated that "legislation which deals with the subject comprehensively, describing (perhaps among other things) what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated." Id. 308. However, the court recognized that:

> "The application of these principles to general laws adopted prior to the enactment of the home rule amendment may present special difficulties in specific cases. Many pre-home rule amendment general laws were necessary to grant powers to municipalities under the now discarded policy that a municipality 'has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred from undoubted municipal rights or privileges.' Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256. Obviously, many pre-home rule amendment statutes granting authority to municipalities were rendered unnecessary

> by the home rule amendment. We are not inclined to attribute to permissive statutes of that type a limiting function upon the powers of municipalities under the home rule amendment or under the parallel language of Section 13 of the home rule procedures act. Were we to infer such a limiting function from the existence of such permissive statutes, the result would be that the legislative power of municipalities would be restricted precisely to those which they had at the time of the adoption of the home rule amendment. That was not the purpose of the voters in adopting the home rule amendment, and no such purpose can be found in the home rule procedures act or in any other legislation passed since the adoption of the home rule amendment." (emphasis supplied) Id. at 309.

Since the Atherton case to which Bloom refers was a zoning case it is fairly clear that Hanover and Bloom taken together are persuasive authority for the general proposition that local zoning powers are very extensive and will not be struck down in specific instances unless they are clearly offensive to either Chapter 40A or other general laws relating to the zoning power. Clearly, this is not the case here. To the contrary, the purpose stated in Section 1.114(b), "to promote the development of the area as a resource for a variety of housing needs including market-rent housing, student and faculty housing and homes for low and moderate-income families...."is in furtherance of the objectives of Chapter 774. Furthermore, in Hanover the court specifically refers to cases like Lamarre v. Commissioner of Public Works of Fall River, 324 Mass. 542 and Henze v. Building Inspector of Lawrence, MAS (1971) 902 which had previously held that "zoning changes affording special treatment to encourage the construction of multi-family residences in cities with housing shortages and to satisfy the need for low and moderate income housing promote the public welfare," MAS (1972) 509-511. See also Moore v. Cataldo, 356 Mass. 325, where a special permit was approved on the condition that "the building shall be so staffed as to qualify for medicare patients."

Assuming that the use of zoning is legally permissible in Massachusetts as a technique for promoting the production of low and moderate-income

housing, the question then becomes whether the standards applicable in the riverfront zone are sufficiently specific to meet the objections of cases like Clark and Smith. Clearly they are, although a question may arise as to the adequacy of the definition of low and moderate-income housing as contained in Section 1.1551. Unlike Chapter 774 where low and moderate-income housing is defined as "any housing subsidized by the federal or state government under any program and to assist the construction of low or moderate-income housing as defined in the applicable federal or state statutes, whether built or operated by any public agency or non-profit or limited dividend organization", the Riverfront District proposal defines such housing in terms of "dwelling units ... subject to control of maximum rents in order to comply with the conditions of federal and state legislation or regulations thereunder relating to subsidy for low or moderate-income housing". Whether this definition should be altered or expanded to include new subsidy programs where control of rents may not be involved is a question which should be given serious consideration. Otherwise the standards for the bonus are quite specific, and compliance with them in turn triggers eligibility for the bonus for providing large apartment units, this bonus, being subject to all of the prior remarks in terms of validity.

B. §1.1554 Memorial Drive Set-Back. The Memorial Drive setback provision may be challenged on the ground that the requirement that such open space "be accessible to the general public" amounts to a "dedication" for use of land as a public park without compensation because there is no rational relationship between the bonus and the amenity - that is, if the bonus is not justifiable under the "externalities" argument. See the R.S.B. memorandum, pages 4 and 5. Again, such a provision is much more susceptible to this challenge if the "matter of right" densities are not economically viable. If

viable, the developer is not being required to dedicate anything and is, in effect, being compensated for his increased costs by the increased density which he is given where the bonus is utilized. The mere fact that the public will be acquiring legal rights with respect to private property in connection with an otherwise valid exercise of the zoning power, certainly is not fatal. In Sylvania Electric Products, Inc. v. Newton, 344 Mass. 428, for example, Sylvania agreed to give the City a 30 year option to purchase certain land and agreed to certain building restrictions as part of a zoning classification change. In upholding the agreement, the court noted that "what was done involved no action contrary to the best interest of the City and hence offensive to the general public policy. It involved no extraneous consideration (as, for example, the request to give land for a park elsewhere in the City) which would impeach the enacting vote as a decision solely in respect to the zoning locus." Id. at 434.

If the residual or matter of right density is not viable, then, again, we must consider the legality of the proposal on the assumption that setting aside of open space "accessible" to the public is required as a condition of any development. Clearly, a provision for "open space" is one of the purposes of the zoning power as stated in Section 2. Whether it is fatal to a regulation "requiring" such open space, that said space be accessible to the general public, is not clear. There are two potential issues: 1) does the phrase "accessible to the general public" amount to a dedication requirement - it is arguable that it falls far short of that; and 2) if it does, is such a requirement a "taking" if the overall effect is not to "deprive the landowners of all practical value to them or anyone acquiring from them, leaving them only with the burden of paying taxes on it." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 641. The critical

issues here will be (a) whether the imposition of a de facto dedication requirement under a Chapter 40A, Section 4 is beyond "authority delegated to the municipalities under the zoning enabling act and if so, whether the home rule amendment and the Hanover and Bloom cases render the "delegation" point moot; (b) whether the taking issue will be discussed in terms of the overall impact on the entire tract owned by the developer or will be considered in the isolated context of the area of the open space setback itself. Troublesome precedent here is the specific provision in the Subdivision Control Law (Chapter 41, Section 81Q) prohibiting a requirement "as a condition for the approval of a plan of a subdivision, that any of the land within such subdivision be dedicated to the public use, or conveyed or released to the Commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground or for any other public purpose, without just compensation to the owner thereof" and the Massachusetts case holding invalid the early official map laws. Edwards v. Bruorton, 184 Mass. 529. Supportive cases include those from many jurisdictions which hold that there is no significant constitutional problem re dedication requirements (see note, Bonus or Incentive Zoning - Legal Implications, 21 Syracuse L. Rev. 895) and that the most significant problem encountered by such provisions has been the lack of adequate enabling legislation - a problem which may be solved in Massachusetts by the Hanover and Bloom cases.

In conclusion, then, with respect to the Memorial Drive setback bonus, the basic problem is the legitimacy of the "residual" (matter of right) density regulations. If valid, then the bonus is probably also valid, if invalid, then the case is substantially weakened, but not necessarily hopeless. If the "accessibility to the public" requirement were dropped,

of course, then legality problems would clearly be eliminated.

C. §1.1553 Riverfront Pedestrian Access. The pedestrian access bonus is subject to many of the same considerations as the open space set-back requirement. General authority for dealing with access is clearly present in Chapter 40A, Section 3. The question is whether the "accessible to the general public" requirement is ultra vires or unconstitutional. The courts treatment of the Memorial Drive set-back provision should be conclusive.

D. §1.1555 Special Design Consideration. Several of the landowners have argued that the special design consideration bonus "is a device to allow control of aesthetics, a function generally found beyond the scope of zoning regulations, and is devoid of any standards whatsoever, thereby leaving the award of this bonus to the whim of the board of appeals..." R.S.B. memo, page 5. Both of these objections have some merit, although the cases do not appear to stand for the proposition that control of aesthetics is a function "beyond the scope of valid zoning regulations", but rather that aesthetics are a factor along with others to be taken into account in considering the validity of regulations. See Opinion of the Justices, 333 Mass. 773, 778, 779. The problem with the special design consideration bonus is not whether it has an aesthetic aspect, but rather that it is insufficiently precise in relating aesthetic considerations to the more usual zoning purposes of "lessening congestion", providing "adequate light and air", "conserving the value of land and building", etc. See, Chapter 40A, Section 2. This in turn leads directly to the well taken objection that there is a failure to designate standards sufficiently precise to properly channel the exercise of discretion in the board of appeals. See Smith v. Board of Appeals of Fall River, 319 Mass. 341; Clark v. Board of

Appeals of Newbury, 348 Mass. 407. There are several possible approaches to correcting this defect. One is to carefully redraft the special design bonus provisions so as to establish the necessary relationship of the bonus to the traditional objectives mentioned above; another, is to abandon a separate bonus for special design considerations, increase the other bonuses in compensation, and apply environmental design standards to all special permit applications for the other bonuses. See, e.g., Town of Brookline's Zoning By-Law, Section 5.09(d).

E. §1.144 Riverfront Design Review Board. Unlike many of the previously discussed objections to the riverfront zone which raise serious questions which must be answered, the arguments against the design review board procedure which have been raised do not seem substantial. The R.S.B. memorandum, pg. 7, challenges this procedure on the grounds that although perhaps "not illegal per se" it is defective in that it fails to specify a time for reporting, may involve the creation of "an illegal precondition to action by the board of appeals", and provides "for evaluation of aesthetic qualities and has no standards..." Perhaps the section 1.1452 procedure could be more specific with respect to the time for filing the report, a detail easily disposed of, but otherwise it is difficult to see how the providing of additional input for Board of Appeals consideration before the granting of a special permit can be viewed as anything other than desirable. Clearly, the report of the design review board is advisory only (see Section 1.1455) and thus raises none of the questions of improper delegation of authority involved in such cases as Coolidge v. Planning Board of North Andover, 337 Mass. 648; Weld v. Board of Appeals of Gloucester, 345 Mass. 376, 378-379; Shopper's World, Inc. v. Beacon Terrace Realty, Inc. 353 Mass. 63. As to the suggestion that the design review board procedure lacks

adequate standards, it is apparent that consideration of the matters specified in Section 1.456(a) directly relate to matters which the board of appeals should consider in special permit cases and that any "adequacy of standards" problem in the Riverfront proposal are to be found in Section 1.1555 dealing with special design considerations and not here.

F. §1.151 One Acre Limitation On Sites Eligible For Bonus. Additional legal questions as to "discriminatory" treatment of parcels of different size within the new district which arise by virtue of Section 1.163 limiting the bonus provisions to parcels of one acre or more must also be considered. This is said to violate Chapter 40A, Section 2 which requires that "all...regulations and restrictions shall be uniform for each class or kind of buildings, structures, or land, and for each class or kind of use, throughout the district...." R.S.B. memorandum, page 7. Although not raised by the various legal memorandum supporting the landowners who oppose the new district as proposed, an equal protection argument might also be made. Unfortunately, cases dealing with either of these issues are sparse in Massachusetts. In Cross v. Planning Board of Chelmsford, 345 Mass. 618, the Massachusetts court avoided the uniformity issue when it struck down an amendment which established lot sizes and frontages within a part of a district based upon proximity to presently accepted streets on the ground that it perceived "no rational connection.... between the onerous restrictions imposed by the amendment and the purposes for which zoning is authorized under G.L.c. 40A, Section 3." Id at 621. This approach is consistent with the holding of many cases that the real issue is whether discrimination among the members of a regulated class can be reasonably grounded in the objectives of the underlying regulation.

See Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1087-1132 (1969). A zoning regulation which poses problems analogous to Section 1.163 is the typical provision of cluster and planned unit development ordinances which limits applications to those parcels above a specified acreage. In discussing such provisions a recent commentator observed that "neither uniformity nor its constitutional equivalent, equal protection, would appear to be violated by the size criteria. Discriminations among the members of a regulated class are permissible if they can be reasonably grounded in the purpose of the underlying regulation. Since the principal objective of both cluster and PUD ordinances is to promote large scale development of attractive design, limiting the benefits of these ordinances to developers with substantial land holdings would appear to meet this test." Costonis, The Chicago Plan: Incentive Zoning and the Presentation of Urban Landmarks, 85 Harvard Law Review, 574, 625. In fact it has even been argued that the uniformity requirement is inapplicable to bulk regulations. Id. at footnote 194, page 625. Thus, the question becomes whether the objective of encouraging site consolidation and larger scale development, implicit in the one-acre limitation, is in furtherance of a "legitimate purpose for which zoning is authorized". Cross, supra, at 345. Keeping in mind the usual presumptions to which zoning is entitled and assuming that one acre is a rational breaking point for the advantages of larger scale (or conversely, disadvantages of smaller scale) in terms of sound utilization of the density bonus, it would seem that such a provision would be sustained by the Massachusetts courts. In support of this conclusion can be cited Joseph v. Board of Appeals in Brookline, MAS (1972) 1405, where one of the bonuses at issue was for development on lots in excess of 24,000 square feet. Naturally, a

quite different result would obtain if the "residual" density regulations preclude any economically feasible development of these smaller tracts. If such a condition were general then the "taking" objection would probably prevail. Of course, if the residual densities were generally viable, the remedy of a landowner individually aggrieved would be the variance procedure of c. 40A, §15 and not an attack on the basic validity of the ordinance itself.

IV. CONCLUSION

The core legal issue which emerges in the proposed riverfront zone is the economic viability of the matter or right or "residual" density regulations. "Down zoning" with respect to the range and density of permitted uses poses no inherent legal difficulties in a jurisdiction like Massachusetts where the "changed circumstance" rule is not in effect and strong presumptions in favor of local legislative acts are regularly applied. The burden will be on the developer to show either that the proposed regulations are beyond the scope of valid zoning powers or result in a taking without just compensation, and this burden cannot be sustained by merely proving diminution in value of the locus. If opponents of the proposed riverfront zone can show that no economically viable development can take place at the residual density levels of 60 units per acre and an FAR of 1.25, the "incentive" aspects of the proposal are effectively eliminated and some or all of the "bonuses" will become required conditions. Whether, even if viewed as required conditions, the various bonuses would be held invalid is by no means clear since promotion of low and moderate income housing, improved pedestrian access as well as encouragement of open space preservation, all appear to relate to legitimate objectives of local zoning power, especially in view of recent cases dealing with the Massachusetts Home Rule Amendment.

Legal problems with respect to specific aspects of the proposed riverfront regulations include possible inadequacies of the definition of low and moderate income housing, the "taking" issue with respect to the requirement in the Memorial Drive setback and pedestrian access bonuses that such ways and open spaces be "accessible to the general public at all times", the lack of specificity

in the special design consideration bonus and procedural defects in the design review board process. Recommended amendments prepared by the planning department deal with these problems by redefining low and modern income housing in terms of eligibility for state and federal subsidies, explicitly establishing a reporting time for the design review process, elimination of the "accessible to the general public" requirement with respect to the Memorial Drive setbacks and establishing much more explicit criteria in determining eligibility for the special design consideration bonus including one relating to public access to open space.

September 17, 1973

William E. Ryckman, Jr.

HOUGHTON MIFFLIN COMPANY
2 PARK STREET BOSTON 02107

June 22, 1973

EDWARD REYNOLDS, JR.
Vice President and Treasurer

(617) 423-5725

Honorable Barbara Ackermann
Mayor, City of Cambridge
City Hall
Cambridge, Massachusetts

Dear Mayor Ackermann: RE: Riverfront District

In response to the opportunity offered to us at the hearing on June 13, 1973, we are pleased to provide herewith copies of the presentations made by Messrs. Jung, Peterson and myself at that time.

Based on the work done for Houghton Mifflin in analyzing and evaluating the proposed Riverfront District, I recommend the following changes:

1. The permitted basic density (i.e., without resorting to bonus provisions) should be increased from a Floor Area Ratio (FAR) of 1.25 to 1.50, and from 60 dwelling units per acre to 72 dwelling units per acre.

2. For subsidized housing making use of bonus provisions the allowable amount of special permit use should be increased to the same ratio as the area of subsidized housing bears to the total area; that is, the present limitation of 15% of total area for special permit use would be changed to permit, for example, 30% of the total area to be used for special permit use if 30% of the area was being committed to subsidized housing.

3. The bonus provisions of the Riverfront District are intended as incentives, but it appears that the incentive might be negated by the Board of Zoning Appeal if that Board applied its powers under Article I, Section 5, "Special Permits", of the City ordinance by calling, for example, for greater front, side or rear yards, or off-street parking, in addition to the requirements of the Riverfront District applicable to that bonus. The

possibility should be eliminated that the intent of the bonus might be lost in this way.

We believe that these changes will retain the substance of the stated objectives of the Riverfront District and will improve the chances of providing economic incentive for development.

Please let us know if any further comments would be helpful.

Sincerely,

Edward Reynolds, Jr.
Vice President and Treasurer

ER:vm

cc: Members of the City Council

Mr. Arthur C. Parris
Chairman, Planning Board
City of Cambridge
57 Inman Street
Cambridge, Massachusetts 02139

Mr. David Vickery
Planning Department
City Hall Annex
57 Inman Street
Cambridge, Massachusetts 02139

June 20, 1973

Comments on the economic limitation on development imposed by the proposed Article IX Res. RF Riverfront District and proposed Amendments by the Cambridge Planning Board dated June 6, 1973.

Riverside Press Property, Cambridge
Houghton-Mifflin Company

Presented by Yu Sing Jung at Hearing before Cambridge City Council, June 13, 1973

Jung/Brannen Associates has been retained by Houghton-Mifflin Company to explore the development potential of the Riverside Press property in the light of a proposed RF zoning regulation, to communicate with the Riverside Cambridgeport Community, and to work with the Planning Department of the City of Cambridge in the exchange of constructive comments.

In the past twelve months our effort has been directed towards the following objectives:

1. To examine the effect of the proposed regulation on the economic value of the property for residential development.
2. To identify the development limitation imposed by the proposed regulation.
3. To identify the most likely land use framework by a developer under the proposed regulation.

A. In essence three basic issues contained in the proposed zoning which will undoubtedly effect a developer's decision and the future development potentials in the Riverfront District are:

   1. The reduction of FAR
   2. Limitation of Special Permit use to 15% of FAR
   3. Bonus Provision subject to design review and zoning appeal process.

B. In examining the effect of the proposed regulation vs. the existing zoning, the following models of tentative land use schemes have been prepared to show the possible volume of buildings and parking structures for the Riverside Press property of 185,142 s.f.

Scheme A - Existing zoning FAR 3
Max. Floor area - 555,426 s.f.
3 towers of 250 ft. high
structured parking - approx. 600 cars

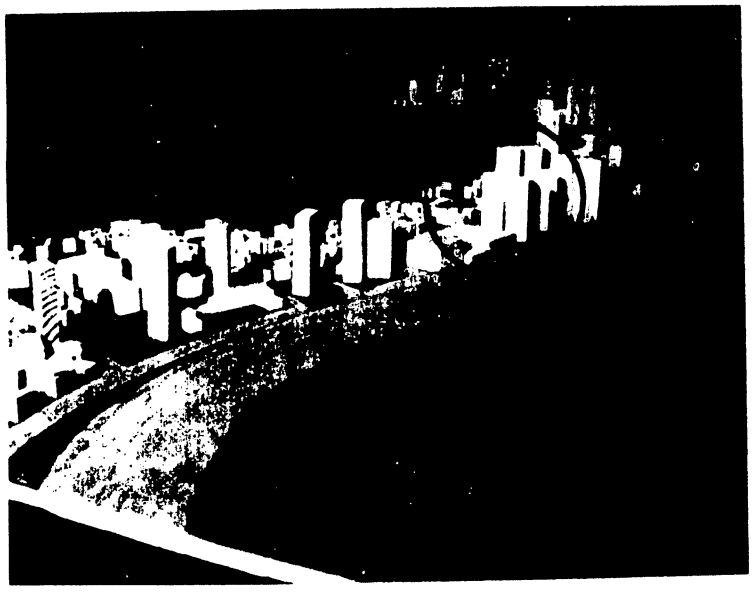
Scheme B - Proposed RF zone FAR 2.5
(with 100% Bonus)
Max. Floor area - 447,800 s.f.
Subsidized housing - 40%
2 slabs of 250 ft. high
1 lower building 70 ft. high
structured parking - approx. 480 cars
open space - 20%

Scheme C - Proposed RF zone FAR 2.1
(with 60% to 70% Bonus)
Max. floor area - 414,400 s.f.
Subsidized housing - 30%
2 towers of 250 ft. high
On-grade parking - approx. 410 cars
open space - 20%

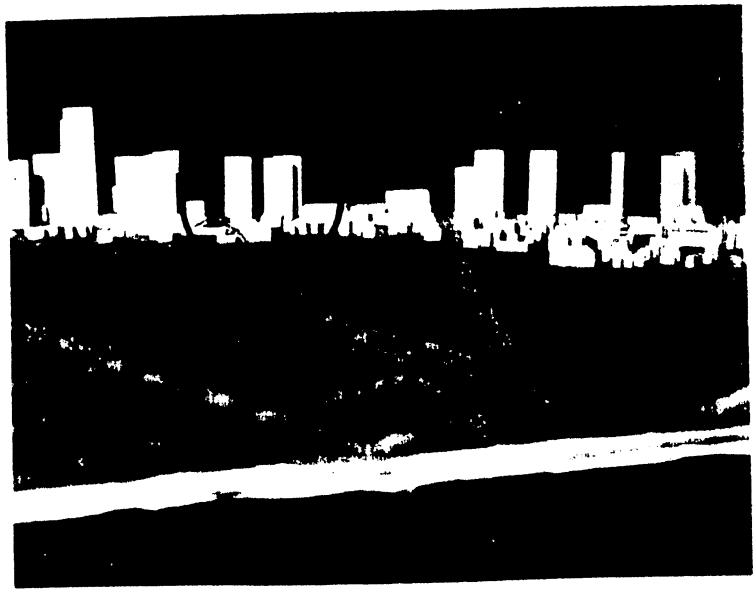
Scheme D - Proposed RF zone FAR 1.25
(no Bonus)
Max. floor area - 230,400 s.f.
No subsidized housing
All buildings 70 ft. high
On-grade parking - approx. 200 cars
open space - 20% or more:

C. As far as height and mass of development are concerned, Scheme A (existing zoning) and Scheme B (with max. Bonus) are very similar. See attached photographs of models inserted in area model prepared by Planning Department of City of Cambridge.
(Note: models of Houghton-Mifflin study shows true vertical scale 1" = 100'-0". City model by Planning Department shows 20% exaggerated vertical height 1" - 80'-0").

EXISTING ZONING
Scheme A FAR 3

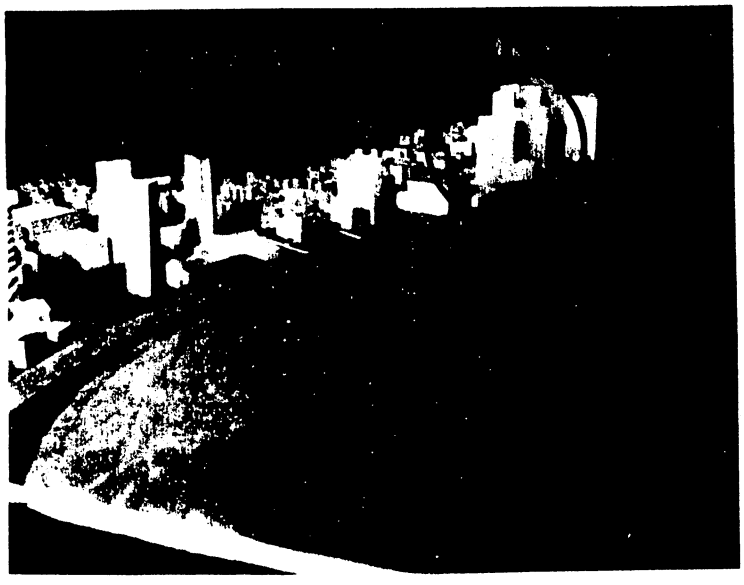


View from the River



View from Central Square

PROPOSED RF - Riverfront District
Scheme B - with 100% bonus FAR 2.5
structural parking

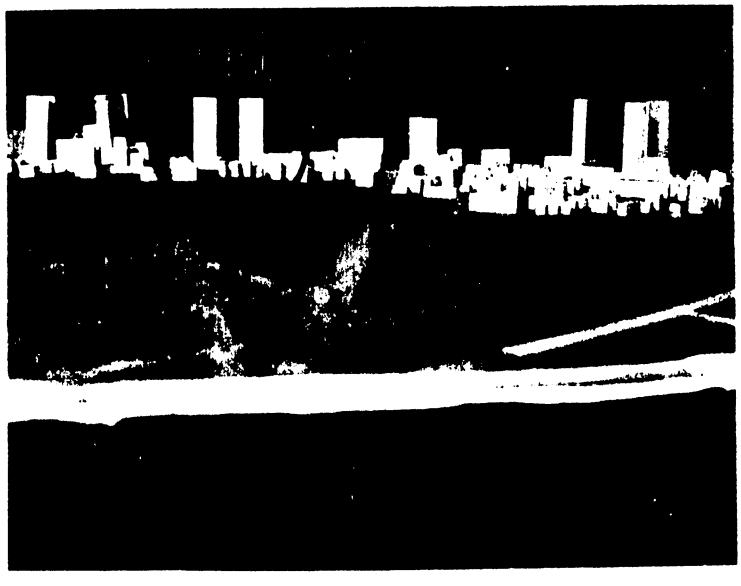


View from the river

View from Central Square

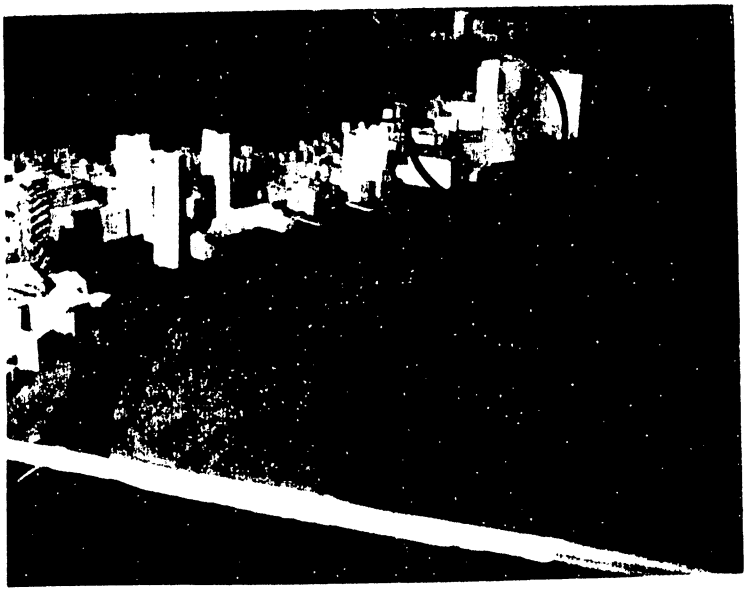
PROPOSED RF - Riverfront District
Scheme C - with 60% bonus FAR 2.1
no structural parking

View from the river

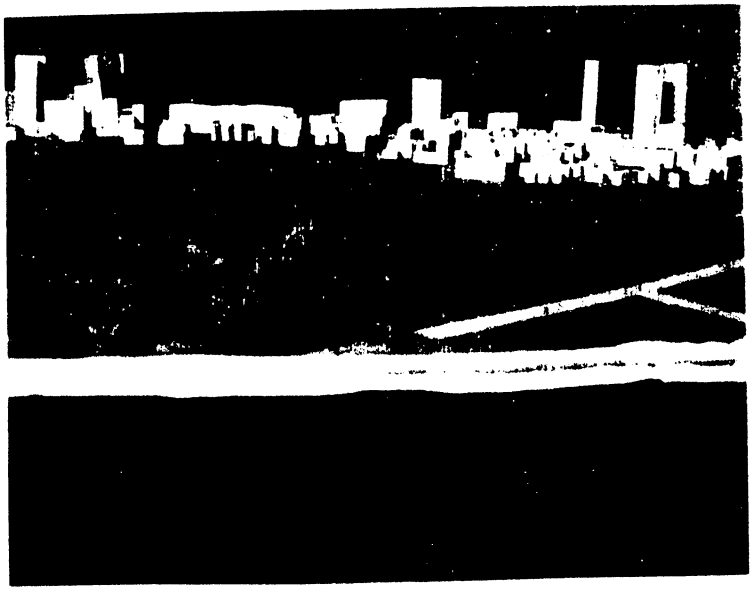


View from Central Square

PROPOSED RF - Riverfront District
Scheme D - with 0% bonus FAR 1.25
all buildings 70' high



View from the river



View from Central Square

D. Any proposed development on the Riverside Press site is very likely influenced by the economic feasibility of providing structural parking beyond capacity of on-grade parking. A maximum FAR of approximately 2.1 (Scheme C) is the cross-over point, beyond which structural parking must be provided. In terms of Basic Density under RES. RF to build a FAR of 2.1 (a total floor area of 400,000 sq.ft. or 416 dwelling units), realistically, 25% to 30% of subsidized housing bonus must be incorporated to obtain a 70% increase.

In terms of development economics, for each additional square foot of floor area beyond FAR 2.1, 0.58 sq.ft. of structural parking must be built. Based on a probable construction cost of $4,000.00 per car space, $6.60 per sq.ft. of additional floor area must be assumed. i.e. for an additional apartment or office space of 1000 sq.ft. $6,600.00 is the equivalent land value.

Explanation:

Scheme C. land area 185,142 s.f.

20%	open space 185,142 s.f. x 20% =	37,030 s.f.
8%	tower coverage 185,142 sf. x 8%	14,800 s.f.
	14,800 x 28 floors for 2 towers (	414,400 s.f.)
72%	on-grade parking available @ 325 s.f. x 410 cars	133,312 s.f.
		185,142 s.f.

Addition building to cover 1000 s.f. of land, to provide 6000 s.f. office space, 70 ft. high,

Parking required:		
	Gr. floor	2 cars
	5 upper floors	5 cars
	replacement	3 cars
		10 cars

10 cars @ 350 s.f. each equals to .58 s.f. per s.f. office space.

Same figures are applicable to additional housing units.

Compared with the "rules of thumb" maximum land acquisition cost of $2,000 per unit under MHFA allowance, or $1,000 per unit under FHA programs in the past, $6,600 per unit is far beyond the workable limit in the consideration of providing subsidized housing.

E. In terms of realistic land cost consideration for subsidized housing, the Housing Economic's report to the City of Cambridge Planning Department dated March 1972 should be carefully reviewed (The conclusion chapter is enclosed herewith) and a land write-down program is almost mandatory.

F. In terms of realistic evaluation of land cost for luxury housing, 60 units per acre or FAR 1.25 will result in a land cost per dwelling unit of approximately $10,000.00 based on a current value of $13.00/s.f. This exceeds current market rate for luxury rental units. It is likely that only luxury condominium developments be considered by developers under the terms of proposed RF zoning regulations. Scheme D shows 70 ft. high continuous unit development without subsidized housing nor pedestrian access to the river. The objectives of the RF zone to encourage subsidized housing will not be acertained.

G. Increase of special Permit use to higher than 15% of FAR is essential to encourage proper scale of mixed-use project and to recapture the potential economic value of the district.

H. Design Review Board - members selection should ensure wider range of expertise including development and environmental studies.

I. The proposed RFzone regulation, particularly the combination of a) the reduction of FAR, b) the limitation of Special Permit use to 15% of FAR, and c) the Bonus Provision subject to design review and zoning appeal process, will undoubtedly discourage any immediate change of land use and will produce a damping effect on the economic value of the Riverside Press property.

CONCLUSIONS

Economic Feasibility Study for the Proposed
Riverfront Special District Zoning Ordinance
Prepared for: City of Cambridge/Planning Department
Prepared by: Housing Economics/Robert H. Kuehn, Jr.
March, 1972

Based on the computer-based economic feasibility analysis, the following conclusions can be drawn:

1. Under the market rate financing programs (ie, conventional, FHA S.221(d)4, and MHFA without subsidy), the high land costs on the Riverfront create a pressure towards increased density in order to spread the effect of land costs over a greater number of units. According to the usual rules of thumb regarding the proportion of land cost to the total cost of housing, these pressures on the Riverfront have created the necessity for densities in excess of 100 units per acre even at the most optimistic land costs per square foot.

2. Under the subsidized financing programs (ie, FHA and MHFA with S.236 funds), the high land costs have relatively minor effects on rents per se. The reason, of course, is that all development costs, including land acquisition, are largely subsidized. However, even under the subsidized programs, a pressure towards increased density is created by the need to qualify the housing under FHA or MHFA policies regarding maximum mortgage amounts or maximum land acquisition costs per unit. Based on these constraints, residential development on the Riverfront given even the highest current densities and the most optimistic land costs per square foot are not feasible.

3. Non-residential rental income can serve to relieve the high land costs of development on the Riverfront. However, based on the cases tested for a project with 20 percent non-residential area renting at $7 per square foot, this offset against land costs does not have a significant effect until densities are greater than 100 units per acre.

4. The larger the average unit sized and the higher the construction costs per square foot required, the greater the rents required. Similarly, the more extensive the amenities such as structured parking, pedestrian walkways, etc., the greater the rents. Given such conditions, the pressures on density will be even more severe.

If a new zoning policy were to follow the line of least resistance, therefore, it would encourage high density, small unit projects with extensive non-residential rental space and minimal amenities. The result would inevitably be middle and luxury income apartments for small families or couples. Alternatively, at even higher densities, mixed income housing with some subsidized family units would result. However, this course of action would likely have two general adverse effects:

1. The Riverfront would be developed at an excessive density and/or at rents and accommodations not appropriate for the immediate community.

2. The inflationary spiral of land costs on the Riverfront would be further supported by the increased densities allowed, creating pressures for yet greater land costs and hence greater densities to support such costs for subsequent development in the area.

Therefore, it is recommended that the Riverfront Special District Zoning Ordinance point in the opposite direction; namely, to discourage high density development and thereby cause a downward pressure on land costs. However, in order to be effective over the short term, such zoning must probably be combined with a land writedown program initiated by the City to assist in creating feasible projects at acceptable densities, especially under the subsidized housing programs.

SUMMARY OF LEGAL POINTS RAISED BY HOUGHTON MIFFLIN COMPANY, OWNER OF THE RIVERSIDE PRESS SITE, AT CAMBRIDGE CITY COUNSEL HEARING, JUNE 13, 1973, TO CONSIDER PROPOSAL TO ESTABLISH RESIDENCE RIVERFRONT ZONING DISTRICT

1. Massachusetts General Laws, Chapter 40A, Section 2, provides that

> "due regard shall be paid to the characteristics of the different parts of the City or Town and the zoning regulations in any City or Town shall be the same for zones, districts or states having substantially the same characteristics."

Zoning regulations and restrictions must be designed, among other things, to "conserve the value of land and buildings." Chapter 40A, Section 3. Yet the testimony indicated that such value and hence the tax base will be reduced by many millions of dollars to at least one-half.

2. Unconstitutional discrimination was asserted. It was pointed out that the Planning Board intentionally eliminated commercial development in the Riverfront District to favor competing development in other Cambridge areas. Similarly, only developers in the Riverfront District are required to provide subsidized housing large apartment units, pedestrian access, additional setbacks and meet special design considerations in order to obtain an increase in the density, while landowners and developers elsewhere in Cambridge do not have to meet this requirement to obtain such

density. Finally, it was noted that the floor area ratio of 1.25 is so low as to subtly convert what are euphemistically termed "bonus" provisions into actual requirements. Such limitation does not meet the Zoning Law Enabling Act requirement that proposed zoning "encourage the most appropriate use of land throughout the City." Chapter 40A, Section 3.

3. The "open space" Memorial Drive setback provisions require landowners, as a practical matter, to dedicate substantial portions of their property to public park use without compensation through constitutional eminent domain proceedings, and to maintain such park space for the public, without provision for public subsidy, in order to develop the remainder of their land. The question was also raised as to whether "open space" was not a misleading term, since much of it will become parking lots, in fact.

4. The regulations are inconsistent with the stated objectives for which they were drafted. For example, the drastic reduction in the number of dwelling units which may be constructed on lots within the Riverfront District will prohibit development of low-and-moderate income housing in the area. It was asserted that the Massachusetts Housing Finance Authority and the Federal Housing Administration would not assist a project which did not have sufficient density to provide any profit incentive to landowner development and operation. The simple fact that low density or open space and low-and-moderate income housing are economically incompatible

was stressed. Furthermore, non-subsidized, private sponsorship of housing would be completely discouraged as a result of such density limitations as well as the complex and ambiguous application of the bonus regulations. The attention of the councillors was drawn to General Laws, Chapter 40A, Section 5, which required that zoning ordinances must not "unduly prolong the life of non-conforming uses." Clearly the result of this proposal will be to freeze any new development, which is a prohibited objective for the Planning Board.

5. The proposed district regulations do not permit owner-residents or others, if they own less than one acre, to enjoy the opportunity to develop at the bonus densities. General Laws, Chapter 40A, Section 2, requires that zoning "regulations and restrictions shall be uniform for each class or kind of building, structures, or land, and for each class or kind of use throughout the district." This unfair treatment is compounded by the erroneous planning board assumption that owners will have no difficulty consolidating their parcels with others, or obtaining permission to build over MDC sewer easements or to close public streets and ways which separate their property from that of others. Again the effect of such consolidation requirements is to freeze development at its present level. As an example, it was noted that even the developers of 808 Memorial Drive, under much higher density limitations, had to acquire additional adjacent land in

order to provide sufficient off street parking for their project.

6. Many court decisions have held that municipal planning must follow a comprehensive zoning plan, and where such a plan is in the process of preparation, piecemeal redistricting must be held in abeyance. Otherwise planning authorities can prevent affected landowners from having an opportunity to present their viewpoint to the City Council as to how the proposed district related to the rest of the zoning plan and whether it will accomplish the objectives of the overall plan. It was suggested that planned land uses and traffic patterns elsewhere in Cambridge might well show inadequacies in the proposed Riverfront District.

7. No special finding was made by the planning board as to why the Riverfront District was especially suitable for subsidized housing and it was asserted that such financing cannot be assumed to be available. Yet this is a condition for a substantial density bonus.

8. The attention of the councillors was called to serious drafting defects in the proposed district regulations which were asserted to fall below minimum constitutional drafting levels. For example, the regulations contain no objective standards, and these provisions extend far beyond General Laws, Chapter 40A, Section 5, which prohibits

> "any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner

> substantially different from the use to which it was part before alteration, or for its use for the same purpose to a substantially greater extent."

9. Finally it was asserted that the presentation of the planning board to the councillors was unfair to the opponents of the proposal inasmuch as the stated assumptions on which the models were based indicates (1) that the vertical scale is substantially greater than the horizontal scale, which greatly exaggerates the possible height and bulk of development, particularly when the human scale cannot be visualized; (2) that the maximum floor area ratio available to developers under present zoning as well as under the proposed rezoning could or would ever be fully utilized; and (3) that the size and number of parking facilities and structures which would cover the area if so developed were eliminated from consideration, creating a false impression of open space and lack of bulk.

REMARKS BY EDWARD REYNOLDS, JR.
Representing Albro Realty Trust (Houghton Mifflin Company)
at Hearing before Cambridge City Council, June 13, 1973

Albro Realty Trust, a real estate subsidiary of Houghton Mifflin Company, owns the property at 840 Memorial Drive, Cambridge, more generally known as the site of The Riverside Press. That property has been for sale since shortly after we closed the Press in 1971, because we found no continuing use for the property ourselves and we did not see ourselves in the role of developer of the site for use by others. In the two years since then there have been many ideas, actions, plans and steps taken by different parties directed at our property which are confusing when presented chronologically, but which have three main identifiable streams of activity which proceeded concurrently:

1. Our efforts to sell the property, which have generated initial interest from a number of developers, but no substantive proposals.

2. The City and the RCCC have extensively studied the property, including the commissioning of the Goff report, with the objective of acquiring the property or controlling its use, for community purposes.

3. The City Planning Department has been pursuing the plan to create a riverfront district, culminating in the proposal now before you.

These three activities went along concurrently, but were interrelated at many points. We have cooperated with the City - with the Mayor, the City Manager and the Planning Department - throughout this period: We told the City first when the property was offered for sale; we made plans of the buildings available to the City and community planners and consultants; we

gave the City advance notice, and solicited proposals from the City for the use of the Press buildings, well before proceeding to demolish the buildings which was made necessary because of the high cost of carrying the buildings in the absence of any purchaser. We have studied the proposed zoning to create the riverfront district throughout its development with the assistance of professional planners and real estate experts. On a number of occasions we have made the constructive comments and suggestions of these planning consultants freely available to the Planning Department.

The point is this: despite our efforts to sell what is generally regarded as a most desirable property, and despite our interest in achieving a good plan for the district through cooperative efforts with the City, we find ourselves without a substantive proposal for the property, and it might be useful as part of these deliberations to consider whether the absence of prospective buyers is not related to the likely effects of the proposed zoning on our property, if it can be viewed as a representative example. It is with that in mind that we are also providing as part of our presentation at this meeting the ideas and opinions of Mr. Jung and Mr. Skinner.

We are generally in sympathy with the stated objectives of the zoning proposal and would support the proposal if there was evidence that it afforded economic incentive to accomplish those objectives. But, as stated in our letter of May 30, 1973 to the Planning Board, "We have heard the opinions of professional planners - working independently and arriving at the same conclusion - that the proposed rezoning will not be effective in achieving its stated objectives." We believe that the likelihood of achieving

these objectives can be substantially improved by changes in two areas of the zoning proposal -- they are (1) a moderate increase in the permitted densities, and (2) an improvement in the allowable proportions of non-residential use. We believe such changes would provide sufficient incentives to cause development consistent with the desired objectives.

In closing, let me add that we have also been advised that this zoning proposal is the most extensive and drastic reduction in density ever attempted in Cambridge, perhaps in the Commonwealth. Considering the very legitimate and understandable differences of opinion that exist at this late date as to the likely effects of the proposed zoning, perhaps it is wiser to make a more moderate change.

CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 39

September 28, 1973

The Honorable, The City Council
City Hall
Cambridge, Massachusetts 02139

Dear Councillors:

Enclosed are copies of two reports requested of the Planning Board at the Council's June 13, public hearing on the proposed Riverfront District.

The Planning Board is prepared to discuss both of these documents at your earliest convenience.

Sincerely,

Arthur C. Parris

Arthur C. Parris,
Chairman

(3)

CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
Tel. 876-6800

EXECUTIVE DEPARTMENT
JOHN H. CORCORAN
City Manager

October 1, 1973

To the Honorable, the City Council,

With reference to request of your Honorable Body on June 13, I transmit herewith two reports from the Planning Board relative to the proposed Riverfront District.

Very truly yours,

John H. Corcoran
City Manager

JHC/m

Agenda # 3. 381

Reports from the Planning Board with reference to City Council request relative to the proposed Riverfront District.

In City Council,

October 1, 1973

10/1/73
Referred to Ordinance Committee
Copy sent to Ordinance Committee 10/2/73