



CITY OF CAMBRIDGE

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

(617) 498-9020

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Joseph M. Kaigler
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Edward J. O'Connell
Legal Counsel

January 4, 1991

Mr. Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: City Council Order #12
Date of Order: 11/26/90
Subject: The relationship between the City's zoning
policy and the taking of property rights.

Dear Mr. Healy:

In regard to the above City Council Order, the following will examine the circumstances in which re-zoning rises to the level of a regulatory "taking" of property rights for which payment of just compensation is required. In order to narrow the focus of this examination, the maker of the motion was contacted with regard to the specific application of the order. The maker of the motion indicated that the subject of the order relates specifically to the proposed re-zoning of a parcel of land located in the Cambridgeport District. The following analysis pertains specifically to this proposed re-zoning.

There exist no specific factors by which to determine the nature of governmental regulations which rise to the level of "takings". The determination is essentially one of reasonableness,

factoring in the interests of the public, the appropriateness of the means and the oppressiveness of the governmental action. (See, Lovequist v. Conservation Commission of Town of Dennis, 397 Mass. 7, 393 N.E. 2d 858 (1979); Flynn v. City of Cambridge, 383 Mass. 152, 418 N.E. 2d 335 (1981)). Where, however, a permanent physical occupation is involved, the law is uniform in its application. The U.S. Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) set forth a per se rule in regard to permanent intrusions onto physical property even if minimal. The Court held that a permanent physical occupation is "perhaps the most serious form of invasion (because) the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice at every strand." Id at 435.

M.G.L. c. 79, §1 et seq. empowers municipalities to "take" private property by eminent domain. Pursuant to c. 79 a municipality has the power to take private property for a public purpose where there is compliance with strict procedural requirements. Pursuant to the Fifth Amendment to the United States Constitution, as well as the Fifth Amendment to the Massachusetts Constitution, said takings may not be undertaken without payment of just compensation to those individuals or entities with compensable property interests. Chapter 79 makes specific provision for such payments. In certain instances, however, governmental regulations have been deemed to rise to the level of "takings", for which payment of just compensation is required. In this regard, the application of municipal land use regulations to particular

districts or parcels of land may, in certain circumstances, be deemed "takings" within the meaning of the Fifth Amendment.

The enactment of land use regulations by a municipality ordinarily falls within the general police power of that municipality. Limiting the use of land for a particular purpose in the majority of cases is a proper exercise of this power, and is not ordinarily a taking. However, situations have arisen where governmental regulations have been found to constitute "takings" within the purview of the Fifth Amendment. In Nollan v. California Coastal Commission, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), the U.S. Supreme Court held that requiring the plaintiffs to grant a public easement across the beachfront section of their property, as a condition to granting a permit to build a house on the property, effected a taking of property without just compensation. Where a land use regulation requires actual conveyance of a portion of the property as a condition to the lifting of a land-use restriction, the Court will look with heightened scrutiny at the legitimate state purposes allegedly advanced by the land use regulation and its advancement of these purposes.

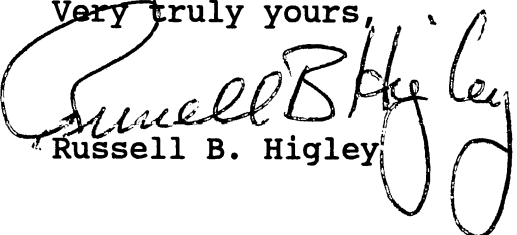
Takings have generally been deemed to occur where a regulation denies an owner economically viable use of his land or where the economic value of his property is completely eliminated by a zoning ordinance. However, a mere allegation of reduction of market value will not support a claim for compensation, nor will a mere allegation that one's business is less profitable as a result of

the regulation. McQuillin, Municipal Corporations, volume 11, section 32.28. See also, Flynn v. City of Cambridge, 418 N.E. 2d at 340. Where a governmental action is not viewed as interfering with an owner's "primary expectation concerning the use of his property and the owner is still able to obtain a reasonable return on his investment", a taking is not deemed to have occurred. Penn Central Transportation Company v. New York City, 438 U.S. 104, 130-131 (1978). Furthermore, the Supreme Judicial Court has held that restrictions which diminish the value of a parcel of land, do not alone establish a constitutional taking. See, Flynn v. City of Cambridge, 418 N.E. 2d at 340.

Particularly in regard to prevailing Massachusetts law, the Supreme Judicial Court has focused on "both the character and the nature and extent of interference with rights in a parcel as a whole" in deciding whether a particular governmental action has effected a taking. Moskow v. Commissioner of Department of Environmental Management, 384 Mass. 530, 427 N.E. 2d 750 (1981). The Court has generally been concerned with a regulation's precluding the use of property for "any reasonable purpose". See, Commissioner of Natural Resources v. Volpe & Co., 349 Mass. 104, 206 N.E. 2d 666 (1965). Moreover, unconstitutional takings have been found to occur where local ordinances or amendments thereto result in the "practical confiscation" of land, depriving the owner of any worthwhile rights or benefits therein. See, McQuillin, Municipal Corporations, volume 11, section 32.28. See also, Cayon v. City of Chicopee, 360 Mass. 606, 277 N.E. 2d 116 (1971).

As previously stated, there are no specific guidelines by which to determine whether a regulatory taking has been effected by the enactment of a zoning ordinance or by an amendment thereto. General guidelines in which to make such a determination, however, have been established by the U.S. Supreme Court and the Supreme Judicial Court. It is clear that the diminishment of property values alone as a result of an otherwise reasonable regulatory action does not establish a taking. See, Pennsylvania Coal Company v. Matron, 260 U.S. 393, 413 (1922). Where, however, a landowner is deprived of all profitable use of a substantial portion of privately owned land, regulatory actions have been deemed to rise to the level of takings. Furthermore, the mere fact that a zoning ordinance or regulation is enacted pursuant to a comprehensive plan of community development does not make it immune from the rule that where the regulation "goes too far", it will be recognized as a taking. See, McQuillin, Municipal Corporations, Volume 11, section 32.28. See also, Nollan v. California Coastal Commission, 97 L. Ed. at 678. Therefore, municipalities may enact reasonable ordinances relative to land use so long as they are not arbitrary, are in the interest of the public, and/or do not result in the "practical confiscation" of the affected property.

Very truly yours,


Russell B. Higley

RBH/jab

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CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL 349-4300
FAX 349-4307

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

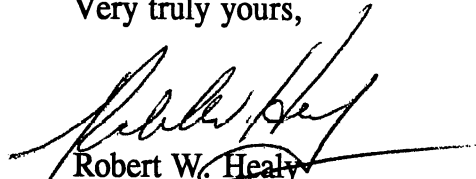
RICHARD C. ROSSI
Deputy City Manager

January 7, 1991

To The Honorable, The City Council:

In response to Awaiting Report Item No. 83, regarding the relationship between the City's zoning policy and the taking of property rights, please find attached a report from Russell B. Higley, City Solicitor, concerning this matter.

Very truly yours,



Robert W. Healy
City Manager

RWH/mev
attachment

Agenda # '60

0-3

Awaiting Report Item Number 83 regarding
the relationship between the city's
zoning policy and the taking of property
rights.

In City Council,

January 7, 1991

Placed on file