



City of Cambridge

30.

IN CITY COUNCIL

April 24, 1995

COUNCILLOR SULLIVAN
 COUNCILLOR DUEHAY
 COUNCILLOR GALLUCCIO
 VICE MAYOR RUSSELL

WHEREAS: The new Republican-controlled United States Congress is on its way to passing the biggest expansion of "Property Rights" in U.S. history (see attached article); and

WHEREAS: This legislation seeks to significantly expand the interpretation of the Constitution's taking clause, which will lead to a sharp decline in a municipality's ability to enforce environmental, planning and other regulations; and

WHEREAS: This legislation would require the government to pay landlords full compensation when certain government regulations reduce the value of the property 33% or more; and

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ORDERED: That the City Manager be and hereby is requested to confer with the City Solicitor's Office to review the new legislative agenda and legal arguments relating to "property rights" and "takings" as to how they relate to such regulations as "parking freeze" and others.

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Adopted by the affirmative vote of nine members.

Attest:- D. Margaret Drury, City Clerk.

A true copy;

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would be created to help Columbia avert a financial crisis. The bill now goes to the passage is expected.

met with two Americans for illegally crossing the border. An appeal of their eight-day sentence has information a court's verdict.

thousands were massacred in the last week by attackers. They killed them, U.S. Ambassador said. Most of the men and children, and at least 100 were slain in the village of...

to act against a Guatemalan accused of instigating the rebellion but was thwarted, when the Justice Department colonel couldn't be prosecuted. Col. Alpirez, said to be on CIA payroll, allegedly was involved in the 1990 slaying.

held in Washington with military officials, who reassure that they will push for aid to encourage reform and end fundamentalist unrest.

elite turned out in large numbers for a slaying supporter. Notably absent were members of the government as well as relatives. Attorney Mireille was arrested, and a client was killed last Tuesday.

under pressure on Bosnia's government to agree to an extension beyond May 1, a U.S. peacekeeping force reported changes in Bosnia's northwestern hills.

NCAA men's basketball team beating Arkansas 89-78.

the state's grand champion for the fifth straight year.

"Some entrants have ragged edges. They don't even try to shape their jerky," says Ned Parrett, an animal-science professor at Ohio State University in Columbus and a judge for the association. "Making jerky is an art."

And like all art appreciation, it is subjective. Alan Krautsack, who owns the Lovell Market in Lovell, thought the winning jerky looked surreal. "They were cute, little, reddish strips. Mine is more traditional," says Mr. Krautsack, which means it comes in thick, dark slabs that look like worn shingles. A novice jerky competitor, he tried to dethrone Terry Kimmel but ran into unfortunate and unexpected competition from a bunch of turkeys. More on that later.

In Ohio, jerky is serious sport. The association, which represents the state's small, independent meat processors, removed it from the Meat Snack category (home of Slim Jim-type sausage sticks) several years ago. Now jerky has its own class, as do wieners and loaf. Just about every butcher tinkers with secret family jerky recipes throughout the year, hoping to capture the elusive blue ribbon.

Everyone, that is, except Mr. Kimmel, who hasn't changed a thing since introducing his jerky seven years ago. "There's no need to change," he says. "We're the best there is."

Priceless Recipe

His Mountain Man jerky can be found for sale in about 50 bars and gas stations near his home. "And we've even got some in Lima," says Mr. Kimmel, which is a good two hours' drive away. He figures he sells about 5,500 pounds of jerky a year, which, at \$16 a pound, makes it the cash cow of the family's custom-butcher operation. When a Canadian traveler stopped by Kimmel's shop, tasted the jerky and offered to write a check for the recipe, the jerky maker responded: "You don't have enough money."

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- ROCHELLE SHARPE

Blessing or Disaster? Environmentalists are naturally alarmed. Says Hal Candee, an environmental lawyer with the Natural Resources Defense Council: "This is insane--the public is already subsidizing irrigation that is devastating the environment, and now we have to pay even more to make it stop?"

Moreover, the takings movement is being watched with growing concern by numerous state and local governments, which fear a huge hit on the public treasury -- or a sharp decline in their ability to enforce what they consider reasonable environmental, planning and other regulations. In Riverside, Calif., a fast-growing Southern California city bedeviled by numerous endangered species, traffic and open-space conflicts, city planner Stephen Whyld calls the new takings proposals "prescriptions for total gridlock."

Nonsense, say proponents, who argue that such legislation is necessary to rein in overweening regulators. "It's obvious that bureaucracies from the federal level down to the local school board have come to believe that the Fifth Amendment just doesn't apply to them," says R.S. Radford, a property-law expert at the Pacific Legal Foundation, a conservative legal think tank that has handled many takings lawsuits on behalf of landowners. The takings movement, he says, confronts "terrible abuses by government against individuals." Central Valley farmers, for example, have long painted efforts to save salmon as an example of government "worrying more about fish than people."

What is certain is that the takings campaign, both in Congress and in a number of states, seeks to significantly expand interpretation of the Constitution's so-called takings clause. This is a snippet of the Fifth Amendment that holds that government "shall not take private property for public use without just compensation."

Keeping a Promise

The recent House proposal also fulfills a promise in the "Contract With America" and is strongly supported by large industries such as mining, ranching, oil and agriculture. It requires the government to pay landowners full compensation when certain government actions to protect the environment trim the value of any portion of their property by 20% or more. The Senate is considering a proposal championed by presidential hopeful and Senate Majority Leader Robert Dole that lifts that threshold to 33% -- but it would apply to all federal regulations, not just environmental rules.

Whatever its final form, such a bill, if passed, would be a populist rallying point that may be difficult for President Clinton to veto. Even if he does, the movement has plenty of steam at a state and local level. Colorado, Oregon, Texas and other states are considering their own expanded takings bills.

In fact, some private-property interests have already begun to push novel legal theories under the current state of takings law -- theories that they clearly hope will be enshrined under the more expansive Republican bills. Wayne Hage, a Nevada rancher and a leader of the West's private property movement, alleges in a lawsuit

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Private Matter: Push to Expand Property Rights Stirs Both Hopes and Fears; Some See a Windfall

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pending in the federal court of appeals in Washington that the government owes him compensation because fish and game agencies don't prevent elk herds from drinking from his streams and munching range on his 7,000-acre spread. That is a taking of his water and grass, he contends.

Mr. Hage also is credited with devising another now-popular theory in the West: that ranchers have what amounts to a private-property right to graze on public range land. Thus, Mr. Hage and several other Western ranchers have sued the U.S. Forest Service and the Bureau of Land Management, claiming that they suffered takings when the agencies tried to restrict grazing on public range, which in many areas has been scalped by years of overgrazing.

In Mr. Hage's case, the Forest Service confiscated some of his cows because he repeatedly defied the agency's orders to stop grazing on public land that federal range experts considered "trampled, compacted, gullied."

For damage from regulators and elk, Mr. Hage seeks compensation of at least \$28.4 million.

Mountains of Concerns

Then there is the case of the Summitville Mine in south-central Colorado. Mining practices there have created a heap of cyanide-laced mine wastes; the Superfund cleanup is expected to cost taxpayers at least \$120 million. The Canadian company that operated the mine for its owners has declared bankruptcy and left the country.

Now, the mine owners, Aztec Minerals Corp., Gray Eagle Mining Corp. and South Mountain Minerals Corp., have sued Colorado's governor and main environmental agencies. Their claim: Because regulators did as the companies wished and permitted mining that earned them substantial profits but polluted their property, their land has been devalued by regulatory action — a taking under the Colorado constitution. The mine owners also say their property values have been hurt because regulators' emergency cleanup of Summitville, undertaken to prevent further poisoning of their land, has closed down mining, possibly for good.

"Let me get this straight: It's a taking when you're allowed to mine, and a taking when you're prevented from mining?" scoffs Roger Flynn, an environmental attorney with the Western Mining Action Project.

Just so, says Tim Gablehouse, the mine owners' attorney: "Government action and inaction have damaged the value of private property, and we have a constitutional right to compensation."

Intangible Costs

Colorado is one of many states considering local takings legislation modeled on the new congressional proposals, and indeed, it is at the state and local level, where planning commissions make numerous decisions on a daily basis, that such measures could really open the floodgates. For example, local governments often deny permission for landowners to subdivide lots or undertake high-density development, on the theory that approval would aggravate congestion or traffic. Yet such decisions often diminish land values by as much as one-third.

Jennifer Moulton, Denver's planning director, predicts that takings legislation pending in the Colorado state legislature would mean "a nightmare of dueling appraisers and dueling lawyers." The Colorado proposal says that any diminution of property values whatsoever requires compensation but leaves it to appraisers to determine how much. "Property owners will have their appraisers, and we'll have ours, and we'll all go around and around and around," Ms. Moulton says.

Texas Notions

Other recent federal takings claims have featured coal companies alleging that they must be compensated because federal law requires them to pay money into a fund for miners stricken with black lung. And a company owned by Texas oil millionaire Clayton Williams has sued Wyoming wildlife agencies over limits and licensing requirements for hunting deer, elk and antelope. Mr. Williams's theory: He owns

the wildlife on his 90,000-acre Wyoming hideaway, and state hunting restrictions are a taking of his private wildlife for which he must be compensated. Mr. Williams lost the first legal round in federal court, but he has appealed.

Not all the recent federal cases deal with environmental matters. International House of Pancakes Inc. has claimed that modifications to restaurants required by a 1990 handicap-access law are a taking for which it should be paid.

IHOP made the claim in defense of a lawsuit brought by Theodore Pinnock, a San Diego attorney with cerebral palsy who sued after he allegedly couldn't get his wheelchair through a narrow restroom door and had to crawl into the men's room. Last summer, the U.S. Supreme Court refused to review a lower court decision against IHOP's takings claim. But many lawyers say IHOP probably would have prevailed under some of the new takings theories being pushed in Congress.

It is that kind of scenario that concerns people like Jerold S. Kayden, a Harvard University property-law scholar. In his view, the Republican takings bills would "vastly expand" the opportunities for claiming compensable takings — and would likely trigger a blizzard of such claims that will force a cash-strapped government to choose between enforcing regulations in the public interest or paying huge sums to landowners.

More fundamentally, the new takings proposals mark a drastic departure from how courts and policy makers have historically interpreted the Fifth Amendment's taking clause. In general, courts have allowed the government significant latitude to make regulations impinging upon private property in the interest of protecting public health and safety, building highways, limiting growth and the like, particularly when the regulation didn't wipe out all economic value of the private land.

Narrow Rulings

The Supreme Court twice in recent terms has taken up major takings claims; both times the court ruled narrowly in favor of landowners, strengthening private-property rights without fundamentally altering past property-law concepts. The court is currently hearing another potential landmark private-property case involving how far regulators can go to enforce the federal Endangered Species Act on private land.

Mr. Kayden also posits another question: If property owners are going to be paid by the public when a regulation decreases property values, he asks, why shouldn't they have to repay the public when regulatory action — flood control, for

example — enhances property values?

Takings proponents, however, contend that the Republican bills aim merely to put common sense back in government's attitude about private property, and they have their own list of abuses that they believe shows the need for a radical change in the takings law. There is the case of a Washington man who was barred from cutting down a few trees on his land because a spotted-owl nest had been discovered some five miles away. There is the South Carolina developer whose \$1 million investment in residential property was totally wiped out by subsequent erosion-control rules, even though his lots were a football-field distance away from the beach. There are the various landowners who have been thrown in jail for dumping clean sand on slivers of their property that were classified as wetlands; in some cases, the "wetlands" had been dry for decades.

Backers also accuse their critics of fear-mongering when they suggest the bills invite landowners to raid the environment and the national treasury. Critics "have propounded the myth that private property and environmental protection are inconsistent," says Rep. Lamar Smith, a Texas Republican and a House leader on property rights.

The House takings proposal, for example, wouldn't apply to any activity that runs afoul of state nuisance laws; that, he and other supporters say, will prevent landowners from "getting paid not to pollute."

Converse Agrees to Buy Apex

NORTH READING, Mass. — Converse Inc. agreed in principle to acquire Apex Inc., a designer and marketer of footwear and related products. Terms weren't disclosed.

cement. She disappeared in the back of the house and emerged a few minutes later with \$25 in crumpled bills.

Beauty-School Sales

Later, Mr. Zellner parks his car in front of a beauty school on Gratiot Avenue, one of Detroit's main drags. He is here to sell heavy-duty curlers and crimpers made by a friend in his garage. Mr. Zellner peddles them as a sideline for \$15 apiece. The wood-and-metal accessories are virtually identical to commercial ones selling for \$25 each.

Today, three beauty-school students are interested in his wares, and he pockets \$15 each from two of them. The third doesn't have any cash, but she persuades Mr. Zellner to take food stamps instead.

"I'm willing to consider anything that won't put me in prison," Mr. Zellner says.

Such thoughts didn't always hinder him. Although he has a clean criminal record, Mr. Zellner says he occasionally sold drugs or shoplifted to supplement his earnings as a factory and construction worker. But he says he stopped doing that several years ago because he felt he was "selling death."

Passing It On

Will Mr. Zellner ever rejoin the ranks of the officially employed? He recently applied for work at Chrysler and Ford, which are both hiring again. At both places, he has relatives trying to help him. But the two companies are very selective, usually taking only people with steady work histories, and Mr. Zellner's chances may not be that good.

He doesn't worry much about it. If need be, he says, he can survive for the rest of his life doing odd jobs. In the meantime, Mr. Zellner says he is passing on his construction skills and work ethic to his children and grandchildren. If they need money for something, he tells them to earn it by helping him at a job.

"It's a way to let them know they can still be somebody," he says, "even when you're broke."

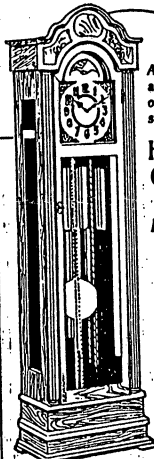
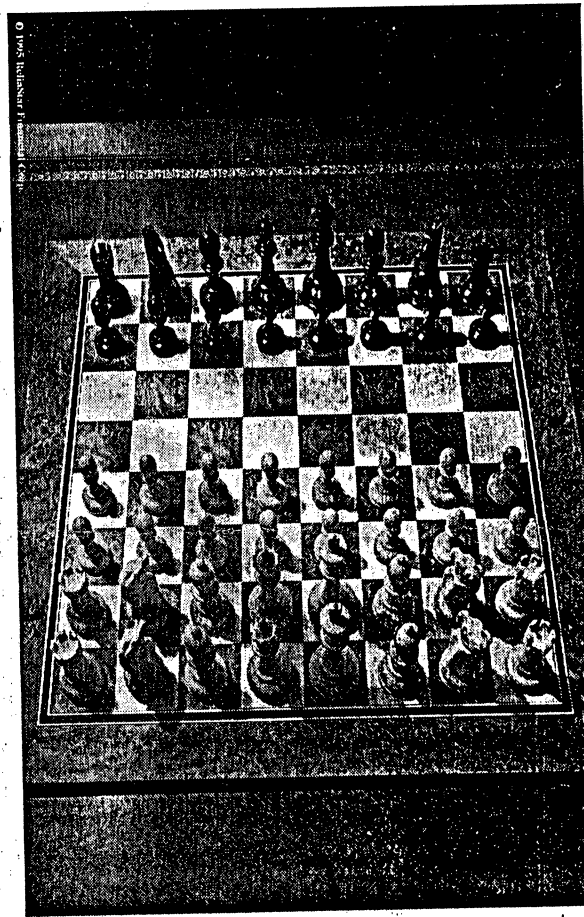
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pending in the federal court of appeals in Washington that the government owes him compensation because fish and game agencies don't prevent elk herds from drinking from his streams and munching range on his 7,000-acre spread. That is a taking of his water and grass, he contends.

Mr. Hage also is credited with devising another now-popular theory in the West: that ranchers have what amounts to a private-property right to graze on public range land. Thus, Mr. Hage and several other Western ranchers have sued the U.S. Forest Service and the Bureau of Land Management, claiming that they suffered takings when the agencies tried to restrict grazing on public range, which in many areas has been scalped by years of overgrazing.

In Mr. Hage's case, the Forest Service confiscated some of his cows because he repeatedly defied the agency's orders to stop grazing on public land that federal range experts considered "trampled, compacted, gullied."

For damage from regulators and elk, Mr. Hage seeks compensation of at least \$28.4 million.

Mountains of Concerns

Then there is the case of the Summitville Mine in south-central Colorado. Mining practices there have created a heap of cyanide-laced mine wastes; the Superfund cleanup is expected to cost taxpayers at least \$120 million. The Canadian company that operated the mine for its owners has declared bankruptcy and left the country.

Now, the mine owners, Atezc Minerals Corp., Gray Eagle Mining Corp. and South Mountain Minerals Corp., have sued Colorado's governor and main environmental agencies. Their claim: Because regulators did as the companies wished and permitted mining that earned them substantial profits but polluted their property, their land has been devalued by regulatory action — a taking under the Colorado constitution. The mine owners also say their property values have been hurt because regulators' emergency cleanup of Summitville, undertaken to prevent further poisoning of their land, has closed down mining, possibly for good.

"Let me get this straight: It's a taking when you're allowed to mine, and a taking when you're prevented from mining?" scoffs Roger Flynn, an environmental attorney with the Western Mining Action Project.

Just so, says Tim Gablehouse, the mine owners' attorney: "Government action and inaction have damaged the value of private property, and we have a constitutional right to compensation."

Intangible Costs

Colorado is one of many states considering local takings legislation modeled on the new congressional proposals, and indeed, it is at the state and local level, where planning commissions make numerous decisions on a daily basis, that such measures could really open the floodgates. For example, local governments often deny permission for landowners to subdivide lots or undertake high-density development, on the theory that approval would aggravate congestion or traffic. Yet such decisions often diminish land values by as much as one-third.

Jennifer Moullon, Denver's planning director, predicts that takings legislation pending in the Colorado state legislature would mean "a nightmare of dueling appraisers and dueling lawyers." The Colorado proposal says that any diminution of property values whatsoever requires compensation but leaves it to appraisers to determine how much. "Property owners will have their appraisers, and we'll have ours, and we'll all go around and around and around," Ms. Moullon says.

Texas Notions

Other recent federal takings claims have featured coal companies alleging that they must be compensated because federal law requires them to pay money into a fund for miners stricken with black lung. And a company owned by Texas oil millionaire Clayton Williams has sued Wyoming wildlife agencies over limits and licensing requirements for hunting deer, elk and antelope. Mr. Williams' theory: He owns

the wildlife on his 90,000-acre Wyoming hideaway, and state hunting restrictions are a taking of his private wildlife for which he must be compensated. Mr. Williams lost the first legal round in federal court, but he has appealed.

Not all the recent federal cases deal with environmental matters. International House of Pancakes Inc. has claimed that modifications to restaurants required by a 1990 handicap-access law are a taking for which it should be paid.

IHOP made the claim in defense of a lawsuit brought by Theodore Pincock, a San Diego attorney with cerebral palsy who sued after he allegedly couldn't get his wheelchair through a narrow restroom door and had to crawl into the men's room. Last summer, the U.S. Supreme Court refused to review a lower court decision against IHOP's takings claim. But many lawyers say IHOP probably would have prevailed under some of the new takings theories being pushed in Congress.

It is that kind of scenario that concerns people like Jerold S. Kayden, a Harvard University property-law scholar. In his view, the Republican takings bills would "vastly expand" the opportunities for claiming compensable takings — and would likely trigger a blizzard of such claims that will force a cash-strapped government to choose between enforcing regulations in the public interest or paying huge sums to landowners.

More fundamentally, the new takings proposals mark a drastic departure from how courts and policy makers have historically interpreted the Fifth Amendment's taking clause. In general, courts have allowed the government significant latitude to make regulations impinging upon private property in the interest of protecting public health and safety, building highways, limiting growth and the like, particularly when the regulation didn't wipe out all economic value of the private land.

Narrow Rulings

The Supreme Court twice in recent terms has taken up major takings claims; both times the court ruled narrowly in favor of landowners, strengthening private-property rights without fundamentally altering past property-law concepts. The court is currently hearing another potential landmark private-property case involving how far regulators can go to enforce the federal Endangered Species Act on private land.

Mr. Kayden also posits another question: If property owners are going to be paid by the public when a regulation decreases property values, he asks, why shouldn't they have to repay the public when regulatory action — flood control, for

example — enhances property values?

Takings proponents, however, contend that the Republican bills aim merely to put common sense back in government's attitude about private property, and they have their own list of abuses that they believe shows the need for a radical change in the takings law. There is the case of a Washington man who was barred from cutting down a few trees on his land because a spotted-owl nest had been discovered some five miles away. There is the South Carolina developer whose \$1 million investment in residential property was totally wiped out by subsequent erosion-control rules, even though his lots were a football-field distance away from the beach. There are the various landowners who have been thrown in jail for dumping clean sand on silvers of their property that were classified as wetlands; in some cases, the "wetlands" had been dry for decades.

Backers also accuse their critics of fear-mongering when they suggest the bills invite landowners to raid the environment and the national treasury. Critics "have propounded the myth that private property and environmental protection are inconsistent," says Rep. Lamar Smith, a Texas Republican and a House leader on property rights.

The House takings proposal, for example, wouldn't apply to any activity that runs afoul of state nuisance laws; that, he and other supporters say, will prevent landowners from "getting paid not to pollute."

Converse Agrees to Buy Apex

NORTH READING, Mass. — Converse Inc. agreed in principle to acquire Apex Inc., a designer and marketer of footwear and related products. Terms weren't disclosed.

cement. She also appears in the back of the house and emerges a few minutes later with \$25 in crumpled bills.

Beauty-School Sales

Later, Mr. Zellner parks his car in front of a beauty school on Gratiot Avenue, one of Detroit's main drags. He is here to sell heavy-duty curlers and crimpers made by a friend in his garage. Mr. Zellner peddles them as a sideline for \$15 apiece. The wood and metal accessories are virtually identical to commercial ones selling for \$25 each.

Today, three beauty-school students are interested in his wares, and he pockets \$15 each from two of them. The third doesn't have any cash, but she persuades Mr. Zellner to take food stamps instead.

"I'm willing to consider anything that won't put me in prison," Mr. Zellner says.

Such thoughts didn't always hinder him. Although he has a clean criminal record, Mr. Zellner says he occasionally sold drugs or shoplifted to supplement his earnings as a factory and construction worker. But he says he stopped doing that several years ago because he felt he was "selling death."

Passing It On

Will Mr. Zellner ever rejoin the ranks of the officially employed? He recently applied for work at Chrysler and Ford, which are both hiring again. At both places, he has relatives trying to help him. But the two companies are very selective, usually taking only people with steady work histories, and Mr. Zellner's chances may not be that good.

He doesn't worry much about it. If he need be, he says, he can survive for the rest of his life doing odd jobs. In the meantime, Mr. Zellner says he is passing on his construction skills and work ethic to his children and grandchildren. If they need money for something, he tells them to earn it by helping him at a job.

"It's a way to let them know they can still be somebody," he says, "even when you're broke."

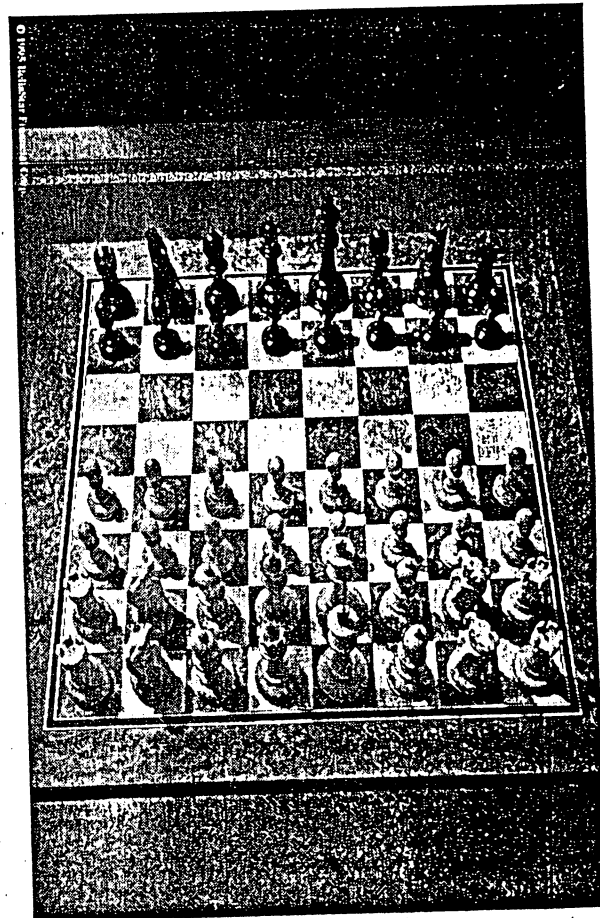
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City of Cambridge

30.

IN CITY COUNCIL

April 24, 1995

COUNCILLOR SULLIVAN

WHEREAS: The new Republican-controlled United States Congress is on its way to passing the biggest expansion of "Property Rights" in U.S. history (see attached article); and

WHEREAS: This legislation seeks to significantly expand the interpretation of the Constitution's taking clause, which will lead to a sharp decline in a municipality's ability to enforce environmental, planning and other regulations; and

WHEREAS: This legislation would require the government to pay landlords full compensation when certain government regulations reduce the value of the property 33% or more; and

WHEREAS: Both proponents and critics of this legislation agree that the Republican proposals promise a procession of policy zigzags and law suits at all levels of government, which will result in a huge hit to already tight and getting tighter city treasury; and

WHEREAS: Many of these new taking arguments being advanced by the Congress are thought to soon begin to prevail in the courts of this country [See, e.g. Dolan Tigard, 114 S. Ct. 2309 (1994)]; now therefore be it

ORDERED: That the City Manager be and hereby is requested to confer with the City Solicitor's Office to review the new legislative agenda and legal arguments relating to "property rights" and "takings" as to how they relate to such regulations as "parking freeze" and others.

Dubray Gallucci/Russell

CM-168

Consent Order #30

Councillor Sullivan re: Review the new legislative agenda and legal arguments relating to "property rights" and "takings" as to how they relate to such regulations as "parking freeze" and others.

In City Council April 24, 1995

Order adopted.