

# Hayes, Clark, Hunt and Embry

ATTORNEYS AT LAW

STEPHEN S. CLARK  
BRUCE J. EMBRY  
FREDERICK B. HAYES, III  
WILLIAM J. HUNT

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MARISA A. CAMPAGNA

P.O. BOX 206  
43 THORNDIKE STREET  
BULFINCH SQUARE  
CAMBRIDGE, MASSACHUSETTS 02141  
617 494-4800  
TELECOPIER 617 494-1522

January 22, 1990

BY HAND

Joseph Connarton  
City Clerk  
Cambridge City Hall  
795 Massachusetts Ave.  
Cambridge, MA

RE: Home-Rule Petition - Section C 1/2

Dear Mr. Connarton:

As you may know this office represents Mr. Alex Steinbergh and Mr. Stanley Bowden, Trustees of the 16 Chauncy Trust which owns the 53 condominium units at 16 Chauncy Street, Cambridge, Massachusetts. Mr. Steinbergh and Mr. Bowden are also the owners as Trustees of various other condominium units and apartments within the City of Cambridge.

This letter shall constitute a Pre-takings Notification to the City that in the event the proposed Home Rule Amendment is adopted by the Cambridge City Council and later passed by the Massachusetts Legislature it is my clients' intention to challenge the law as an unconstitutional taking of private property, without compensation, in violation of both the Massachusetts and the United States Constitutions and statutes thereunder. It is also my clients' intention that in that event, they will seek compensation for losses caused to them by this City's actions.

As you know, on November 29, 1989 I wrote to the various City Councillors and to the City Clerk stating our position and concern that the proposed Home Rule Petition to reinstitute Section C 1/2 as a restriction on sales would be in violation of the Massachusetts and the United States Constitutions. Fortunately, on that date, and to the present, no action has been taken.

As I am sure you know, however, the Cambridge Rent Control Board, on that date, adopted new regulations which the Board itself deemed to be appropriate to assure compliance with the provisions of Ordinance 966. It is our belief that those regulations are more than sufficient to assure compliance with the Removal Permit Ordinance. Where the Board itself has acted in its administrative capacity and has passed those regulations

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which it deems sufficient to ensure compliance with the law, any further legislation on the part of this body, would certainly not be deemed by the courts to be "necessary" or "substantially related" to the aims and goals of rent control.

The purpose of this letter is to once again alert the City and City officials as to the serious action and serious consequences which would result by the passing of this Home Rule Amendment and the potential liability to which the City may be exposed. It is now well established constitutional doctrine, that the City may be exposed to damages from a land owner even for a "temporary" regulatory taking. Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Since the Massachusetts Supreme Judicial Court stated in the Steinbergh v. Rent Control Board of Cambridge case that "we have little trouble in concluding that the regulatory mechanism established in subsection C 1/2 is not necessary to the achievement of rent control objectives" Steinbergh, p. 7., it is, in my opinion, extremely likely that under the prevailing constitutional standards set down in both the Nollan and First English cases and as more recently expounded by the New York State Court of Appeals in the case of Seawall v. City of New York, the imposition by the legislature and this City of a "sales ban" on individual units will be found to be an unconstitutional "taking" requiring the City to pay compensation.

As you may or may not be aware, the measure of damages in these cases may result in losses to the City which could run to the millions of dollars. It is my understanding that there are thousands of units in this city which would be effected by a re-introduction of Section C 1/2. An interesting case for you to consider is Wheeler v. The City of Pleasant Grove, 833 F.2d. 267 (11 cir. 1987) where a Federal Court found that the measure of damages for a temporary taking should be an award to the land owner of the market rate return computed over the period of the temporary taking based upon the difference between the property's fair market value without the restriction and its fair market value with the restriction. Based on this precedent and on some informal calculations, it is our conclusion that damages, if pursued by property owners in the City of Cambridge, for losses during the period of time between the enactment of this Amendment and the time when it is ultimately struck down by the courts could indeed run \$1-2 million per year. In light of this possibility and in light of the Rent Board's action in

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enacting regulations which it deems appropriate to address the loss of Section C 1/2, this council's rush to a decision on this matter is puzzling.

This rush to decision is also puzzling in light of the actions taken on behalf of the Federal Government, after the Nollan and First English cases, to assure that the Federal Government, with its far more substantial economic base, does not run afoul of these constitutional protections and in turn be forced to pay millions of dollars in unintended compensation. As is noted in that order: "Governmental officials should be sensitive to, anticipate, and account for the obligations imposed by the just compensation clause of the 5th Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc." The Executive Order goes on to note that "actions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially effect its value or use, may constitute a taking of property. Further governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interest in the same private property and even if the action constituting a taking is temporary in nature." A copy of the Executive Order is attached hereto.

In response to that Executive Order the Attorney General of the United States has executed guidelines for the evaluation of risk and avoidance of unanticipated takings dated June 30, 1988. Those guidelines run in excess of 50 pages demonstrating the Federal Government's extreme concern that regulatory action taken on the part of Government may result in the payment of large sums to individual property holders. I will gladly provide you with a copy of those guidelines but for purposes of this letter suffice to say that the circumspection and thought with which the Federal Government has addressed this serious problem, stands in sharp contrast to the hasty and reflexive action on the part of the City Council in seeking to restore a provision which the highest Court in the State of Massachusetts has already deemed not to be necessary for Rent Control.

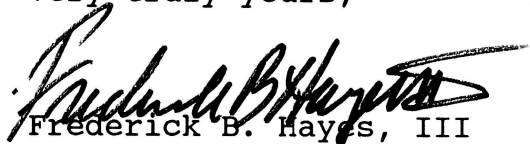
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In closing, it is my hope, and the hope of my clients, that this City Council will critically heed the message of the Massachusetts Supreme Judicial Court and accept its determination that Section C 1/2 is not necessary to the implementation and maintenance of rent control. Particularly, in light of the judicially determined lack of jurisdiction for this section, the passage of more extensive regulations on the part of the Cambridge Rent Control Board and the warnings - implicit and explicit - from both the Federal Courts and the Executive Branch, that regulatory actions of this type may have severe financial consequences for the City of Cambridge, it is my hope that the City Council will at this time reject any attempt to reinstitute Section C 1/2 either through the Home Rule Petition or any similar mechanism.

As I noted at the outset, in the event the Home Rule Amendment is passed, a claim for compensation on the part of my clients and I suspect many others in the City, will inevitably follow. In a time of increasingly limited municipal fiscal resources, the possibility that the City may be about to undertake a needless financial obligation to numerous property owners requires far more contemplation than that currently offered.

Very truly yours,



Frederick B. Hayes, III

FBH:dar  
Enclosure

# Presidential Documents

Title 3—

The President

Executive Order 12630 of March 15, 1988

## Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

**Section 1. Purpose.** (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

**Sec. 2. Definitions.** For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

**Sec. 3. General Principles.** In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

**Sec. 4. Department and Agency Action.** In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

**Sec. 5. Executive Department and Agency Implementation.** (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

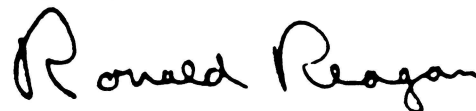
(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

**Sec. 6. Judicial Review.** This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.



THE WHITE HOUSE.

March 15, 1988.

[FR Doc. 88-0145

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