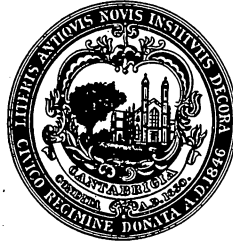


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

October 11, 2001

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

***Re: City Council Order # 0-39, dated September 24, 2001 re: Request for
Analysis and Report Back on the Legal Issue Regarding the Requirement for a
Super Majority Vote to Amend Zoning***

Dear Mr. Healy:

I am writing in response to a request for an analysis and report back on the legal issue regarding the requirement for a super-majority vote to amend zoning. A super-majority or two-thirds vote of the City Council is always required to change or amend the zoning ordinance. If, however, a protest against the proposed zoning change is duly filed by affected landowners as defined in the Massachusetts Zoning Act, Chapter 40A, Section 5, the change must be adopted by three-fourths of the City Council in order to pass. Similar statutes requiring a super-majority vote of a governing body in order to override a protest exist in many states. The courts have upheld the validity of such protest provisions, although the Massachusetts case law suggests that because the requirements of this statute limit the authority of the municipal legislative body by requiring the super-majority vote in these circumstances, the statute must be strictly construed.

There are only a handful of reported cases in Massachusetts in which the courts have interpreted the provisions of Chapter 40A, Section 5. Thus far, Massachusetts's courts have not given any guidance regarding the provision concerning the delineation of the land area from which a protest may rise. There are, however, reported cases from other jurisdictions that have addressed this issue with mixed results. Some courts have suggested that if in the context of an omnibus petition, several districts in a large area are proposed to be rezoned, it is sufficient for twenty percent (20%) of the landowners in any one of those districts to file a protest in order to trigger the super-majority requirement. However, other courts have determined that where a zoning petition affects a large area in several districts or even the entire city, the "land area" means the entire area covered by the petition. Therefore, a protest by twenty percent (20%) of the landowners in the entire area or, if applicable, the entire city is required. The Courts have carefully scrutinized the particular statutory requirements of each individual state's zoning laws as well as the facts

pertaining to each of the zoning petitions at issue in these cases. The results from other jurisdictions are not only mixed, but are distinguishable from one another based upon different states' statutory schemes, and are clearly not precedent in Massachusetts.

It is our conclusion that generally, the phrase "the area of land proposed to be included in such change", means the entire area proposed to be rezoned by any particular zoning petition. This conclusion is based upon the fact that almost always in the City's planning process, proposed changes in one district must be considered in the context of the impacts of those changes upon other districts. The City's planning process in such circumstances could thus be thwarted if a small number of landowners were permitted to cause a portion of an overall plan to fail based upon a protest having been filed with respect only to proposed changes in one area or district. As the requirement for a super-majority vote constitutes a limitation on municipal legislative authority, and is thus likely to be narrowly construed, I believe that this conclusion would be upheld by our courts.

Very truly yours,


Russell B. Higley

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23.

CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager Richard C. Rossi, Deputy City Manager

October 15, 2001

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 01-238, regarding a report on legal issues relative to the requirement for a super majority vote to amend zoning, received from City Solicitor Russell B. Higley.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Healy".

Robert W. Healy
City Manager

RWH/mec
Attachment



Consent Agenda #23

Awaiting Report Item
Number 01-238, regarding a
report on legal issues to the
requirement for a super
majority vote to amend
zoning.

In City Council October 15, 2001

PLACED ON FILE