



CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

(617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

SEVERLIN B. SINGLETON, III
BIRGE ALBRIGHT
DONALD A. DRISDELL
LEGAL COUNSEL

April 28, 1986

Robert W. Healy
City Manager

RE: Building and Demolition Permits

Dear Mr. Healy:

By Council order dated April 7, 1986, Councillor Walsh and Councillor Danehy have asked for an opinion as to whether the Cambridge Inspectional Services Department or the Cambridge Rent Control Board has the ultimate right to issue building and demolition permits for property that is structurally unsound or unfit for human habitation.

Be advised of said opinion as follows:

Building permits

Building permits are required for the construction and repair of buildings, among other things. State Building Code, 780 CMR, s.113.1. The Code, in s.114.1, provides that, if the Building Commissioner or Inspector of Buildings "is satisfied that the proposed work conforms to the requirements of this code and all pertinent law applicable thereto, he shall issue a permit." In Cambridge, the duties of the "Building Commissioner" and "Inspector of Buildings" are exercised by the Commissioner of the Inspectional Services Department (Commissioner). See Ordinance no. 995 (5-23-83). Thus, it is clear that in Cambridge building permits are issued by the Commissioner.

Demolition permits

Demolition permits are also issued by the Commissioner. State Building Code, 780 CMR, s.113.1.

Unsafe structures

There are various statutes which set forth the procedure for demolishing buildings which are deemed to be unsafe or dangerous. See G.L. c. 143, ss.6-9. (dangerous or abandoned buildings); G.L. c. 139, ss.1-3A (burnt, dilapidated, or dangerous buildings treated as nuisances); G.L. c. 111, s.127B (demolition of buildings unfit for human habitation). Under all of these statutes, the Commissioner must issue a demolition permit.

In Cambridge, it has been customary to proceed under G.L. c. 143, ss. 6-9. Under this procedure, a careful survey of the building is made by a Board of Survey, consisting of the City Engineer, the Fire Chief and one disinterested person appointed by the Commissioner. The Board makes a written report to the Commissioner. Id., s.8.

If such report declares such building to be "dangerous" or to be "unused, uninhabited or abandoned, and open to the weather", and if the owner neglects to remove the building or make it safe, the Commissioner has the authority to cause the building to be "made safe or taken down". Id., s9.

In Cambridge, the practice for a long time has been not to demolish such a building unless (a) it is structurally unsound, and (b) a Board of Survey recommends its demolition. This practice applies to all buildings which are "unsafe", "dangerous", "abandoned", "burnt", "dilapidated", "unfit for human habitation", or considered to be a "nuisance".

Removal permits

Cambridge Ordinance no. 966 (1981) provides in s.1(e) that "No owner...shall remove from the market any controlled rental unit, unless the (Rent Board) after a hearing grants a permit."

In s.1(b)(4) of the Ordinance, "Removal from the market" is defined to include the demolition of a unit and also the rehabilitation, repair or improvement of a unit," other than as required by the law of the Commonwealth or the city, in such a way as to prevent residential occupancy during the course of the rehabilitation, repair or improvement."

Regarding building permits, I interpret Ordinance 966 to mean that if the rehabilitation prevents residential occupancy during the course of the work, a removal permit would be required in addition to the building permit. But if the rehabilitation, repair or improvement is required by the State Building Code, a removal permit is not required.

Here, s.114.1 of the Building Code is relevant. That section states that if the Commissioner "is satisfied that the proposed work conforms to the requirements of this code and all pertinent law applicable thereto, he shall issue a permit." The question is whether Ordinance 966 is included in the phrase "all pertinent law applicable thereto".

In a 1985 decision involving property at 14-16 Clinton Street in Cambridge by the State Building Code Appeals Board, it appeared that the building suffered severe fire damage and was determined to be unfit for human habitation according to a report of a Board of Survey. Before the fire, the building contained 19 rooming house units. The owners applied for a building permit to correct cited violations and restore the building for human habitation, reducing the number of units from 19 to 8. The Commissioner denied the application because no removal permit had been obtained.

The State Building Code Appeals Board decided that "the Rent Control Law is not considered pertinent within the scope of Section 114.1", and ordered the Commissioner to issue the building permit. The Rent Board obtained a preliminary injunction from the Appeals Court preventing the owners from rehabilitating the building. At that point, however, the case was settled, and, therefore, no court decided whether Ordinance 966 constitutes "pertinent law" under s.114.1. To the best of my knowledge, there is no case on this point.

I note, however, that, in Lamb v. Rent Control Board of Cambridge, 17 Mass. App. Ct. 1038 (1984), the Court held, without discussing s.114.1 of the Building Code, that a removal permit was required to convert a building from four units to three units.

Contrary to the opinion of the State Building Code Appeals Board, it can be argued that the removal ordinance should be considered "pertinent law" to the same extent as the zoning ordinance is so considered. If the Commissioner perceives a zoning violation, he will not issue a building permit. Although Ordinance 966 is separate from the Building Code, so too is the zoning ordinance. See Enos v. Brockton, 354 Mass. 278, 279 (1968) ("...the zoning ordinance is separate and distinct from the building code".).

It may also be appropriate to note that s.12-2 of the Cambridge City Code provides that:

Every officer...issuing a...permit shall insert therein a condition that the person accepting the same shall conform to all statutes and ordinances...

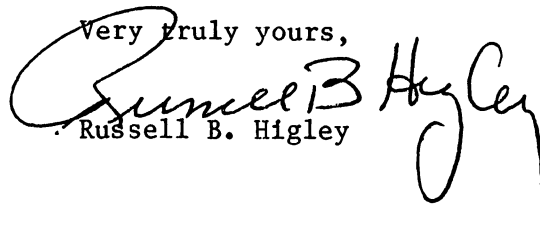
See Meadows v. Town Clerk of Saugus, 333 Mass. 760 (1956) (town clerk properly refused to issue license for dog kennel where its maintenance would violate zoning by-law).

Regarding demolition permits, the same arguments, pro and con, apply. Where there is no suggestion that the building is unsafe, it seems clear that a removal permit is required. This was decided by the Superior Court in 1981 in Fresh Pond Shopping Center, Inc. v. Cambridge Rent Control Bd. (Middlesex Superior Court, C.A. No. 81-1179), where it appeared that the owner, at the time it purchased a six-unit apartment building, planned to demolish the building and pave over the lot to provide parking to a commercial tenant of the shopping center.

The decision of the Superior Court was affirmed by an equally divided Court, 388 Mass. 1051 (1983), and the appeal to the Supreme Court was dismissed for want of a substantial federal question, 464 US 875 (1983) (Rehnquist, J., dissenting).

I am not aware of any case on the necessity of a removal permit where a Board of Survey recommends demolition. However, I am informed by Patricia Cantor, General Counsel of the Rent Board, that the Board would not require a removal permit where the Commissioner causes a building to be demolished in reliance on a Board of Survey report which recommends demolition.

Very truly yours,


Russell B. Higley



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
TEL. 498-9011

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

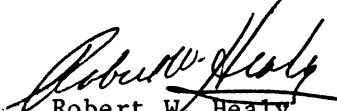
RICHARD C. ROSSI
DEPUTY CITY MANAGER

April 28, 1986

To the Honorable, the City Council:

In response to City Council Order No. 17 of April 7, 1986 regarding the legal authority to issue building permits and demolition permits, I submit the attached report from Russell Higley, City Solicitor.

Very truly yours,


Robert W. Healy
City Manager

Re: report from the City Solicitor on legal
authority to issue building & demolition
permits.

In City Council,

April 28, 1986

Placed on File