CCM-101

City of Cambridge

~~36.~~
Calendar Item #12

IN CITY COUNCIL

~~March 16, 1998~~
March 23, 1998

COUNCILLOR BORN
COUNCILLOR RUSSELL
COUNCILLOR DAVIS
MAYOR DUEHAY
VICE MAYOR GALLUCCIO
COUNCILLOR REEVES
COUNCILLOR SULLIVAN
COUNCILLOR TOOMEY
COUNCILLOR TRIANTAFILLOU

WHEREAS: Legislation currently pending in the **United States Congress (H.R. 1534) and the United States Senate (S. 1256)** would, if adopted, seriously diminish local land use and zoning authority and expand litigation and liability against cities and towns in federal court; and

WHEREAS: The Massachusetts Municipal Association and the National League of Cities have taken positions in opposition to this legislation; and

WHEREAS: This legislation, if adopted, would have detrimental and costly effects on the City of Cambridge; now therefore be it

ORDERED: That the City Council go on record in **opposition to H.R. 1534 and S. 1256** and direct the City Clerk to forward a copy of this resolution to **Senators Kennedy and Kerry and Congressman Kennedy**.

In City Council March 23, 1998.
Adopted by the affirmative vote of nine members.
Attest:- D. Margaret Drury, City Clerk.

A true copy; D Margaret Drury

ATTEST:-

D. Margaret Drury
City Clerk

BORN & RUSSELL.

36

Whereas: Legislation currently pending in the U.S. Congress (HR. 1534) and the U.S. Senate (S 1256) would, if adopted, seriously diminish local land use and zoning authority and expand litigation and liability against cities and towns in federal court, and

Whereas: The Massachusetts Municipal Association and the National League of Cities have taken positions in opposition to this legislation, and

Whereas: This legislation, if adopted, would have detrimental & costly effects on the City of Cambridge, therefore be it

Ordered: That the City Council go on record in opposition to HR 1534 and S. 1256 and direct the City Clerk to forward a copy of this resolution to Senators Kennedy and Kerry and Congressman Kennedy.

& return to me ASAP

(See attached NLC information sheet)

TAKINGS LEGISLATION:
The Preemption of Local Authority

Proposed New Federal Mandate on Cities and Towns in Local Land Use Issues

On October 22, 1997, the House passed and sent to the Senate a bill introduced by Rep. Elton Gallegly (R-CA), H.R. 1534, which would preempt historic and traditional state and local land use and zoning authority by mandating new Federal standards on local government regulation of land use. The legislation would also expand litigation and liability against cities and towns and their taxpayers in federal court. The full Senate could take up the House-passed version of the bill at any point when it reconvenes late in January, 1998, or consider a version, S. 1256, pending before the Senate Judiciary, introduced by Senator Orrin Hatch (R-UT), which incorporates the basic language of the Gallegly bill.

The proposed legislation contains four key elements from the local and state perspective:

I. The bill would direct federal courts to preempt State court consideration of taking claims against cities and towns. The legislation would overturn a U.S. Supreme Court decision, Williamson County v. Hamilton Bank, in which the court held that a taking claim against a local government is not "ripe" in Federal court until the State courts have first had an opportunity to consider the claim for compensation. The House-passed and Senate versions of the bill would allow litigants to bypass the State courts completely.

II. The bill would impose a one-size-fits-all federal limitation on local decision-making in land use cases by changing the so-called "finality" prong of ripeness doctrine. The Supreme Court has established that a taking suit in federal court is not "ripe" until the local government has reached a final, definitive decision on what type of development the community will actually allow. The House-passed legislation would generally require a developer to pursue only one available appeal or one waiver before going to court.

III. The bill would bar federal courts from "abstaining" from hearing a case in favor of more appropriate State courts or administrative bodies, if the lawsuit involves no State law claims, and if a parallel proceeding is not pending in the State courts. In lieu of abstention, the bill would provide narrow opportunities for Deferral Courts to "certify" state law questions for resolution by the State courts.

IV. The bill could alter the law of taking, because the bill defines a "final decision" as "a definitive decision regarding the extent of permissible uses on the property that has allegedly been infringed or taken." As emphasized by the Department of Justice, this language could alter the established rule that a taking must be assessed in relation to the "parcel as a whole."

FEDERAL TAKINGS PREEMPTIONS OF HISTORIC & TRADITIONAL STATE & LOCAL AUTHORITY
Myths vs. Reality

Myth: *The legislation in no way changes substantive law or rights; it merely alters court jurisdiction and procedures.*

Reality: The bill represents an unprecedented effort to preempt local government handling of local land use issues and to preempt any local variations inconsistent with the national standard. The bill would dictate whether, for example, the local planning board or the zoning board of appeal can even hear a particular case. The bill would define what procedures a community can implement and would provide a wide opportunity for litigants to bypass local procedures altogether.

Myth: *This legislation would not change the standards and procedures governing lawsuits vs. cities and towns.*

Reality: H.R. 1534 allows developers to bypass local waiver and appeal procedures altogether. In addition, the legislation would allow developers to bypass state courts, which have the greatest experience with local land use matters.

H.R. 1534 would amend current federal law by adding a new section, which provides that to have a ripe property claim, claimants need not pursue local procedures for appeals or waivers where the local procedure "cannot provide the relief requested." A claimant thus can bypass these local procedures simply by contending in federal court that the local procedure does not provide the relief the claimant wants. For example, local governments typically are not authorized to award compensation to owners whose land use proposals are denied. The legislation would allow claimants to circumvent local waiver and appeal procedures completely and sue in federal court by requesting compensation and arguing that the local procedures "cannot provide the relief requested."

Myth: *The legislation imposes no new unfunded mandates, costs, or liabilities on local governments and taxpayers.*

Reality: H.R. 1534 would impose huge new burdens on local communities that want to avoid litigation.

H.R. 1534 purports to allow local officials to avoid immediate litigation where the disapproval or a land use proposal meets certain requirements, but this narrow "escape hatch" would impose huge and unprecedented burdens on local governments. To forestall litigation, local officials would be forced to specify the "use, density, or intensity of development" that would be approved, as well as "any conditions" for such approval. Although the bill language is not entirely clear, to meet this requirement local officials presumably would need to do far more than simply refer to applicable zoning ordinances. The bill's mandate to specify "any conditions" required for approval strongly suggests that local officials would need to develop a site-specific development plan that could pass muster under local law. In other words, the bill would require local officials to identify

with specificity how development of the property at issue could meet all local zoning ordinances and other local laws. Because preparation of an approvable development plan usually requires an intimate knowledge of the site and the proposed use, current law generally requires the developer to determine how its development proposal would meet local requirements. The bill's requirement that local communities do the developer's work to avoid litigation would impose tremendous and unfair burdens on local communities, and it would compel the community to guarantee approval.

- **Example**: *Suppose a local community denies an application for commercial development, but is willing to consider residential development. To avoid a lawsuit under the narrow "escape hatch" in H.R.1534, community officials could be forced to identify and specify in detail all conditions for residential development, including precise descriptions of street locations, sewer lines, water connections, open space, building set-backs, and all other amenities and conditions that would be required for the site. Generating this information for one development proposal would be expensive enough, but having to provide it for all development proposals simply to avoid litigation would be overwhelming for a small town.*

Myth: *During debate in the House, the bill managers made several amendments which significantly improve the legislation from the perspective of cities and towns.*

Reality: The change to the bill approved by the House of Representatives during the October 22, 1997, floor debate would further preempt traditional local authority. The amendments added by the full House make it even easier to bypass local citizens and elected leaders. The key House amendment adopted on the floor provides that property claims are ripe for federal court review as soon as the claimant "has applied for one appeal or waiver which has not been approved." In other words, developers would not even have to wait until local officials had decided the appeal or waiver request before suing in federal court. Under H.R.1534 as passed, a challenge to a local land use decision is ripe for federal court review as soon as the developer **submits** the appeal or waiver request. The threat of premature litigation would greatly shift the balance of power away from local officials to developers and other claimants.

Myth: *This legislation deals only with claims regarding federal rights and laws.*

Reality: This legislation has only one purpose: to preempt historic and traditional land use and zoning authority of local citizens in a community and their elected leaders, as well as the state laws enacted to ensure that residents and business leaders in cities and towns could determine the most appropriate developments, land uses, and zoning for their own communities.

Myth: *This legislation does not preempt traditional state and local jurisdiction.*

Reality: H.R. 1534 allows developers and other claimants to challenge local protections without waiting for local decisions on waiver requests or appeals. The legislation would amend current federal law to permit any claimant to bypass

traditional local procedures simply by contending in federal court that the local procedure does not provide the relief the claimant wants. In addition, the legislation would allow developers to completely bypass the state court system.

Myth: *This legislation would not eliminate existing federal law requirements that takings claimants exhaust all state and local remedies and appeals before filing suit against cities in federal court.*

Reality: H.R. 1534 allows developers and other claimants to challenge local protections without waiting for local decisions on waiver requests or appeals.

- **Example:** *Local zoning ordinances often prohibit the operation of adult bookstores and similar establishments within a specified distance (e.g., 1000 feet) of a school or church. Suppose a landowner applies to operate an adult bookstore next to a school, is denied permission under the applicable ordinance, and then submits a waiver request or an appeal. Under H.R. 1534 as passed, the owner can sue in federal court as soon as the waiver request or appeal is submitted, arguing that the appeal or waiver request "has not been approved." Faced with the prospect of expensive federal court litigation, local officials would feel pressured to approve such land use proposals at the expense of community values and the public good.*

Myth: *This legislation would not interfere with purely local issues.*

Reality: From the outset, H.R. 1534 has been designed to provide developers and other claimants with a "fast track" to federal court litigation at the expense of local planning procedures. The bill would foster a larger volume of wasteful and burdensome litigation against cities and towns. The changes in ripeness doctrine would lead to the filing of more lawsuits, result in the earlier filing of litigation, and expand the length of time required to resolve litigation. In the process, the bill would interfere with efforts to resolve land use issues in a cooperative fashion. The litigation generated by this bill would impose significantly higher litigation costs on local governments and local taxpayers.

Myth: *This legislation provides no special advantages for homebuilders and developers.*

Reality: The bill would grant special privileges to individuals asserting that restrictions on real estate development have violated their constitutional rights as compared with individuals asserting other types of constitutional violations. As amended in committee, the bill limits the restrictions on federal court "abstention" to cases involving "uses of real property." As a result, a developer claiming a taking because the local zoning board denied a variance application would have superior access to the Federal courts than, for example, litigants challenging the conditions of confinement in a juvenile detention facility, the denial of Medicaid benefits, or the denial of First Amendment rights.

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CHARTER RIGHT EXERCISED BY COUNCILLOR TOOMEY.

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Cal. 12

Consent Order #36 S-203

Cuncillors Born and Russell re: legislation pending that would diminish local land use and zoning authority and expand litigation and liability against cities and town in federal court.

In City Council March 16, 1998
CHARTER RIGHT EXERCISED BY
COUNCILLOR TOOMEY.

3/23/98

ORDER ADOPTED