



City of Cambridge

10.

IN CITY COUNCIL

September 21, 1992

COUNCILLOR WALSH

WHEREAS: The attached documentation regarding Cambridge Rent Control Board Case #RPZ-91009 concerns the property of owner/occupant of the residence at 25 Ware Street, Benedict F. Fitzgerald, Jr.; and

WHEREAS: A reading of same indicates not only a complicated and lengthy case but also one which has become extremely burdensome and draining to Mr. Fitzgerald, an elderly life long Cambridge resident. The case deserves special consideration; now therefore be it

ORDERED: That, in view of the above and in an effort to resolve the problem once and for all as quickly as possible and thereby alleviate the stress it has brought to Mr. Fitzgerald, that this City Council hereby empowers the City Manager to obtain an outside and independent arbitrator to judge the case and provide a creative and appropriate solution to what is obviously a very difficult problem. Further, that the City Manager be and hereby is requested to report back to the Council on October 5, 1992 with the status of progress in this regard.

CHARTER RIGHT EXERCISED BY COUNCILLOR WALSH

S. Russell

City of Cambridge

Chapter #4

MASSACHUSETTS

Move the quash

In City Council Oct 5 1992

YEA	NAY	ABSENT	PRESENT	
	✓			Mr. Ed Cyr
	✓			Mr. Francis H. Duehay
	✓			Mr. Jonathan S. Myers
✓				Mrs. Sheila T. Russell
✓				Mr. Walter J. Sullivan
✓				Mr. Timothy J. Toomey, Jr.
			✓	Mr. William H. Walsh
	✓			Ms. Alice K. Wolf
	✓			Mayor Kenneth E. Reeves
3	5	0	1	



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CHARTER RIGHT EXERCISED BY COUNCILLOR WALSH

J. M. Medeiros

- Pg. two - Sept. 14, 1992

Thereafter on August 19, 1992 the Board held a hearing which was adjourned for the purpose of policy considerations with Board member Connors voting to present the case for criminal prosecution.

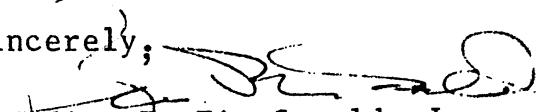
Please be advised that on August 5, 1991 the undersigned complied with the Board's earlier request that a property Registration be filed. When the aforesaid was filed the clerk placed her time stamp on a duplicate copy.

Historically 25 Ware St. was occupied by the FitzGerald family father, (supervisor of Music in the Cambridge schools for thirty years) his wife and daughter. The 26 foot wide structure was used as a rooming house. Any and all occupants lived upon the premises by family members and their attorney, several of whom are now deceased, along with all records. On Occassion two single rooms were rented by family members. Occassionally undocumented aliens and Israelie recruited pilots were housed free of charge during the crisis in Israel. More recently the house was temporarily occupied by A. Noval, K. Lwanga R. Winfrey, Gopal Mirad, and C. Brengel. All Resided elsewhere in India, Japan, S. Carolina and New York. Brengel resided at Harvard University and utilized Ware st. as the headquarters of the Harvard-Radcliffe Dance Club until his departure at the suggestion of Superior Court Judge O'Brien, prior to the property being placed under rent control.

Four rooms on the 3rd floor presently under the control of W. King, Esq. at the rent designated by the Board have been in litigation. No rent has been recieved because of a controversy due to the failure of the license commission to act on the Application of a Lodging House License. Also involved is litigation with contractors who were paid to erect a fire escape when they failed to perform alleging obstructionist tactics by the licensing commission.

On July 24, 1991 the date of the Board's ruling the sole occupant were the undersigned, his wife and daughter Tara. The premises have never been licensed as a lodging house by any family members.

Sincerely,


Benedict E. FitzGerald, Jr.

BF/a

COMMONWEALTH OF MASSACHUSETTS
APR 12 2 38 PM '92

CAMBRIDGE RENT
CONTROL BOARD

RPZ-91009
25 Ware Street

OBJECTIONS TO EXAMINERS REPORT

STATEMENT OF CASE

This is an objection to a Hearing Examiner's Findings and Recommendations following the filing of an application for a removal permit. The application seeks to remove four single rooms, comprising four individual units situated on the third floor of a single family residence at 25 Ware St., Cambridge from rent control. The rooms were formerly occupied by students. The building is owned and occupied by the Family of Benedict F. FitzGerald, Jr., life long residents of Cambridge. The application filed on April 6, 1992 stated that:

"the mandatory requirements of the building code and age of the owner (seventy-eight, (78) and the building (1870) make operation of the structure economically unfeasable."

A hearing was held on April 22, 1992 before David Leon, Examiner. No one appeared in opposition. Only the applicant provided testimony. The Examiner issued a report recommending that the application be denied.

STATEMENT OF FACTS

Benedict F. FitzGerald, Jr. (hereinafter, "the Applicant,") testified as follows:

1. That he has been a life long resident of Cambridge having been born thereat on May 23, 1914 and is now seventy eight (78) years of age. He is married to his wife Jean O'Neil and has a daughter Tara. All reside at 25 Ware St., and occupy the first and second floor of the single family row brick structure which is twenty-six (26) feet wide.

BENEDICT F. FITZGERALD, JR.

25 WARE STREET 876-1223
CAMBRIDGE, MA 02138

September 14, 1992

Jeanne M. Medeiros
Deputy Counsel
Cambridge Rent Control Board
831 Mass. Avenue
Cambridge, Mass. 02139

Re: 25 Ware St.
Cambridge, MA.

Dear Mls. Medeiros:

Reference is made to your letter of September 2, 1992 requesting information with respect to the single family residence at 25 Ware St. occupied by the FitzGerald family for the past quarter of a century and standing in the name of the Tara Ware St. Trust which you are now threatening to target for criminal prosecution.

The July 24, 1991 ruling by the Board that the FitzGerald property was a five unit rent-controlled lodging house was challenged by the undersigned on numerous grounds and is presently before the Appeals Court.

Additionally on April 7, 1992 in Case RPZ-91009 the undersigned filed an application For Removal pursuant to Chapter 8.44 alleging that:

"Mandatory requirements of the building code and age of owner (78) and building (1870) makes operation of structure economically unfeasible and undesirable."

Following the filing of the above David Leon Examiner held a hearing on April 22, 1992 which was unopposed. Thereafter written objections to the Examiner's report were filed on Aug. 31, 1992 with the Board which challenged a recommendation by Harvard University's Tenancy Advocacy Project, hereinafter "T.A.P. a project financed by the Harvard University to fight landlord's. (See Ltr. dated. 7-21-92 attached) At the same time constitutional objections were raised including reference to the 5th, 14th and 13th Amendments.

Thereafter the recent decision in Yee v. City of Escondido, 112 Sup Ct. 1522 (1992) was produced. There a unanimous decision authored by Justice O'Connor announced on April 1, 1992 analyzed rent control legislation where property owners were not required to rent their property. In ruling that there was no physical taking the court pointed out that "a different case would be presented were the statute to compel a landowner over objection to rent his property."

2. That the third floor has four single rooms and a bath. The rooms, two in front of the building and two in the rear are served by a central stairway as is described in the floor plan submitted as Exhibit One, attached. The four rooms were recently occupied at the rent set by the Board in SCF91064 until they were abandoned because of the applicant's inability to obtain a certificate of occupancy and a lodging house license because the structure lacked alternate egresses on the front of the building and an egress on the rear.

3. That contractors and iron workers were retained and it was determined that the installation and erection of two individuable suitable egresses with cantilever stairways to the ground would involve capital expenditure of approximately \$35,000.00 which funds were unavailable. Exhibit Two, a plan of a proposed fire escape/^{was} submitted as an example of a proposal that was not acceptable as it lacked the "cantilever" arrangement and would be an open invitation to unlawful entry with subsequent liability to the applicant. The frontfire-escape was unsatisfactory to neighbors, in that they threatened litigation to stop the project because it tended to mar the face of the stone building which they shared. That the applicant had taken steps to secure insurance coverage for the proposed "lodging house" which could not be protected under the typical "home owner's policy" then in effect and that if coverage were obtained it would approximate \$5,000.00 per annum.

5. That the hot air heating system was in excess of 25 years of age and its replacement with a gas fired hot water system had been recommended to provide adequate heat to the third floor of the 1870 structure.

6. ThAT the applicant at seventy-eight (78) years of age is now retired and is unable to meet the rigors required in the ope ration of a licensed lodging house, bearing in mind the litigious nature of his most recent occupants who have emptied his bank account and put him close to bankruptcy.

SPECIFIC OBJECTIONS TO REPORT

The Examiner's Report and the Recommendations thereto are objected to on the following grounds:

1. The findings of fact contain statements and ommissions of a material nature and are not supported by substantial evidence. (The applicant was the sole person providing testimony at the hearing. See Pgs. 1-60, of the hearing on April 22, 1992 transcribed by Robert J. Hezzelwood, Court Reporter.) attached hereto and incorporated herein by reference.

2. The testimony of the applicant that he is seventy-eight (78) years of ages, that he desires to retire and is unable to meet the rigors required in the operation of a licensed lodging house is uncontradicted, as are the other allegations set forth in Paragraphs one (1) thru five (5) supra.

3. The Examiner improperly attempts to have a determination of the findings of fact upon the findings of the SCF 91062. The SCF 91062 was issued on June 7, 1991 and upon the flawed testimony of a transitory witness at the 1991 hearing who was frequently absent from the area and present in Europe and Asia during the period that he ventured an opinion as to the residence of the other occupants of 25 Ware St., during his absence. Moreover, SCF 91062 is now in The Appeals Court, and any findings and conclusions therein lack finality, and as the Examiner, himself pointed out when he restricted consideration of the earlier hearing at the April 22, 1992 hearing at Tr. Pg. 19 "I don't want to go into that" (meaning the earlier hearing.)

and again on Tr. Pg. 19, line 16 when the Examiner warned the applicant: "This is a different proceeding and you're asking for something different.."

4. The Examiner has failed to consider a written recommendation advanced by the Tenancy Advocacy Project, (herinafter, "T.A.P.") a project financed BY THE Harvard Law School for the protection of Tenants. (See Ltr. dtd. 7-21-92 attached, and incorporated herein by reference.) to the effect that the applicant for removal should be entitled to the same treatment under Rent Control Regulation 13-01 (ee) which allows an owner to rent up to two rooms to roommates without considering them rental units and without changing the status of the owner-occupied unit under the Rent Control Act and Removal Permit Ordinance. Therefore, if this interpretation is correct, the Applicant would be entitled to discount two of the rental units so that he is left with an owner-occupied three unit building exempt from rent control.

5. Constitutional Objections. The Applicant contends that at 78 years of age he can not be forced into the operation of a licensed lodging house business or in fact any other business in the first place as it is constitutionally offensive for the Examiner or the Board to attempt to do so.

While it maybe desireable to provide below market housing to the thousands who are annually being attracted to the City of Cambridge because the City has delegated its responsibility to provide housing to the small property owners of Cambridge the Courts have recognized that there must be some control for the protection of the small property owner. The latter can not be constitutionally forced to carry on a business that is either unproductive, or is perpetual without regard to his age or infirmness.

Originally, rent control was enacted for a limited period. Indeed, former Chief Justice Hennessey observed that a time limitation was required for rent control to be constitutional. Mayo v. Boston Rent Control Admr., 365 Mass. 575, 314 N. E, 2d 118, 125 N.3 (1979), citing Block v. Hirsch, 256 U. S. 135, 157 (1921).

In contrast to c. 842 of the Acts of 1970, the present law (c. 36 of the Acts of 1976) has no expiration date and therefore is constitutionally infirm. Mayo, supra; Block, supra. Despite this, rent control has continued unabated in Cambridge.

The 5th Amendment of the U. S. Constitution, which is made applicable to the states by the 14th Amendment, prohibits the taking of private property for public use without payment of compensation.

Part 1, Article 10 of the Massachusetts constitution provides that "each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws" and therefore "no part of the property of an individual can with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." *1/

The Examiner proposes that the applicant's constitutional guarantees be violated in a number of ways, including but not being limited to the following:

The owner of a controlled unit, cannot demolish it, and cannot use the units for any other purpose than as a controlled unit.

*1/ The right to acquire, possess and sell property is a "natural and essential and inalienable right" reserved for all Massachusetts citizens under Part 1, Article 1 of the Massachusetts constitution.

The Thirteenth Amendment, in relevant part, states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. U. S. Const. amend. XIII Sl.

While the Thirteenth Amendment was enacted to combat the evils of slavery, judges have recognized that the amendment by its terms proscribes less obvious or overt forms of involuntary servitude. See Memphis v. Greene, 451 U. S. 100, 135 (1981) Marshall J. dissenting; Nash v. City of Santa Monica, 688 P. 2d 894, 37 C 3rd. 97, 207 Cal. Rptr. 285, appeal dismissed 105 S. Ct. 1740, 470 U. S. 1046, 84 L. Ed. 2d. 807 (1984) (Mosk J., dissenting). There appears to be a total absence of credible authority in Anglo Saxon jurisprudence to the effect that a 78 year old disabled veteran can be required to apply for and operate a lodginghouse. The single precedent seems to be in connection with the operation of Nazi Prison Camps where slave laborers were compelled to work until the prisoner dropped.

Indeed the Examiner would require the applicant to maintain and repair third floor units, and to otherwise expend resources in connection with the ownership of the unit, without allowing the owner a fair net operating return for his labor. The very wrong addressed by the Thirteenth Amendment. See Nash, supra, at 294 (Byrd, Chief Justice, concurring and dissenting.)

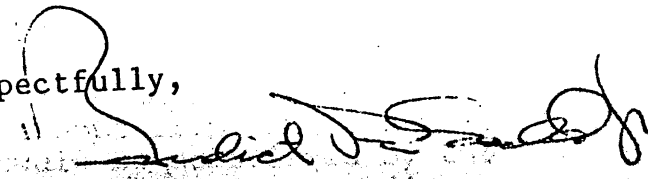
I would acknowledge that Nash's practical ability to cease being a landlord has been burdened. Further, inasmuch as the duties of a landlord necessarily involve the rendering of personal services, I agree with Justice Mosk that the right to cease being a landlord is constitutionally protected. (Cites omitted) The freedom to withhold personal services is a corollary of the basic freedom to pursue and obtain happiness by engaging in the common occupations of the community. (Cites omitted).

Such a proposition appears to have been outlawed in Yee v. City of Escondido, U. S. Law Week, Vol 60, No. 38, 60 LW 4301. There a decision by Justice O'Connor announced on April 1, 1992 analyzed rent control legislation involving a trailer park where property owners were not required to continue to rent by either the city or the state. In ruling that there was no physical taking the court pointed out that "A different case would be presented were the statute to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy,"

Since the recommendations of the Examiner involve a physical and regulatory taking of the applicant's property; changes in the physical structure of the building necessitating the application of excessive funds for capital improvements with no probability of a future reasonable rate of return; and all of which is objectionable to the property owner who desires to retire, the recommendations should be rejected and the application for removal should be granted by the Board.

Aug. 12, 1992

Respectfully,


Benedict F. FitzGerald, Jr.
Trustee, Tara Ware St. Trust
Applicant.

SERVICE:

I certify that a copy of the above objections were served upon the Examiner and the Board by personal delivery of the above to each at their offices and to TAP Austin Hall, 202 Harvard Law School, Cambridge 02138 at 831 Mass. ave., Cambridge, on Aug 12, 1992.
all on August 12, 1992.

Benedict F. FitzGerald, Jr.

 TAP
TENANT ADVOCACY PROJECT

Austin Hall 202
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-4394
FAX (617) 495-1110

July 21, 1992

David Leon, Esq.
Assistant Counsel
Cambridge Rent Control Board
831 Massachusetts Avenue
Cambridge, MA 02139

Re: 25 Ware St., RPZ-91009

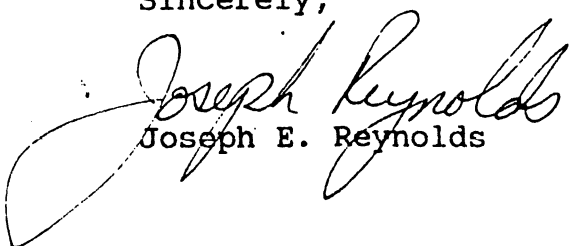
Dear Mr. Leon:

In reviewing your report for the 25 Ware St. removal permit hearing, we noticed that Regulation 13-01(ee) was not discussed. It appears to us that the regulation applies here and may provide the most appropriate vehicle for resolving this case.

We interpret Regulation 13-01(ee) to mean that an owner may rent up to two rooms of his unit to roommates without considering them rental units and without changing the status of the owner-occupied unit under the Rent Control Act and Removal Permit Ordinance. Therefore, if this interpretation is correct, Mr. Fitzgerald would be entitled to discount two of the rental units so that he is left with an owner-occupied three unit building exempt from rent control.

We believe that this issue should be considered by the Rent Control Board and request that a memorandum regarding its applicability be prepared for the Board for its hearing on August 19, 1992. I would be happy to discuss this matter with you or any of the Rent Control Board staff if you believe that would be appropriate.

Sincerely,


Joseph E. Reynolds

cc: Judith A. Stalus, Esq.
Benedict Fitzgerald, Esq.



City of Cambridge

NC
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IN CITY COUNCIL

Councillor Walsh

September 21, 1992

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WHEREAS: A reading of same indicates not only a complicated and lengthy case but also one which has become extremely burdensome and draining to Mr. Fitzgerald, an elderly life long Cambridge resident. The case deserves special consideration; now therefore be it

ORDERED: That, in view of the above and in an effort to resolve the problem once and for all as quickly as possible and thereby alleviate the stress it has brought to Mr. Fitzgerald, that this City Council hereby empowers the City Manager to obtain an outside and independent arbitrator to judge the case and provide a creative and appropriate solution to what is obviously a very difficult problem. Further, that the City Manager be and hereby is requested to report back to the Council on October 5, 1992 with the status of progress in this regard.

(ATTACHMENT)



CAMBRIDGE CITY COUNCIL

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

(617) 349-4280

FAX (617) 349-4287

William H. Walsh
City Councillor

BY HAND

September 17, 1992

MEMORANDUM:

TO: D. Margaret Drury
City Clerk

FROM: David Noonan, for *David Noonan*
Councillor Walsh

ATTENTION: Mrs. Donna Lopez

RE: Council Order (NON-CONSENT AGENDA)
September 21, 1992

Councillor Walsh requests that the enclosed Council Order (with attachments) regarding the Rent Control Case which concerns the residence at 25 Ware Street be included in the NON-CONSENT AGENDA for the Council Session on Monday, September 21, 1992.

Your customary courtesy and cooperation in this regard are appreciated.

(ENCLOSURE)

CC: Councillor Walsh



City of Cambridge

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NON-CONSENT ORDER #10

F-42

Councillor Walsh re: Cambridge Rent
Control Board Case #PRZ-91009.

10/5/92 Referred to the
City Manager for
mediation
Copy sent to City Mgr
10/7/92 @

In City Council,

September 21, 1992

Charter Right by Councillor
Walsh