



CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

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LEGAL COUNSEL

November 4, 1988

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

Re: Building Moratorium

Dear Mr. Healy:

By order of May 23, the City Council has requested my opinion on the legality of a "moratorium of one year on building and demolition of the Harvard Motor Inn and the Cherry, Webb and Touraine Building."

A moratorium is a form of "emergency", "interim" or "stopgap" zoning regulation, which is allowable in certain circumstances. The law generally is stated as follows in 101A C.J.S., Zoning and Land Planning, s. 16 (1979):

"Although a landowner has a right to expect that zoning regulations shall have a fair degree of permanency... an emergency ordinance, with respect to building and use restrictions, to be enforced pending investigation and enactment of a permanent zoning ordinance, may be valid. The main purpose of an emergency zoning regulation is to temporarily preserve existing land uses and maintain the status quo."

See also 82 Am. Jur. 2d, Zoning and Planning, s. 72 (Interim or "stopgap" Zoning) (1976); 1 Rathkopf, Law of Zoning and Planning, Chapter 11.

The leading moratorium case in Massachusetts is Collura v. Town of Arlington, 367 Mass. 881 (1975). There, the town of Arlington adopted an amendment to the zoning by-law which imposed a two-year moratorium on the construction of apartment buildings in certain areas of the town. The amendment stated as follows:

"Section 9A. Restrictions in Moratorium District #1.

"In Moratorium District #1, no new building or part thereof shall be constructed for use as an apartment house or for apartments or for any use in an Industrial District in Moratorium District #1 for a period of two years from the date of approval of this section by the Massachusetts Attorney General's office, or September 1, 1975, whichever date is the longer period of time. Whereas the Town of Arlington is in the process of updating its Comprehensive Plan, it is desired to protect certain parts of the Town from ill-advised development pending the final adoption of a revised Comprehensive Plan and a moratorium on the issuance of building permits for the construction of apartment houses in a Moratorium District in excess of two families is hereby in effect for a period of time described above."

The Court held as follows:

The town had authority under G.L. c. 40A, ss. 2 and 3 to enact the moratorium - an "interim zoning provision" - for a two-year period, in view of the fact that the town was in the process of reviewing its comprehensive plan.

"Interim zoning can be considered a salutary device in the process of plotting a comprehensive zoning plan to be employed to prevent disruption of the ultimate plan itself." Id., 886. "The orderly process of interim zoning allows the issues to have the benefit of full public debate, at the same time protecting the affected area from unwise exploitation prior to agreement and formulation of new zoning restrictions which may be

more restrictive." Id., 887. "We cannot say that two years is an unreasonable length of time for the town to undertake and complete a thorough review of its comprehensive plan." Id., 888.

The Collura case was cited with approval in Sturges v. Town of Chilmark, 380 Mass. 246 (1980), which upheld a town "rate of development" by-law which limited the issuance of building permits for residential construction to one-tenth of the lots in a "subdivision" in the year the lots are subdivided and a further one-tenth of those lots in each of the subsequent nine years. The Court stated, at pp. 252-253:

We hold that a municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.

I draw the following conclusions:

1. If a moratorium is adopted, it should be done by means of an amendment to the Zoning Ordinance, as was done in Collura and Sturges.
2. The test of the validity of any zoning amendment is "whether there is any substantial relation between the amendment and the furtherance of any of the general objects of the enabling act." Collura v. Town of Arlington, 367 Mass. at 885. In my opinion, a moratorium would be upheld only if it were designed to preserve the status quo in a particular area or areas of the city while city officials conduct studies related to possible zoning amendments. The moratorium would have to be reasonable in light of all the facts. For example, in Collura, the Court noted that, "There was evidence that in the last decade almost sixty-eight percent of all dwelling units constructed in Arlington were

apartment units, as compared to seventeen percent in the previous decade, so that the restriction was aimed at an interim solution to a matter of genuine planning significance." Id at 887. And the period of the moratorium would have to be a reasonable one in light of the studies being undertaken.

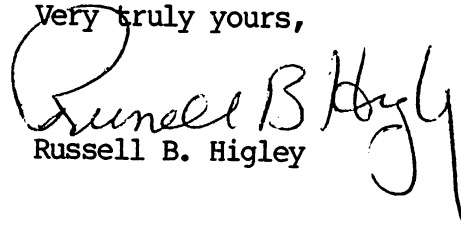
3. I do not believe that a moratorium which applied to only two projects would be held valid, because it would be regarded as a form of "spot zoning." See 18 MPS, Randall and Franklin, Municipal Law, s. 614 (1982); 82 Am. Jur. 2d, Zoning and Planning, s. 78 (1976). It would also violate the uniformity principle contained in G.L. c. 40A, s. 4:

Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.

4. If a moratorium is adopted, the City should be careful to ensure that it does not constitute a "taking" or "inverse condemnation" of any landowner's property. This is particularly true after the decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US , 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), where the U.S. Supreme Court held that, under the Just Compensation Clause of the Fifth Amendment, where the government has "taken" property by a land-use regulation, the landowner may recover damage for the time before it is finally determined that the regulation constitutes a "taking." Unfortunately, First English does not cast additional light on the question of what constitutes a "taking" and thus is silent on the constitutionality of moratoriums. Justice Stevens' dissent suggests that, in testing whether there is a taking, it is important to assess how much

of the property right is affected by the regulation, how much of the total area of property is regulated, and how long the regulation is in effect. 96 L. Ed. 2d at 273. And, as suggested in paragraph 2 above, we must also examine the City's reasons for imposing the moratorium.

Very truly yours,


Russell B. Higley

RBH/jb



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
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EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

November 14, 1988

To the Honorable, the City Council:

With respect to Awaiting Report Item No. 9, enclosed please find a copy of the opinion of Russell B. Higley, City Solicitor, relative to the issue of a one-year moratorium on the building and demolition of the Harvard Motor Inn and the Cherry, Webb & Touraine Building.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert W. Healy", is written over a horizontal line.

Robert W. Healy
City Manager

RWH/mbf
Enc.

Agenda Item No. 1 S-688

Re: response to Awaiting Report Item 9 on the
issue of a one-year moratorium on the building
& demolition of the Harvard Motor Inn & the Cherry,
Webb & Touraine Bldg.

In City Council,

November 14, 1988

11-14-AA

Placed on File.