



CITY OF CAMBRIDGE

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October 31, 1995

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

Re: *Order No. 2 of June 19, 1995--Portland Stone Ware Litigation*

Dear Mr. Healy:

In response to the above-referenced Awaiting Report Item please find attached a memorandum from Attorney Scott Lewis summarizing the status of existing litigation between the City and the Portland Stone Ware Company.

Very truly yours,

Russell B. Higley
Russell B. Higley

MEMORANDUM

To: Members of the City Council
Robert Healy, City Manager
Donald Drisdell, Deputy City Solicitor
CITY OF CAMBRIDGE

From: Scott P. Lewis
PALMER & DODGE

Re: Portland Stone Ware

Date: October 31, 1995

You have asked for a status report on the pending litigation involving Portland Stone Ware. Portland is currently involved in three separate civil actions with the City or City officials.

1. **The Federal Action.** In April 1994 Portland filed *Portland Stone Ware Co., Inc. v. City of Cambridge et al.*, Civil Action No. 94-10701-DPW (the "Federal Action") in federal district court. Portland named the City, the City Manager, and eight members of the City Council as defendants. Portland has asserted a number of claims purportedly arising out of (i) the City's enforcement of the "Do Not Enter" restriction on Middlesex Street, barring all vehicles from entering the street during school crossing hours; (ii) the City's proposal to institute a nighttime truck ban on Middlesex Street; (iii) the City's threat to install a "bollard" on the sidewalk at the intersection of Pemberton and Middlesex Streets, to prevent trucks from driving over the sidewalk; and (iv) miscellaneous investigative and enforcement actions. Portland alleges that the defendants have unlawfully deprived Portland of its right to use its property and have violated the U.S. Constitution and the federal Surface Transportation Assistance Act. Portland seeks both injunctive relief and damages from each of the defendants, including the individual City Councilors named in its complaint. The federal court entered an Abstention Order in June 1994, staying all further action pending final resolution in the Massachusetts state courts of (a) the lawfulness of a ruling by the Massachusetts Highway Department ("MHD") that federal law requires municipalities to allow heavy commercial trucks to gain access to every business location at all times; and (b) Portland's application for a permit to "move" its curb cut. The court's stay remains in effect.

2. **The MHD Appeal.** In June 1994, following entry of the Abstention Order, the City and Commissioner Bersani brought suit in Middlesex Superior Court against the Commissioner of the MHD and Portland. *City of Cambridge v. Bedingfield*, Civil Action No. 94-3397. In this suit, the City has challenged the ruling by MHD that federal law requires municipalities to allow heavy commercial trucks access to every business location at all times. Commissioner Bersani has also sought to prevent trucks entering or exiting Portland's property from driving across the

City's curb and sidewalk. The City's appeal from the MHD ruling was expected to come before the Court on a motion for summary judgment last year, but the Commissioner of the MHD obtained an advisory opinion from the Federal Highway Administration that delayed presentation of the merits of the dispute. We expect to put the City's appeal, and Commissioner Bersani's enforcement action, before the Court within the next ninety days.

In the MHD Appeal, Portland has asserted three counterclaims against the City itself. Two of these counterclaims simply seek rulings in Portland's favor on the questions of truck access and use of the sidewalks and curbing. A third counterclaim is conditional and seeks to bring Portland's entire federal case into the state court action if the Federal Action is dismissed without prejudice.

3. **The Zoning Appeal.** The third action, a zoning appeal, was brought by Commissioner Bersani against the individual members of the City's Board of Zoning Appeal ("BZA") and Portland in September 1994. *Bersani v. Miller*, Civil Action No. 94-5129. Commissioner Bersani is appealing the approval by the BZA of Portland's application to "move" its curb cut, claiming that the BZA's decision is contrary to the City's Zoning Ordinance and to the Massachusetts Zoning Act.

Portland has asserted four counterclaims against Bersani in the Zoning Appeal, alleging that he has (i) acted under color of law to deprive Portland of the use of its property, purportedly in violation of 42 U.S.C. § 1983; (ii) interfered with Portland's right to use its property by means of threats, intimidation, or coercion, purportedly in violation of G.L. c. 12, § 11I; (iii) engaged in an unlawful civil conspiracy with the members of the City Council; and (iv) intentionally interfered with Portland's contractual and advantageous business relations.

Discovery is currently taking place in the Zoning Appeal. A trial of Commissioner Bersani's appeal is scheduled to begin on February 26, 1996, to be followed, if need be, with a trial on Portland's counterclaims.

Portland has recently asked the state court to consolidate the MHD Appeal with the Zoning Appeal. We have opposed the motion to consolidate. A ruling is expected imminently.

The City has urged the state court to resolve the pending claims in a series of separate rulings, beginning with the appeal of the MHD access ruling and the appeal of the BZA's decision, and only later reaching Portland's counterclaims, if they remain viable. It is our hope that the underlying questions of (a) whether the City may restrict Portland's trucking operations by enforcing the existing "Do Not Enter" restriction and the proposed nighttime truck ban, and (b) whether Portland has a right to "move" its curb cut, will be resolved by the state trial court within the next several months. We cannot, however, assure the Council that the trial court will act that quickly, or that appeals will not follow from whatever outcome is reached.



EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

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Deputy City Manager

CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300
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November 6, 1995

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 23, regarding an update on the lawsuit with Portland Stoneware, received from City Solicitor Russell B. Higley.

Very truly yours,

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

Robert W. Healy
City Manager

RWH/mec
attachment

Consent Agenda #20

S 388

Relative to Awaiting Report Item
Number Twenty-three regarding an
update on the lawsuit with Portland
Stoneware.

*for original order
See 1995- City Manager
Requests # 262.*

In City Council November 6, 1995

*Tabled by Councilor
Born*