

# CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139  
Tel. 498-9011

EXECUTIVE DEPARTMENT  
JAMES L. SULLIVAN  
City Manager

May 18, 1981

To the Honorable, the City Council:

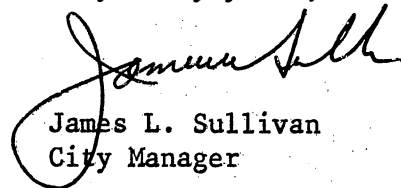
Please be advised that I have appointed the following persons as Constables for a three year term effective the first Monday in January, 1981 -

Gordon Murray, 6 Craigie Circle, Cambridge - With Power

Stephen Powers, 28 Cedar Street, Cambridge - Without Power  
(Bronc's Inc.)

Kevin Roche, 17 Sunset Ave., N. Reading - Without Power  
(Bronc's Inc.)

Very truly yours,



James L. Sullivan  
City Manager

JLS/b

Agenda # 4

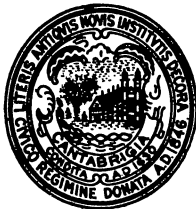
Appointment of three constables.

In City Council,

May 18, 1981

5-18-81

Placed on File



# CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139 • (617) 498-9020

## LAW DEPARTMENT

RUSSELL B. HIGLEY  
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CHARLES A. WATSON  
LEGISLATIVE AGENT

May 8, 1981

Mayor Francis H. Duehay  
City Hall  
Cambridge, MA

Re: Taxation of Land of Non-profit Agencies

Dear Mayor Duehay:

You have requested my opinion regarding the following Order dated March 9, 1981:

That the City Manager be and hereby is requested to cause home rule legislation to be prepared for submission to the General Court which would allow the City of Cambridge to limit the location and expansion of non-profit agencies in the City of Cambridge by requiring that the City Council approve in advance by majority vote the removal of any land from the tax rolls.

Real property situated in Massachusetts, unless expressly exempt, is subject to property tax. General Laws, c. 59, §2. The following property is exempted from tax:

...real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization...for the purposes of such other charitable organization...; and real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase;

provided, however, that:- (proviso omitted)

General Laws, c. 59, §5(Third).

"Charitable organization" is defined as follows:

... (1) a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth, and (2) a trust for literary, benevolent, charitable, scientific or temperance purposes...

General Laws, c. 59, §5(Third).

I assume that the Order, in its use of the term "non-profit agencies" intends to cover "charitable organizations" as defined above.

The question posed by the Order may be stated as follows:

May the General Court, having exempted from the property tax land belonging to charitable organizations, limit this exemption with regard to land in Cambridge by requiring that such organizations wishing to purchase land there obtain the approval of the Cambridge City Council?

Would such legislation violate the Massachusetts Constitution, Part II, c. 1, §1, art. 4, wherein the General Court is given a power

to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth....

Would such legislation violate Article 10 of the Declaration of Rights of the Massachusetts Constitution, which states:

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....

Would such legislation violate the equal protection or due process clause of the Fourteenth Amendment of the United States Constitution?

#### DISCUSSION

At the outset, I note that the proposed Order is somewhat similar to St. 1979, c. 565, as amended by St. 1980, c. 387, which provides:

Notwithstanding the provisions of section three of chapter forty A of the General Laws, the city of Cambridge is hereby authorized to regulate and restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by a religious sect or denomination, or by a nonprofit educational corporation within all residentially zoned districts which require a lot area of one thousand two hundred square feet or more per dwelling unit.

I also note that a colonial law of 1650 exempted from taxation the revenues and lands of Harvard College, not exceeding the value of £500 per year. This exemption is confirmed in the Massachusetts Constitution, Pt. 2, c. 5, §1, art. I, and, therefore, could not be revoked, at least without amending the Constitution. See Hardy v. Inhabitants of Waltham, 24 Mass. 108 (1828); Harvard College v. City of Boston, 104 Mass. 470 (1870). The proposed Bill, however, would not affect this exemption.

In my opinion, a good case can be made that the proposed Bill is constitutional, if it is held that the right involved, i.e., the right to acquire land, is not a "fundamental" right which triggers strict scrutiny under the equal protection clause. If the right is found to be fundamental, then I have grave doubt as to the Bill's constitutionality.

Since this is not a tax measure, it is not subject to the requirement in the Massachusetts Constitution, Part II, c. 1, §1, art. 4, that taxes be "proportional and reasonable." It would, however, be subject to the protection of the due process clause of the Fourteenth Amendment, and of art. 10 of the Declaration of Rights of the Massachusetts Constitution. It must also meet the test of the equal protection clause of the Fourteenth Amendment.

CONSTITUTIONAL STANDARDS

If the proposed legislation were enacted into law, by what standards would it be judged? The law was summarized in Commonwealth v. O'Neal, 367 Mass. 440, 447-449 (1975), as follows:

It is generally well settled that State Legislatures are free to enact legislation as long as such legislation is not patently arbitrary or capricious.... Commonwealth v. Henry's Drywall Co. Inc. 366 Mass. 539, 541-542, 543-544 (1974)...A statute duly enacted has presumptive validity and ordinarily will not be struck down if it "bears a reasonable relation to a permissible legislative objective." Pinnick v. Cleary, 360 Mass. 1, 14 (1971). In the ordinary case, such a statute will not be found to run afoul of the due process clause of the Fourteenth Amendment unless no state of facts may reasonably be conceived to justify it. Colella v. State Racing Commn. 360 Mass. 152, 156 (1971).

Where fundamental constitutional rights are at stake, however, this general rule does not apply. In such a case the burden is reversed, Selectmen of Framingham v. Civil Serv. Commn. 366 Mass. 547, 555 (1974), and the State must demonstrate that the statute in question serves a compelling governmental interest. Commonwealth v. Henry's Drywall Co., Inc., supra. Selectmen of Framingham v. Civil Serv. Commn., supra. Roe v. Wade, 410 U.S. 113, 155 (1973)...In addition, the State must also show the absence of less restrictive means to reach its compelling goal. Roe v. Wade, supra....Thus, if there is an alternative means by which the State can fulfil its purpose,

having less adverse effects on fundamental constitutional rights, the State is required to use the less restrictive, more precisely adapted means. Fiorentino v. Probate Court, 365 Mass. 13, 19-20 (1974). "Statutes affecting constitutional rights must be drawn with 'precision,' NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson... (394 U.S.) at 631 (1969)." Dunn v. Blumstein, (405 U.S. 330, 343 (1972)).

In the past, many rights guaranteed by the Constitution have been held to be fundamental, either in a due process or an equal protection context. These include freedom of speech and the press, Lovell v. Griffin, 303 U.S. 444, 450 (1938);...freedom of religion and association, Bates v. Little Rock, 361 U.S. 516, 524 (1960);...and the rights of privacy, Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring);...procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); interstate travel,...Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974); and voting, Reynolds v. Sims, 377 U.S. 533 (1964),... Although there is no precise standard for determining what rights are fundamental, we are guided by what is "explicitly or implicitly guaranteed by the Constitution." San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

I note that the right to own or acquire property does not appear in the list of "fundamental" rights in Commonwealth v. O'Neal, supra. Nor does it appear in the discussion of rights which trigger strict scrutiny under the equal protection clause in 16A Am. Jur. 2d, Constitutional Law, §750 (1979).

It is clear that "the enjoyment of private property may be subordinated to reasonable regulations that are essential to the peace, safety, and welfare of the community" and that such regulations do not infringe a fundamental right. Consolidated Cigar Corp. v. Dept. of Public Health, 372 Mass. 844, 851 (1977) (upholding health regulations as applied to property of tobacco company); Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N. D. Ind. 1973), aff'd 491 F.2d 161 (upholding ordinance prohibiting display of "For Sale" signs in residential areas; right to sell property not fundamental); People v. Byers, 90 Cal. App. 3d 149, 153 Cal. Rptr. 249 (1979) (regulation of subdivision of lands not deprivation of fundamental liberty); Central Sec. Nat. Bank of Lorain County v. Royal Homes, Inc., 371 F. Supp. 476 (D. Mich., 1974) (right to alienate one's property not fundamental right); 16A Am. Jur. 2d, Constitutional Law, §§397, 398 (1979).

Most of the cases in this area involve the regulation of the acquisition, use or selling of property, either through zoning or in some other way. I have not found any case in which a governmental body attempted to deny to any person the right to purchase property, and I am not prepared to say that a Court would not say that this infringed a "fundamental right." See Lynch v. Household Finance Corp., 405 U. S. 538, 552 (1972):

...The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account....

See also Rogers v. Okin, 478 F. Supp. 1342, 1366 (D. Mass., 1979).

In San Antonio School District v. Rodriguez, 411 U. S. 1, 31 (1973), the Court stated:

The Court...does not pick out particular human activities, characterize them as "fundamental," and give them added protection. To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. (emphasis in original)

#### EQUAL PROTECTION

The following discussion is based on the assumption that the right to acquire property which is here infringed is not "fundamental." Because the proposed Bill is similar to a tax measure, I have used many tax cases by way of illustration.

It is well settled that the U.S. Constitution, in securing the equal protection of the laws, does not prohibit legislation which is limited as to the territory within which it is to operate. Holt Civic Club v. Tuscaloosa, 439 U. S. 60, 70-71 (1978); Begley v. Board of Appeal of Boston, 349 Mass. 458, 208 N.E. 2d 799 (1965); Opinion of the Justices, 341 Mass. 760, 781 (1960). In Opinion of the Justices, the Court stated at p. 781:

The equal protection clause of the Fourteenth Amendment does not prevent reasonable classification of subjects of legislation. It also does not preclude legislative action providing treatment of problems in one community, different from the treatment of those problems in another community, in a manner having a reasonable relationship to the objects of the legislation. Different treatment is justified if the conditions in these communities differ sufficiently so as fairly to give rise to the legislative belief that such different treatment is desirable in the public interest, and if the legislation operates equally within each geographical area with respect to persons simi-

larly situated. See Brest v. Commissioner of Ins. 270 Mass. 7, 14-19; Goodale v. County Commrs. of Worcester, 277 Mass. 114, 149-150; Connor v. Metropolitan Dist. Water Supply Commn. 314 Mass. 33, 37-38; Century Cab Inc. v. Commissioner of Ins. 327 Mass. 652, 660-665; Doherty v. Commissioner of Ins. 328 Mass. 161, 164;...

The Legislature has broad powers in granting tax exemptions in the execution of proper public purposes. Thompson v. Chelsea, 358 Mass. 1, 8 (1970) and cases cited. "The public purpose is of controlling significance in construing an express exemption from taxation." (citations omitted). Board of Assessors of Newton v. Pickwick, Ltd., Inc., 351 Mass. 621, 626 (1967), where it was held that the tax exemption of property of the MBTA extended to real estate of the MBTA used by a lessee solely in the conduct of a private business for profit. The Court concluded at p. 626:

We cannot say that the exemption provided by St. 1949, c. 572, §6, does not primarily benefit the public by alleviating some of the authority's financial burdens even though the property was operated by a lessee in the pursuit of its own ends. The exemption was reasonably incident to the plan adopted by the Legislature designed to remove the crushing financial burden which had fallen upon the authority. Cabot v. Assessors of Boston, 335 Mass. 53, 64-65, and cases cited. That such an exemption would place one business in a favored position is not determinative of the issue of constitutionality. Boston Fish Mkt. Corp. v. Boston, 224 Mass. 31, 34-35.

The Legislature also has broad powers in allocating financial burdens among municipalities. City of Springfield v. Board of Assessors, Mass. Adv. Sh. (1979) 1358, 1363; Thompson v. Chelsea, supra, 358 Mass. at 8. Thompson v. Chelsea held that St. 1909, c. 490, Part I, §52, which exempted Chelsea, Revere and Winthrop from Suffolk County taxes, thus leaving the county costs to be borne wholly by Boston, was constitutional.

If the proposed Bill were a tax measure, it would be subject to the following test, stated in Frost v. Commissioner of Corporations & Taxation, 363 Mass. 235, 248 (1973):

"A classification by a Legislature of property and persons for the purpose of taxation is not violative of the equal protection clause of the Fourteenth Amendment so long as any basis of fact can be reasonably conceived showing that the distinction upon which it rests has a fair and rational relation to the object sought to be accomplished by the enactment, and so long as, the classification being valid, the State deals equally with all the members of the same class."

In my opinion, the same test is applicable to non-tax cases and the proposed Bill can be defended under it. The class here is charitable organizations about to purchase land in Cambridge. The object sought to be accomplished is to stop the erosion of the Cambridge tax base. It certainly can be shown that the distinction "has a fair and rational relation to the object sought to be accomplished..." Finally, the Bill "deals equally with all the members of the same class."

If it is objected that the Legislature has no right to single out charitable organizations in Cambridge, when other cities may have property tax problems which are just as serious, the answer is that

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think....Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Williamson v. Lee Optical, 348 U. S. 483 (1955).

"Legislative classifications need not be perfect in order to survive a challenge on equal protection grounds." Commonwealth v. Petralia, 372 Mass. 452, 458 (1977).

The State's freedom in designing a tax system has also been recognized outside Massachusetts. See, e.g., Association of Bar of City of New York v. Lewisohn, 34 N.Y. 2d 143, 356 NYS 2d 555, 313 N.E. 2d 30, 37 (1974):

...The State has great freedom in selecting the subjects of taxation and in granting exemptions and neither the due process clause nor the equal protection clause imposes any rigid limitations upon the State's power to devise reasonable tax policies. Lehnhausen v. Lake Shore Auto Parts, 410 U. S. 356, 359...

Lewisohn held that a New York statute which permitted local governments to terminate exemptions for nonprofit organizations, other than those conducted exclusively for religious, educational, charitable, hospital or cemetery purposes, did not violate either the due process clause or the equal protection clause of the Federal and New York Constitutions. The New York Legislature in 1971 (the year the statute was adopted) "found that 30% of the total assessed valuation of real property in the State, and one third in (New York City), was then exempt from taxation, and that the continuous removal from the tax rolls of taxable real property was imposing a particular hardship on local governments and increasing the burden of additional local taxation..." American Bible Society v. Lewisohn, 40 N.Y. 2d 78, 351 N.E. 2d 697, 701 (1976).

In American Bible Society v. Lewisohn, supra, the Court of Appeals of New York again upheld the constitutionality of the statute, stating: (351 N.E. 2d at 701)

...The Legislature's articulated desire to stem and to reverse the severe erosion of the local municipal tax base, accompanied by its recognition of the corollary serious predicament of local municipal finances, surely provides a rational basis for the expanded grant of authority to tax.

#### DUE PROCESS

The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law." The protection afforded property interests by the Fourteenth Amendment and by art. 10

of the Declaration of Rights of the Massachusetts Constitution is subject to the same analysis. School Committee of Hatfield v. Board of Education, 372 Mass. 513, 515, n.2 (1977).

At the outset, it is clear that the "property" which is protected by the due process clause includes the right to acquire property. Merit Oil Co. v. Director, 319 Mass. 301, 302 (1946); 16A Am. Jur. 2d, Constitutional Law, §§583-585 (1979); 16 C.J.S., Constitutional Law, §209 (1956).

In Holden v. Hardy, 169 U.S. 366, 391 (1898), the Court stated by way of dictum;

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. (due process clause)

Assuming again that no "fundamental" right is involved, in considering the constitutionality of ordinary economic legislation under the due process clause, the Court's task is to decide

whether the apparent objective of the legislation is rationally related to the promotion of the public safety, health, morals, or general welfare, or is merely arbitrary, Mobil Oil Corp. v. Attorney Gen. 361 Mass. 401, 413 (1972), and if there is such a rational relationship, whether the means selected to achieve the objective are supportable in reason. Commonwealth v. Henry's Drywall Co. Inc. 366 Mass. 539, 543-544 (1974). Williamson v. Lee Optical of Okla. Inc. 348 U.S. 483, 487-488 (1955). We are not to pass on the wisdom of the measure. 122 Main St. Corp. v. Brockton, 323 Mass. 646, 649 (1949). Druzik v. Board of Health of Haverhill, 324 Mass. 129, 138-139 (1949).

Opinion of the Justices, 368 Mass. 857, 861 (1975).

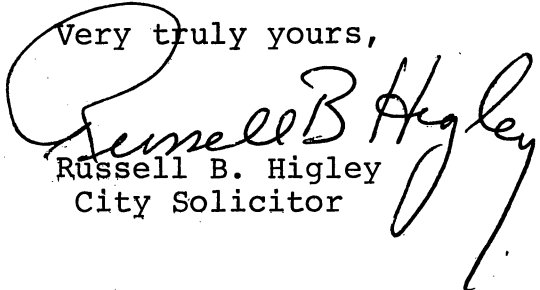
May 8, 1981

In short, does the proposed Bill bear a "reasonable relation to a permissible legislative objective"? Blue Hills Cemetery v. Board of Registration, Mass., Adv. Sh. (1979) 2647, 2652, 398 N.E. 2d 471, 475.

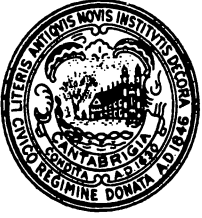
Under this standard, the "Legislature possesses a large measure of discretion to determine what the public interests require and what means should be taken to protect those interests." Merit Oil Co. v. Director, 319 Mass. 301, 304-305 (1946). In my opinion, the proposed Bill could be defended under this test, using much the same analysis that we used under equal protection.

If the proposed Bill is enacted into law, in order to protect the procedural due process rights of the affected charitable organizations, the Ordinance called for by the Bill would have to be carefully drafted to provide detailed criteria for the granting of the permits.

Very truly yours,

  
Russell B. Higley  
City Solicitor

RBH:jl



# CITY OF CAMBRIDGE

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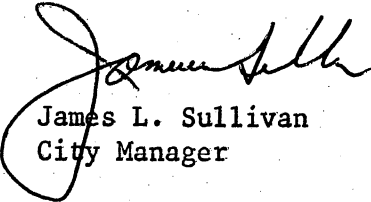
EXECUTIVE DEPARTMENT  
JAMES L. SULLIVAN  
City Manager

May 18, 1981

To the Honorable, the City Council:

With reference to City Council Order of March 9, 1981, enclosed please find opinion of Russell B. Higley, City Solicitor, relative to the taxation of land of non-profit agencies.

Very truly yours,



James L. Sullivan  
City Manager

JLS/b

Agenda # 3 F-165

Opinion from the City Solicitor re: pertaining to the taxation of land of non-profit agencies.

In City Council,

May 18, 1981

5-18-81

Placed on file-