

CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

(617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

EDWARD A. CUNNINGHAM
SEVERLIN B. SINGLETON
DAVID B. O'CONNOR
BIRGE ALBRIGHT
LEGAL COUNSEL

BY HAND

September 21, 1983

Mr. Patrick J. Hurley
Clerk of Court
Supreme Judicial Court
1412 New Court House
Pemberton Square
Boston, Mass. 02108

Re: Petegorsky v. Cambridge City Council
(No. 3300)

Dear Mr. Hurley:

I enclose Defendant's Suggestion of Mootness for filing in the above action. I would appreciate it if you would bring this to the attention of the Court.

Very truly yours,


Russell B. Higley
City Solicitor

RBH/jl
Enc.

cc: Marjorie Heins, Attorney-At-Law
Kenneth Cohen, Esq.
Robert E. Sullivan, Esq.
Thomas J. Curry, Esq.
Donald K. Stern, Esq.
Wayne S. Henderson, Esq.
Mayor Alfred Vellucci
City Manager Robert W. Healy

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

S.J.C. No. 3300

DAN PETEGORSKY

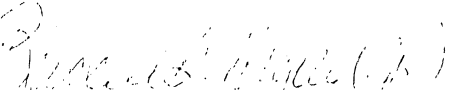
V

CAMBRIDGE CITY COUNCIL

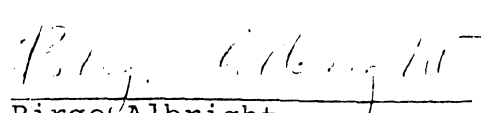
DEFENDANT'S SUGGESTION OF MOOTNESS

Now comes the defendant, Cambridge City Council, and suggests that this action may now be moot, because the Council, on September 19, 1983, voted to place the Nuclear Free Cambridge Initiative on the ballot. A certified copy of the Council vote is attached hereto.

Respectfully submitted,
By its attorneys,



Russell B. Higley
City Solicitor



Birge Albright
Legal Counsel
Law Department
City Hall
795 Massachusetts Avenue
Cambridge, Mass. 02139
(617) 498-9020



City of Cambridge

1.

IN CITY COUNCIL

September 19, 1983

COUNCILLOR WYLIE

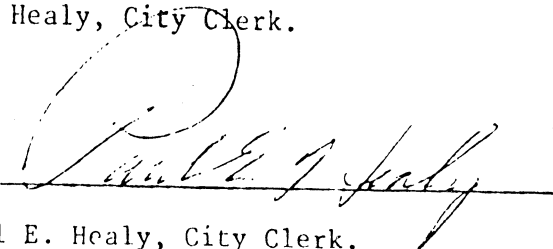
ORDERED:

That pursuant to the provisions of Chapter 43, Section 40 of the General Laws, the initiative petition submitted by a group called "Mobilization For Survival" and referred to as "Nuclear Free Cambridge Initiative Petitions", be placed on the ballot for the next municipal election to be held on November 8, 1983.

In City Council September 19, 1983.
Adopted by a yeas and nays vote:-
Yeas 5; Nays 2; Absent 0; Present 2.
Attest:- Paul E. Healy, City Clerk.

A true copy;

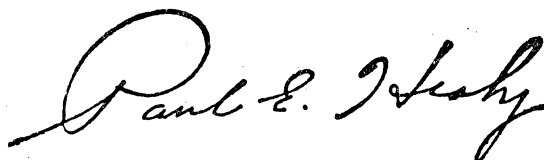
ATTEST:-


Paul E. Healy, City Clerk.

SEP 20 1983

DATE:

A TRUE COPY. ATTEST:



CITY CLERK

GOODWIN, PROCTER & HOAR
28 STATE STREET
BOSTON, MASS. 02109
(617) 523-5700
(COPY)

BY HAND

September 21, 1983

Chief Justice Edward F. Hennessey
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Pategorsky v. Cambridge City Council, No. 3300

Dear Chief Justice Hennessey:

On Monday night, September 19, on a Motion for Reconsideration made by Cambridge City Councillor David Wylie, the Cambridge City Council voted 5 "yes", 2 "no", and 2 "present" on whether the Nuclear Free Cambridge initiative should be placed on the November ballot, thus changing the prior 4 to 4 vote of the Cambridge City Council. It is my understanding that the Cambridge City Solicitor, in response to this latest vote, intends to file a Suggestion of Mootness with this Court.

I urge this Court not to dismiss this case on grounds of mootness, for two reasons. First, while the plaintiff may have no present need for any relief from the Court, the case is not necessarily moot. As the change in votes has made clear, the City Council's present position is not final or irrevocable. The City Council at any one of its weekly Monday night meetings could have yet another motion for reconsideration and vote again on this issue. In particular, this could occur if this Court does rule that the City Council has the power to refuse to put this initiative on the ballot. Three of the five City Councillors voting to put the initiative on the ballot stated that they believed the initiative statute required them to do so. If this Court were to determine that a city council could vote to keep an invalid or unconstitutional proposal off the ballot, these votes might not remain "yes" votes. Under similarly changing circumstances, this Court has held the case not moot. See, e.g., Commissioner of Correction v. Myers, 379 Mass. 255, 256-57, 260-

Chief Justice Hennessey
September 21, 1983
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61 (1979) (case held not moot when defendant prisoner first refused life-saving medical treatment, one month later agreed to such treatment, and then one week later again refused the treatment); School Committee of Boston v. Boston Teachers Union, Local 66, 378 Mass. 65, 69 n.7 (1979) (not moot when "the subject is one of continuing contention").

Second, even if the dispute among the parties were seen as fully and finally resolved, dismissal on mootness grounds is nevertheless not warranted, because the issue raised is "capable of repetition, yet evading review." Hashimi v. Kalil, 388 Mass. 607, 609 (1983); Brach v. Chief Justice of the District Court Department, 386 Mass. 528, 532-33 (1982). In such instances, this Court has rendered decisions where the issue is one of public importance. E.g., Hashimi v. Kalil, supra; Grace v. Town of Brookline, 379 Mass. 43, 48 n.11 (1979); Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271, 274 (1978); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 550 (1977) (court should decide repetitive impoundment issue of importance to judges while it "is still news, and not yet history."). That is clearly the case here. The case law of this Court suggests that a city council possesses a certain narrow degree of discretion as to placing matters on the ballot, which the plaintiff contends does not exist under the initiative statute. Moreover, the amicus brief of the State Election Commission filed in this case contends that a city council's duty is only a ministerial one under the statute. The State Election Commission is responsible for advising municipalities on electoral matters including initiatives and referenda; Cambridge City Councillor David Sullivan is the Commission's counsel. Thus city councils seeking guidance as to their powers concerning initiatives are presently told by the responsible state agency that they have none. This advice may result in short-lived lawsuits, or may short-circuit entirely any litigation that might resolve the issues. The issue presented in this case is worth resolving to assist municipalities, which will not otherwise receive the Court's guidance.

In the present case, the need for resolution of this issue is even more compelling. As noted above, of the five votes in favor of placing the initiative on the ballot, three City Councillors stated that they were so voting because they believed the statute required them to vote to place the initiative on the ballot, regardless of whether it might ultimately be invalid or unconstitutional.

Chief Justice Hennessey
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In addition, a determination on the merits of this case is appropriate here when the issue raised has been "fully argued to [this Court] in an adversary proceeding." Brach v. Chief Justice of the District Court Department, supra; Commissioner of Correction v. Myers, supra, 379 Mass. at 261; Grace v. Town of Brookline, supra. Briefs have been submitted and the Court has heard argument; this Court could now issue a ruling that would be of significant benefit, not only to the parties concerned, but to other municipalities facing this issue in the future.

Respectfully submitted,

Kenneth A. Cohen

bbr

cc: Marjorie Heins, Esquire
Russell B. Higley, Esquire ✓



CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139
Tel. 498-9011

10.

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

September 26, 1983

To the Honorable, the City Council:

Enclosed please find copies of two communications, one from Goodwin, Procter & Hoar and one from Russell B. Higley, City Solicitor, relative to the Petegorsky matter.

Very truly yours,

Robert W. Healy
City Manager

RWH/mbf
Encs. 2

Agenda # 10

S-517

Communications from Goodwin, Procter &
Hoar and the City Solicitor relative to
the Petegorsky matter.

In City Council,

September 26, 1983

9/26/83

19V
Placed on File

- Filed -