



# CITY OF CAMBRIDGE

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Office of the City Solicitor  
City Hall  
795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

(617) 498-9020

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

Joseph M. Kaigler  
Legal Counsel

Diane Wynshaw-Boris  
Legal Counsel

## M E M O R A N D U M

TO: Robert Healy, City Manager  
FROM: Russell Higley, City Solicitor  
DATE: January 22, 1990  
RE: Repeal of Ordinance 1093

### Introduction

On January 8, you asked me to research and analyze by today the effect and ramifications of the proposed repeal of Ordinance 1093. I do not undertake in this memorandum to discuss the validity or invalidity of 1093. As you know, that is the subject of the lawsuit recently filed -- Collins v. City of Cambridge, Middlesex Superior Court Civil Action No. 90-85(C). You have our filed Memorandum in Opposition to the Plaintiffs' Request for Preliminary Injunction and the Plaintiffs' Complaint and Memorandum setting forth the issues raised. Similarly, I do not undertake here to discuss the potential procedural infirmities which may affect the validity of Ordinance 1093.

Obviously, if Ordinance 1093 is found to have been invalid from its inception by the Court in Collins, no challenge could be mounted by any party claiming to have obtained rights thereunder. (The fact that many of the landowners whose property is subject to

the ordinance have sought to intervene is beneficial. If these persons are not parties, it might be possible for them to later argue that their interests were not sufficiently represented by the City and that they should be permitted to relitigate the issue.) Equally obvious is the fact that a ruling of invalidity would render repeal or rescission of Ordinance 1093 unnecessary and superfluous.

### Analysis

All legislative enactments are presumed to be constitutional. The law is well settled that rights created by statutes can be taken away by statute, except in a manner which violates some express provisions of the constitution. Because the City Council has clearly intended to repeal ordinance 1093, there is no issue of intent; the sole issue becomes one of constitutionality.

Black's Law Dictionary, (4th Revised Edition), defines "repeal" as follows:

abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated, (which is called "express" repeal), or which contains provisions so contrary to, or irreconcilable with, those of the earlier law, only one of the two statutes can stand in force, (called "implied" repeal) . . .

"Repeal" of a law means its complete abrogation by the enactment of a subsequent statute, whereas the "amendment" of a statute means an alteration of the law already existing, leaving some part of the original still standing.

One may assume that by the repeal, the City Council has intended to make retroactive the provisions of the rent control law as they existed before December 26, 1989 when Ordinance 1093 was enacted. To determine the constitutionality of such action, we

must look at the rights and obligations of the parties as they existed immediately before and after the express date of the enactment. It is only where vested substantive rights of parties are adversely affected that a statute is construed to operate retroactively and it is then that the Court will analyze the nature of the governmental interest involved to determine whether the enactment violates constitutional rights.

The rights implicated by the repeal of 1093 and those grounds on which the new ordinance will most likely be challenged are: (1) Federal Fifth Amendment due process, (2) Art. 1 §10 of the United States Constitution barring impairment of obligation of contracts, (3) the due process provisions of the State Constitution (Part II, c.1, §1, art 4 and articles 1, 10 and 12 of the Declaration of Rights) and (4) Article 30 requiring separation of powers.

We deal principally with a potential challenge that the ordinance repealing 1093 constitutes a regulatory taking. We begin with the proposition that the rights of owners to use and enjoy property are subject to reasonable regulations designed to promote general welfare. This is because the same constitutions which create the rights, leave them vulnerable to reasonable qualification or restriction. The issue becomes: when does a land-use regulation so restrict an owner's use and benefit of his property that it constitutes a taking? Such inquiries are "ad hoc, factual inquiries." Factors to be considered are: does the governmental action interfere with the owner's primary reasonable expectation concerning the use of the property; is the owner still able to obtain a reasonable return on his investment or make

economically viable use of his property; what public or safety or welfare purposes are to be served by the legislation; and did prior law by statute, regulation or contract, create an expectancy interest in the property such that the interest can be deemed to be vested? It is essentially a test of reasonableness and requires balancing of interests. Because the inquiries in this area of law are so fact intensive, courts are reluctant to declare statutes facially unconstitutional.

Regulations which are found to require permanent physical occupation of a person's property by the government or a third party have been found to be per se invalid. See Seawall Associates v. City of New York, 74 N.Y. 2d 92 (1989).

The property owners benefitted by Ordinance 1093 will undoubtedly argue, inter alia, that its repeal unconstitutionally deprives them of property in violation of the due process provisions of state and federal law. Fundamentally and as a general principle, it can be argued that to the extent the initial regulations regarding rent control were validly applied to the properties listed in Ordinance 1093, the repeal and then reinstatement thereof are on no different legal footing than the initial enactment and application. In other words, the repeal of Ordinance 1093 is no different from the initial implementation of rent control. Assuming all aspects of that law were valid to begin with, they are, as a general principle, valid now. The sole persons who should be able to claim that vested property rights were unconstitutionally taken as a result of the repeal are those who purchased or otherwise acted in reliance on Ordinance 1093 between

the dates of its enactment and the first public advertisement of the proposed repeal. See Smith v. Building Commissioner of Brookline, 367 Mass. 765, 771 n. 7 (1977) (holding that the notice of hearing rather than passage is determinative of the effective date of a zoning amendment.) Obviously, those individuals who had actual notice of the repeal prior to publication and took action thereafter relying on 1093 would act at their peril. It could be argued that those who had simply applied for demolition or building permits would have acquired no vested rights. See Spector v. Bldg. Inspector of Milton, 250 Mass. 63, 71 (1924).

In Flynn v. Cambridge, 383 Mass. 152 (1981), the Court held that owners who purchased their property after the effective date of the ordinance denying condominium owners the right to occupy their units suffered no unconstitutional taking because they were on notice that they had no right to use their property as owner-occupied housing. The Court further held that as to owners who purchased their units prior to the effective date of the ordinance and were using it as rental housing on the effective date were also not unconstitutionally deprived of their property, although prior to the effective date they had the right to occupy their units. In Polednak v. Rent Control Board of Cambridge, 397 Mass. 854 (1986), the Court held that the same ordinance, if applied to an individual who purchased her condominium unit before the effective date of the statute and resided in it prior to that date, would be a taking requiring just compensation. The Court reasoned that such regulation would interfere with that class of owners' primary expectation concerning the use of the property. This same analysis

would govern the repeal of ordinance 1093.

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