CITY OF CAMBRIDGE

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November 13, 1995

Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Proposed Cambridge First-Hiring and Residency Requirement

Dear Mr. Healy:

On February 6, 1995, Councillor Toomey introduced an Ordinance which would have required that City employees be Cambridge residents.

On October 23, Councillor Toomey introduced an amended Ordinance entitled "Cambridge First-Hiring and Residency Requirement," which has been substituted for the earlier proposal. In this letter, we analyze the new Ordinance (copy attached).

A. Description of proposed Ordinance

The proposed Ordinance would add to Title Two of the Cambridge Municipal Code a new Chapter 2.120, entitled "Cambridge First-Hiring and Residency Requirement." This Ordinance would require several things, as follows:

1. "Cambridge First" hiring preference

The proposed Chapter 2.120 provides, in part:

(a) The City of Cambridge shall establish a "Cambridge First" hiring preference which shall apply to all salaried or hourly rate municipal positions with an annual compensation of less than fifty thousand dollars ($50,000.00). The "Cambridge First" hiring preference shall include:

(1) With regard to job applicants, the City shall establish an absolute priority for current city residents when other employment factors are approximately equal.

Thus, for positions paying less than $50,000, there would be a preference for "current city residents," but this preference would take effect only "when other employment factors are approximately equal." I note that this preference apparently would apply whether the applicant had been a city resident for one day or twenty years. And there is no requirement that the applicant remain a city resident after he or she is hired. Furthermore, the Ordinance does not say who is to determine whether "other employment factors are approximately equal." Clearly, this determination would be made by the City Manager as the appointing authority.

The City Manager's Office, Personnel Office and Office of Work Force Development would be required to recruit and maintain lists of Cambridge residents for hiring in city positions, and "establish and operate classes and training programs in preparation for civil service exams for Cambridge residents." §(a)(2) and (3). The City Manager would be requested to report to the Council annually the number of Cambridge residents employed by the City with an eventual goal of 60% of city employees being Cambridge residents within the next 10 years. §(a)(4).

The City Manager would also be requested "to negotiate with the appropriate collective bargaining units and provide reasonable incentives thereto with the view in mind of requiring Police Officers, Fire Officials and Teachers ... hired on or after January 1, 1996, to reside within the City ...." §(a)(5).

2. Office of Work Force Development

Sections (b) and (c) of the Ordinance state:

(b) The City Manager shall be requested not to decrease any funding for the Office of Work Force Development during the effective periods of this act. Funding for the Office of Work Force Development should remain constant or be increased during the operation of this act.

(c) The City of Cambridge, through the resources of the Office of Work Force Development shall establish a visible and accessible location for Cambridge residents to gain information, job listings, and intake services for job opportunities in city government, as well as within private industry conducting business within the city.

3. Residency requirement for employees earning $50,000 or more.

Section (d) of Chapter 2.120 provides as follows:

(d) Every employee as defined in Section (e) of this Act, first employed by the City of Cambridge on or after January 1, 1996 shall, within six (6) months of the effective date of employment, become a resident of the city and shall not cease to be a resident of the city during his or her employment by the city.

"Employee" is defined in §(e) to mean "any person performing services for or holding an office, position or employment in any city department or agency, whether by election or appointment, contract of hire or engagement, serving with a compensation of ... $50,000 or more annually by salary or hourly rate, on a full, regular, part-time, intermittent or consultant basis."

The term "employee" also applies to department heads, "and to any person who maintains supervisory authority over three ... or more full-time city employees, regardless of compensation."

Section (f) states that, after January 1, 1996, any current employee who is promoted to or accepts a new position, with an annual compensation of ... $75,000 is subject to the provisions of this chapter. But an employee who surpasses $75,000 through "a cost of living salary adjustment without a change in job status or responsibility" is not subject to the chapter.

Section (g) provides that every employee, annually, must file "a certificate signed under the pains and penalties of perjury, stating his or her own name and place of residence." If the Personnel Director receives a certificate indicating that the employee does not reside in Cambridge, he must arrange a hearing "to show reasons why said employee is no longer a legal resident of the city."

If it is found that the employee is no longer a legal resident, "that person shall cease to be employed by the city, and ... shall be terminated by the City Manager ...." A person who is terminated could not be re-employed by the city for one year. §§(h) and (i).

4. Civil Service Law

Section (j) provides:

> To the extent permitted by (G.L. c. 31), every examination held to establish a civil service list for employment by the city shall be restricted to city residents.

5. Severability

There are two severability sections, (k) and (m).

6. Waiver

Section (l) states:

> If the City Manager, with the unanimous approval of the City Council, determines it to be in the best interest of the city to do so, the provisions of this chapter may be waived with respect to a particular person or position, but said waiver shall not be for more than the period of one (1) year from the effective date of employment, and shall not defeat the application of this chapter to any other person or position.

7. Residence

Section (n) provides:

> In construing this chapter, residence shall be the actual principal residence of the individual, where he or she eats, sleeps and maintains his or her normal personal and household effects. This section shall be deemed to affect both civil service and non-civil service employees of the city, including all appointments of the City Council.

B. Legal Analysis

1. General discussion of residency requirements and preferences

Municipal officers and employees have been made subject to two types of residency requirements - durational and continuous. A durational residency requirement mandates that one must be a resident of the municipality for a prescribed period of time before assuming office or employment; a continuous residency requirement (sometimes referred to as a bona fide residency requirement) mandates that one must reside in the municipality during the term of office or employment.

In the proposed Ordinance, §§(a) and (a)(1), there is a "hiring preference," i.e. a preference for "current city residents," but not a requirement that they shall have been residents for any particular length of time. In §(d), there is a continuous residency requirement, i.e. a requirement that certain employees must live in Cambridge during their employment.

(a) Durational residency requirements

Durational residency requirements have been held to infringe on three different fundamental rights guaranteed by the federal constitution: the right to interstate travel, the right to vote and the right to freedom of association. Therefore, the compelling interest test has generally been used to sustain constitutional attacks against durational residency requirements under the equal protection clause of the Fourteenth Amendment. See 3 McQuillin, Municipal Corporations. §12.59.05 (1990): "A durational residency requirement for a municipal employee is unconstitutional because it restricts an employee's fundamental right to travel."

(b) Continuous residency requirements

Continuous residency requirements have generally been upheld against constitutional challenges. For example, McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) held that Philadelphia's regulation requiring that its employees live in the city did not violate the employees' right to travel interstate. See Salem Blue Collar Workers Assn. v. Salem, 33 F3d 265 (C.A. 3, 1994) cert. den. U.S. (1995), which held (2-1) that a residency ordinance of the City of Salem, New Jersey did not violate either

the Privileges and Immunities Clause or the Equal Protection Clause of the U.S. Constitution.

Such a continuous residency requirement is permitted in Massachusetts. See G. L. c. 41, § 109, which states in part:

> . . . Unless otherwise provided by general or special law, ordinance or by-law, a person need not, in order to accept appointment to a public office in a town or district, be a resident of such town or district; provided, however, that if an appointed town or district officer is required to become a resident within a period of time specified at the time of his appointment by the board or officer making the appointment but fails to do so within the time specified, or if an elected or appointed town or district officer removes from the town or district in which he holds his office, he shall be deemed to have vacated his office.

See Mello v. Mayor of Fall River, 22 Mass. App. Ct. 974, 976 (1986, rescript); 18 M. P. S., Randall and Franklin, Municipal Law, §§ 207, 283 (1993).

It has been argued, however, that even continuous residency requirements conflict with the equal protection and privileges and immunities clauses of the U.S. Constitution. See Myers, "The Constitutionality of Continuing Residency Requirements for Local Government Employees: A Second Look," 23 Cal. Western Law Rev. 24 (Fall, 1986).

(c) Hiring preferences

It is clear that the City could not require that job applicants have lived in Cambridge for one year before applying for a position. That would be a durational residency requirement which would violate the right to travel. The proposed Ordinance, for certain positions, would give a preference to "current city residents" when "other employment factors are approximately equal."

The right to travel between and among the states has been recognized as a fundamental constitutional right. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), holding that state statutes which denied welfare benefits to persons who had not resided within the jurisdiction for at least one year violated the Equal Protection Clause. The basis for this ruling was that a residency requirement has the effect of deterring the entry of indigent persons into these jurisdictions, thereby limiting their rights to engage in interstate travel.

The Civil Service Law, G.L. c. 31, § 58, provides in part:

> . . . If any person who has resided in a city or town for one year immediately prior to the date of examination for original appointment to the police force or fire force of said city or town has the same standing on the eligible list established as the result of such examination as another person who has not so resided in said city or town, the administrator, when certifying names to the appointing authority for the police force or the fire force of said city or town, shall place the name of the person who has so resided ahead of the name of the person who has not so resided; provided, that upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided.

Section 58 thus gives a preference on Civil Service eligible lists for municipal police and fire applicants who have lived in the municipality for one year prior to the date of examination. I note, however, that there is no obligation to live in the city

after the date of the examination to qualify for the preference, just as there is no such obligation in the proposed Ordinance. The constitutionality of this provision was upheld in Milton v. Civil Service Commission, 365 Mass. 368 (1974), against a challenge that it burdened the right to travel of non-residents and violated the Equal Protection Clause.

Addressing the right to travel issue, the Court pointed out that applicants do not have a right to public employment. Id. at 372. The Court concluded as follows:

> . . . the burden which this statutory scheme imposes on those who have recently exercised their right to travel comes down to this: they may be placed at a relative disadvantage to one-year residents in the competition for a job to which they have no vested right. We conclude that this burden cannot be regarded as such a drastic deprivation of the rights of citizenship or the means of maintaining life as to trigger the extremely vigorous scrutiny of legislation implicit in the compelling State interest test ...

Id. at 374.

As noted above, it has been held that a durational residency requirement for a municipal employee is unconstitutional because it restricts an employee's fundamental right to travel and because it violates the Equal Protection Clause. See e.g., Bruno v. Civil Service Commission of Bridgeport, 192 Conn. 335, 472 A2d 328 (1984) (1-year durational residency requirement for position of recreation superintendent, which implicated fundamental right to travel freely within the state, did not pass test of strict judicial scrutiny and, therefore, violated Equal Protection Clause).

In Bruno, the Court had this to say about the right to travel:

> The right to travel has long been recognized and protected as a fundamental right which is firmly established in the law .... It is a right which the courts have repeatedly protected in the face of durational residency requirements that affect that right .... Writing for the Court in Shapiro v. Thompson, 394 U.S. 618 (1969), Justice Brennan cited with approval the decision of Chief Justice Taney in the Passenger cases, 48 U.S. (7 How.) 283, 492 (1849) as follows: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states." Shapiro v. Thompson, 394 U.S. at 630.

472 A2d at 333.

In Carofano v. City of Bridgeport, 196 Conn. 623, 495 A2d 1011, 1020 (1985), the Court stated:

> It must be conceded that even a bona fide residence requirement would burden the right to travel, if travel meant merely movement .... The right to travel that has been found to be "fundamental" and thus to necessitate demonstration of a compelling state interest for maintenance of any governmental restraint thereon, involves much more than locomotion .... It concerns the right "to migrate, resettle, find a new job, and start a new life." Shapiro v. Thompson, 394 U.S. 618, 629 (1969). It is the barriers to such resettlement raised by durational residency requirements as qualifications for receiving benefits or exercising privileges that have been found to have such serious impact as to infringe upon the constitutional right to travel ....

As noted above, Salem Blue Collar Workers Assn. v. Salem, 33 F3d 265 (C.A. 3, 1994), cert. den. U.S. (1995), held (2-1) that a bona fide residency ordinance of the City of Salem, N.J. did not

violate the Privileges and Immunities Clause of the U.S. Constitution (Art. 4, §2, cl. 1). The ground for this holding was that direct public employment, as opposed to private employment, is not a privilege or fundamental right protected by the Clause. Id. at 270.

There was a dissent, however, by Chief Judge Sloviter, who stated his belief that the Privileges and Immunities Clause did apply to municipal employment. Chief Judge Sloviter relied on United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984), which held that Camden's hiring preference ordinance, requiring that at least 40 percent of the employees of contractors and subcontractors working on city construction projects be Camden residents, was subject to the strictures of the Privileges and Immunities Clause. Based on this holding, Judge Sloviter concludes that, "The Camden opinion suggests, even if it does not actually hold, that even a direct municipal residency requirement or preference for municipal employment will be subject to scrutiny under the ... Clause." 33 F3d at 276.

In conclusion, Courts are hostile to durational residency requirements and preferences. See e.g. Bruno, supra, and Attorney-General of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986), which held that a New York state limit on a civil service veterans' preference to only those veterans who were residents of the state when they entered military service violated the right to travel.

A hiring preference for "current city residents" would certainly have to have at least a rational basis. Since a "current city resident," when hired, might have been a resident for only a day and would have no obligation to remain a resident after being hired, it is hard to imagine any basis for such a provision except to furnish jobs for the City's unemployed. But it is questionable whether this is a "rational basis." See Ward v. Board of Examiners, 409 F. Supp. 1258, 1260 (D.P.R. 1976), aff'd 429 U.S. 801 (1976), where a nonresident of Puerto Rico challenged the island's residency requirements for licensing as an engineer. The Board of Examiners advanced several purposes for the requirement, one of which was to "save the work" on an island plagued by high unemployment. Although the Court upheld the requirement on other grounds, it stated that "saving the work" for island residents was "not a permissible governmental purpose." Id. at 1260.

As noted above, the Civil Service Law, G.L. c. 31, §58, gives a preference on Civil Service eligible lists for municipal police and fire applicants who have lived in the city for one year prior to the date of examination. In light of the authorities cited above, I am unable to say with certainty that the City can give any further preference to current Cambridge residents who apply for positions with the City. If such a preference were permitted, it would be subject to bargaining with the appropriate collective bargaining units. See G.L. c. 150E, §7(d).

2. The Continuous residency requirement

As noted above, continuous residency requirements are generally upheld by the Courts, and the residency requirement in §§(d) and (e) of the proposed Ordinance would probably be upheld also. See 2 Sands & Libonati, Local Government Law, §10.02.

It is possible, however, that the proposed residency requirement may conflict with the City's Plan E Charter, specifically with G.L. c. 43, §§103, 104 and 105, dealing with the appointment and removal powers of the City Manager. This conflict is most apparent in §(h) of the proposed Ordinance which would mandate that the City Manager terminate employees found to be no longer City residents. However, there are no cases directly in point and any such questions would be decided by a court as a case of first impression.

However, there is some question about §(f) which states that the residency requirement would apply to current employees who are promoted to positions paying $75,000. A similar provision was struck down under the Louisiana Constitution in Police Association v. City of New Orleans, 635 So. 2d 380 (La. App. 4 Cir. 1994). That case held that an ordinance which created an exemption to the domicile requirement for all officers or employees, who, on a specified date, maintained their actual domicile outside of Orleans Parish, but denied them promotional opportunities unless they moved their domicile to Orleans Parish, violated equal protection and due process under the Louisiana Constitution.

Even if the promotion provision in §(f) is held to be constitutional, it would be a mandatory subject of bargaining with the appropriate collective bargaining units. See G.L. c. 150E, §7(d).

3. Categories of affected employees

(a) School Department employees

General Laws, Chapter 71, §38 regulates the employment of teachers and other School Department employees. This section provides:

> No school district shall require that an individual reside within the city, town or regional school district as a condition of promotion, assignment, transfer or continued employment as a school teacher, instructional aide, assistant principal, principal, director, supervisor, deputy superintendent or professional employee; provided, however, that the provisions of this paragraph shall not apply to any individual appointed, reappointed or promoted to the position of superintendent, associate superintendent or assistant superintendent.

This means that the positions specified in §38 (school teacher, etc.) could not be made subject to a residency requirement. Regarding the position of Superintendent, this official is employed by the School Committee. See G.L. c. 43, §32 (part of the Plan E Charter); G.L. c. 71, §§41 and 59. In my opinion, it is doubtful whether the City Council, by ordinance, can impose terms and condition on the School Committee's power of appointment of a Superintendent. See Leonard v. School Committee of Springfield, 241 Mass. 325 (1922).

General Laws, c. 71, §59B provides that:

> ... Principals employed under this section shall be responsible, consistent with district personnel policies and budgetary restrictions and subject to the approval of the superintendent, for hiring all teachers, instructional or administrative aides, and other personnel assigned to the school, and for terminating all such personnel, subject to review and prior approval by the superintendent and subject to the provisions of this chapter.

In my opinion, the proposed Ordinance, if enacted, would become part of the City's "personnel policies," and, therefore, it could apply to administrative aides and "personnel assigned to the school" except the positions specified in G.L. c. 71, §38. As with all unionized employees, the residency requirement would be a mandatory subject of bargaining.

(b) Police Officers and Fire Fighters

General Laws, Chapter 41, § 99A provides:

> **Members of regular police or fire department and fire alarm division; residence outside city or town**
>
> Any member of the regular police or fire department and fire alarm division of a city or town appointed subsequent to August first, nineteen hundred and seventy-eight shall reside within fifteen miles of the limits of said city or town. Said distance shall be measured from the closest border limits of said city or town in which said member is employed to the closest border limits of the city or town in which said member lives; provided however, if any said city or town by local ordinance or by-law to which the provisions of paragraph (d) of section seven of chapter one hundred and fifty E of the General Laws shall apply, or by collective bargaining agreement shall require the members of a regular police or fire department appointed on or after August first, nineteen hundred and seventy-eight to be residents of such city or town, the provision of such local ordinance, by-law or collective bargaining agreement shall supersede the provision of this section and provided further such local ordinance, by-law or collective bargaining agreement shall apply only to those members of a regular

police or fire department appointed subsequent to the adoption of such local ordinance, by-law or collective bargaining agreement. Added by St.1965, c. 411. Amended by St.1971, c. 956, § 1; St.1978, c. 373, § 1; St.1981, c. 446.

I believe that § 99A has the following meaning:

Any Police officer or Fire fighter appointed after August 1, 1978 must reside within 15 miles of the City limits; provided, however, that, if any city, by ordinance or by collective bargaining agreement, shall require Police officers or Fire fighters appointed after August 1, 1978 to be city residents, the provisions of such ordinance or agreement shall supersede the provisions of this section, and provided further that such ordinance or agreement shall apply only to Police officers or Fire fighters appointed subsequent to its adoption.

At present, Cambridge does not have any collective bargaining agreement which requires Police Officers or Fire Fighters to be City residents. However, residency is among the "terms and conditions of employment" of G. L. c. 150E, § 6, and is thus a mandatory subject of bargaining. Town of Lee v. Labor Relations Commission, 21 Mass. App. Ct. 166, 167 (1985). According to c. 150E, § 7(d), when a collective bargaining agreement contains a provision regarding a § 6 subject that conflicts with "any municipal personnel ordinance . . . ," that provision of the agreement prevails. Id. at 167.

It follows as a matter of logic that if an agreement contains no provision about a particular § 6 subject, such as residency, and a municipal employer inaugurates or alters a policy or requirement

with respect to that subject, it is bound upon request to bargain, regardless of any ordinance in point. Id.

I conclude, therefore, that the City Council could adopt the proposed residency ordinance pursuant to G. L. c. 41, § 99A, but that the ordinance would not relieve the City of its duty to bargain collectively in good faith with the unions representing Police Officers and Fire Fighters before imposing a residency requirement on them. The City would also have a duty to bargain with all other unionized employees and those who might decide to unionize in the future.

(c) Consultants and other independent contractors

In my opinion, consultants might be covered by the "Cambridge First" hiring preference in §a, which applies to "all salaried or hourly rate municipal positions with an annual compensation of less than ... $50,000." They would certainly be covered by the definition of "employee" in §(e), which specifically includes, "... any person performing services ... on a ... consultant basis."

As drafted, the ordinance would require either a preference or mandatory residency for all independent contractors and consultants. If this is not the result that the City Council intends, then it is possible to exclude all independent contractors and consultants, other than those "consultants" over whom the City exercises sufficient control to make them, in effect, "employees" within the meaning of the Internal Revenue Code. This can be accomplished by amending the definition of "employee" to read as follows:

> The term "employee" as used in this Chapter shall mean any individual performing services for or holding an office or position in any city department or agency, whether by election or appointment, contract of hire or engagement, serving with a compensation of $50,000 or more annually by salary or hourly rate, on a full, part-time or intermittent basis, provided that such individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship.

4. Effect of Civil Service Law, G.L. c. 31

Section (j) of the proposed Ordinance states:

> To the extent permitted by Chapter Thirty-One of the General Laws, every examination held to establish a civil service list for employment by the city shall be restricted to city residents.

Presumably, this section would apply to all city positions regardless of the compensation.

The civil service system is part of the personnel system for public employees. "Its purpose is to minimize political influence in public employment and to supply appointing authorities with names of qualified applicants." 18 M.P.S., Randall and Franklin, Municipal Law, §321 (1993).

The Department of Personnel Administration administers civil service examinations and has oversight of the civil service system. The Personnel Administrator is in charge of the Department.

The duties of the Administrator are listed in G.L. c. 31, §5. Among other duties, the Administrator approves and disapproves qualifications and specifications submitted by an appointing authority for any civil service position, evaluates the qualifications of applicants and conducts examinations and established mandatory standards. Examinations for original

appointments are open to all qualified candidates. G.L. c. 31, §6. The Administrator establishes eligible lists of persons who have passed each examination for appointment to a position in the official service. G.L. c. 31, §25.

Based on these and other sections of Chapter 31, it is my opinion that, although the City Manager could request that an examination held to establish an eligible list for employment by the City be restricted to City residents, the final decision would be in the hands of the Administrator.

5. Funding of Office of Work Force Development

Section (b) of the proposed Ordinance states:

> The City Manager shall be requested not to decrease any funding for the Office of Work Force Development during the effective periods of this act. Funding for the Office of Work Force Development should remain constant or be increased during the operation of this act.

I note that this section is phrased in terms of a request to the City Manager. This is in accordance with the law, because the City Council, by ordinance, could not tie the hands of the Manager regarding the preparation of future budgets. See Whalen v. Holyoke, 13 Mass. App. Ct. 446 (1982), rev. den. 386 Mass. 1104 (1982), holding that the Mayor was not bound by an ordinance which, by prescribing staffing levels in a city department, appeared to set limits on his prerogatives in formulating the city budget pursuant to the Municipal Finance Act, G.L. c. 44.

C. Conclusion

In conclusion, it is my opinion that the continuous or bona fide residency requirement set forth in §(d) of the proposed

Ordinance would be upheld if challenged. I have doubts, however, about the "promotion" provision in §(f), based on the decision in Police Association v. City of New Orleans, 635 So. 2d 380 (La. App. 4 Cir., 1994).

I also have doubts about the "Cambridge First" hiring preference, because I believe that it would impose a burden on the right to travel of nonresidents who might want to move to Cambridge.

Very truly yours,

Russell B. Higley

RBH/jb
Enclosure

ORD#3\Residenc.Req\Analysis.Ord

CAMBRIDGE CITY COUNCIL

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139
(617) 349-4280
FAX (617) 349-4287

Timothy J. Toomey, Jr.
City Councillor

February 3, 1997

Mayor Sheila Doyle Russell
Cambridge City Hall
795 Massachusetts Ave.
Cambridge, MA 02139

Dear Mayor Russell:

At the January 27, 1997 City Council meeting, an order was passed which requested the City Manager "...to instruct the City Solicitor to render a legal opinion as to whether the Residency Ordinance violates the City Charter, M.G.L. Chapter 43, Sections 93-110." I voted against this order since the City Solicitor has already issued a legal opinion on this matter. I enclose a copy of that legal opinion, dated November 13, 1995.

This legal opinion was issued after the City Council passed the proposed ordinance to a second reading on October 23, 1995 and before it was passed to ordination on December 11, 1995. In fact, prior to final passage, the proposed ordinance was amended to eliminate the so-called "promotion provision" on which the City Solicitor expressed doubts in his legal opinion.

The City Solicitor's legal opinion makes only one reference to the ordinance's possible conflict with the City Charter as indicated in the January 27 Council order. On page 13 he states "It is possible, however, that the proposed residency requirement may conflict with the City's Plan E Charter, specifically with G.L. c 43, §§103, 104 and 105, dealing with the appointment and removal powers of the City Manager. This conflict is most apparent in §(h) of the proposed Ordinance which would mandate that the City Manager terminate employees found to be no longer City residents. *However, there is no cases directly in point and any such questions would be decided by a court as a case of first impression*" (emphasis added). This is hardly a strong legal opinion that a conflict would exist and I, and attorneys I have consulted, maintain that a conflict does not exist.

In addition, the main point of discussion at the January 27, 1997 City Council meeting was the waiver provision. On page 5 of the City Solicitor's legal opinion the waiver provision is noted (the waiver was subsequently amended to provide for a 2/3 vote of the Council rather than an unanimous vote). Nowhere in the rest of the legal opinion is this provision questioned as to a possible conflict with the City Charter which would have occurred if the City Solicitor thought that a conflict existed.

Furthermore, it is clear to me that the City Manager knows that a conflict does not exist with the waiver provision. In early November of 1996, the City Manager transmitted to me for my consideration proposed amendments to the Residency Ordinance. Among these amendments was the following: "Amend paragraph (k) to read 'If the City Manager determines it to be in the best interest of the city to do so, the provisions of paragraph (d) of this chapter may be waived with respect to a particular person or position. The City Manager shall report all such waivers to the City Council at the time they are made. Such waivers may be granted for the period of time determined appropriate by the City Manager, *except that any waiver for a period of more than three years after employment in a position subject to paragraph (d) of this chapter shall be subject to the approval of the Council*'" (emphasis added). While he would like more leeway, the City Manager is clearly stating that the City Council has the right to approve waivers.

I am troubled by the City Manager stating (as reported in the January 30, 1997 *Cambridge Chronicle*) that this is the first time he is asking for a legal opinion on this ordinance. Clearly it is not; and the November 13, 1995 legal opinion is addressed to him. If another legal opinion is issued with a conclusion different to that of the November 13, 1995 legal opinion it means that either the City Solicitor was negligent in the first legal opinion, or, more ominously, that there was coercion placed on the City Solicitor from the highest levels of City government.

Sincerely yours,

Timothy J. Toomey, Jr.
City Councillor

cc: City Councillors

Communications and Reports from City Officers #1

5-82

A communication was received from D. Margaret Drury, City Clerk, transmitting a letter from Councillor Timothy J. Toomey, Jr., regarding the legal opinion on the Residency Ordinance.

In City Council February 10, 1997

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