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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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October 21, 2024

Yi-An Huang
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Response to Awaiting Report No. 24-44 Re: Report on Whether Cambridge can Enact a Local Ordinance or Regulation Similar to H.3685, Which Would Prohibit Associations from Unreasonably Restricting the use of a Solar Energy System, or Whether the City Should Submit a Home Rule Petition to Ensure Access to Solar Energy for Residents.

Dear Mr. Huang:

Please accept the following opinion in response to the above-referenced Awaiting Report No. 24-44 of 8/5/2024 ("Council Order"). The Council Order requests the City Manager "to work with the Law Department to provide a legal opinion on whether Cambridge can enact a local ordinance or regulation similar to [proposed House Bill,] H.3685 [(hereinafter, H.3685)], which would prohibit associations from unreasonably restricting the use of a solar energy system, or whether the City should submit a Home Rule Petition to ensure access to solar energy for residents."

For reference, it is understood that the term "associations" as it appears in the Council Order is a reference to an organization of real property owners such as condominium or homeowner associations. It is further understood based on information provided by Community Development Department staff that the General Court, as of now, will not be enacting H.3685.

As explained below, we believe that the City Council's enactment of an ordinance similar to H.3685 likely would not constitute a valid exercise of municipal power granted under Section 6 of the Home Rule Amendment, art. 89 of the Amendments to the Constitution of the Commonwealth (hereinafter, "Home Rule Amendment" or "HRA"). Namely, such an ordinance would likely be considered the enactment of a private or civil law governing civil relationships and not be incident to an exercise of independent municipal power, and thus noncompliant with Section 7(5) of the Home Rule Amendment. In light of this, to enact legislation similar to H.3685,

the City Council would need to submit a Home Rule Petition to the Legislature pursuant to Section 8 of the HRA requesting such authority.

DISCUSSION

A. Summary of Pertinent Provisions of H.3685.

H.3685, as proposed, would impose two prohibitions related to the use of a "solar energy system" (which the bill defines, in pertinent part, as "a devise or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating or water heating"). H.3685. Namely, H.3685 would amend G.L. c. 184 by striking out the existing Section 23C of that chapter and replacing it with the following: "[a]ny provision in an instrument relative to the ownership or use of real property which purports to forbid or unreasonably restrict the installation or use of a solar energy system, or the building of structures that facilitate the collection solar energy shall be void." Id.

G.L. c. 184, § 23C, as amended by H.3685, would also contain the following provision: "No association shall forbid or unreasonably restrict the installation or use of a solar energy system." Id. For reference, the bill would define "association" as "a homeowners' association, condominium association, property owners association, community association, housing cooperative or any other nongovernmental entity with covenants, bylaws and administrative provisions with which a homeowner is required to comply". Id.

B. Relevant Provisions of the Home Rule Amendment.

Municipalities are authorized by the Home Rule Amendment to enact local laws. Specifically, Section 6 of the HRA provides, in pertinent part:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

Section 7 of the Home Rule Amendment contains specific limitations on municipalities' ability to enact legislation. As relevant here, Section 7 states: "Nothing in this article shall be deemed to grant to any city or town the power to . . . (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power."

C. The Enactment of an Ordinance Similar to H.3685 Would Likely Implicate Section 7(5) of the Home Rule Amendment.

If the City Council were to enact an ordinance like H.3685, it would be civil in nature and would likely be considered to govern civil relationships. Specifically, one of the provisions of

H.3685 would void any provision in an instrument relative to the ownership or use of real property which forbids or unreasonably restricts the installation or use of a solar energy system or the building of structures that facilitate the collection of solar energy. Similarly, the other relevant provision in H.3685 would prohibit associations from forbidding or unreasonably restricting the installation or use of solar energy systems.

It is unknown if any properties in Cambridge are currently affected by legal instruments (*e.g.* deeds, mortgages, leases) that contain such prohibitions or if any associations forbid or restrict the installation or use of solar energy systems. Assuming for sake of argument some properties in Cambridge are currently affected by such prohibitions or restrictions, an ordinance voiding such prohibitions would affect civil relationships, and thus implicate the first portion of the limitation set forth in Section 7(5) of the Home Rule Amendment. Bannerman v. City of Fall River, 391 Mass. 328, 331-32 (1984).

Further, even if the City Council were to enact an ordinance that either: (A) prohibits associations formed after the ordinance's enactment from promulgating covenants that limited the use of solar energy systems; or (B) prohibits already existing associations from promulgating such covenants in the future (if such covenants are not already in existence), and did not include the exact provisions of H.3685, such an ordinance would still likely be considered to govern civil relationships. See Bloom v. City of Worcester, 363 Mass. 136, 146-47 (1973) (emphasis added) (indicating civil relationships for purposes of Section 7(5) of HRA include "landlords and present or **prospective** tenants and between employers and present and **prospective** employees").

The enactment of an ordinance that limits associations from restricting the installation or use of solar energy systems would therefore likely implicate Section 7(5) of the HRA.

D. The Enactment of an Ordinance that Restricts Associations from Limiting the Use or Installation of Solar Energy Systems on Properties Likely Would not Constitute a Valid Exercise of Municipal Power Granted Under Section 6 of the HRA.

As referenced above, "[a]n ordinance which governs a civil relationship may be valid despite the proscription of [Section] 7(5) if it is 'incident to an exercise of an independent municipal power.'" Bannerman, 391 Mass. at 332 (quoting HRA, § 7(5)). The Supreme Judicial Court has interpreted the phrase "independent municipal power" in Section 7(5) of the Home Rule Amendment to mean "viewing separately the various component powers making up the broad police power, with the consequence that a municipal civil law regulating a civil relationship is permissible . . . only as incident to the exercise of some independent, individual component of the municipal police power." Bd. of Apps. of Hanover v. Hous. Apps. Comm. in the Dep't of Cmty. Affairs, 363 Mass. 339, 359 (1973) (quoting Marshal House, Inc. v. Rent Review and Grievance Bd. of Brookline, 357 Mass. 709, 718 (1970)). If an independent municipal power is identified as supporting the enactment of an ordinance that implicates Section 7(5), the analysis turns on whether that ordinance's enactment can be found valid as an exercise of that specific municipal power granted to the municipality by Section 6 of the HRA. CHR Gen. Inc. v. City of Newton, 387 Mass. 351, 356 (1982).

For the purposes of this analysis, the only independent municipal power included in Section 6's grant of powers to adopt ordinances for the protection of the public health, safety and general welfare which we believe the City could *ostensibly* enact legislation like H.3685 would be pursuant to the City's zoning power. Bd. of Apps. of Hanover, 363 Mass. at 359. More specifically, we believe an ordinance that restricts associations from limiting the use or installation of solar energy systems on real properties would affect the use, not ownership, of such properties. See CHR Gen. Inc., 387 Mass. at 356 (citing A. Rathkopf, Zoning and Planning § 1.04, at 1-21 (4th ed. 1982).

We further believe, however, that the enactment of an ordinance that restricts associations from limiting the use or installation of solar energy systems on real properties would not be a valid exercise of the City's zoning power because the City likely would have no method of enforcing the ordinance's requirements. G.L. c. 40A, § 7 sets forth municipal zoning enforcement powers. The relevant enforcement mechanisms of that statute, however, contemplate action with respect to: (A) buildings or structures that are going to be constructed in the future; (B) buildings or structures that are already constructed; and (C) uses of real property that are already in effect. Id. The ordinance that is proposed by the Council Order likely would not apply to any of these circumstances.

Rather, the enforcement scenario likely to arise would be as follows: (A) a condominium unit owner desires to install a solar energy system on the exterior of the condominium building where said owner lives pursuant to the hypothetical ordinance; (B) the condominium association refuses to grant the unit owner permission to install the solar energy system on the building's common area; and (C) the unit owner then requests that the City compel the condominium association to allow the owner to permit the installation of the solar energy system on the building's exterior common area pursuant to the hypothetical ordinance. In that scenario, the City would seek to compel a condominium association to require the construction of a building appurtenance (a solar energy system) somewhere on the condominium building's exterior common area.

Though the powers of municipalities to enact zoning ordinances and bylaws are not to be narrowly construed, Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of App. of Billerica, 454 Mass. 374, 381 (2009), compelling property owners to allow construction of structures or appurtenances does not appear to be one of the enforcement mechanisms contemplated by G.L. c. 40A, § 7.

This conclusion is buttressed by the last sentence of G.L. c. 40A, § 7, which states: "The superior court and the land court shall have the jurisdiction to enforce the provisions of this chapter, and any ordinances or by-laws adopted thereunder, and may **restrain** by injunction violations thereof." (Emphasis added). There are generally two kinds of injunctive relief: mandatory and prohibitive. 14C Mass. Prac. Summ. of Basic Law, § 10:16 (5th ed.). "A mandatory injunction compels a party to take some type of affirmative action, while a prohibitory one restrains a party from doing a specific act." Id. In this regard, the fact that G.L. c. 40A, § 7 includes "restrain," but does not include "compel" is instructive. Namely, courts do not read into a statute a provision which the Legislature did not see fit to put in, nor add words that it had the option to but chose not to include. Commonwealth v. Williams, 481 Mass. 799, 807-08 (2019). If the Legislature had intended to provide local zoning officials the power to compel individuals who are subject to

zoning law to take affirmative actions, it presumably would have included the word "compel" in the last sentence of the statute.

Thus, enacting an ordinance that would permit the City to enforce a zoning violation by way of compelling an association to require the construction of a building appurtenance against the association's will would, in effect, read into G.L. c. 40A, § 7 language that the Legislature did not see fit to include. As such, under existing state zoning law, it appears the City would have no method of enforcing such an ordinance.

Accordingly, the enactment of an ordinance that restricts associations from limiting the use or installation of solar energy systems on real properties likely would not constitute a valid exercise of municipal power granted under Section 6 of the Home Rule Amendment.[1] As a result, we believe that the City, through the City Council, would need to submit a Home Rule Petition requesting authorization from the Legislature pursuant to Section 8 of the HRA to enact such an ordinance.

CONCLUSION

For the reasons explained above, it is our belief that the enactment of an ordinance that restricts associations from limiting the use or installation of solar energy systems on real properties (like by H.3685) would not constitute a valid exercise of municipal power granted under Section 6 of the Home Rule Amendment. The enactment of such an ordinance would likely be considered the enactment of a private or civil law governing civil relationships and not be an incident to an exercise of independent municipal power, and therefore not be compliant with Section 7(5) of the HRA. Therefore, to enact legislation similar to H.3685, the City Council would need to submit a Home Rule Petition to the Legislature pursuant to Section 8 of the HRA requesting authority to do so.

Very truly yours,

Megan B. Bayer
City Solicitor

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[1] Even if the enacting an ordinance like H.3685 was permissible under the City's zoning power, the City would not be permitted to enact provisions which voided existing legal instruments related to the ownership or use of real property that forbid or restricted the installation or use of solar energy systems on real property (*e.g.*, an existing condominium bylaw limiting solar energy systems) because a zoning law cannot relieve established and existing building restrictions. Brackett v. Bd. of App. of Bldg. Dept. of City of Boston, 311 Mass. 52, 57 (1942); Jenney v. Hynes, 282 Mass. 182, 194 (1933).