CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager *Richard C. Rossi, Deputy City Manager*

July 29, 2002

To The Honorable, The City Council:

In response to City Council Order No.19, dated 06/10/02, regarding a legal opinion on whether the City Council may by ordinance or otherwise delegate the power to approve curb cuts, Russell B. Higley, City Solicitor reports the following:

The City Council's statutory authority to grant curb cuts derives from the provisions of G.L. c. 82 s 21, which authorizes the City Council to accept, lay out and alter public ways. Unless there is a special act specifically authorizing some other official or body to grant curb cuts, this authority rests solely with the City Council pursuant to that statute.

If the City Council wished us to prepare a home rule petition for the passage of such a special act, we would need additional information as to whether the City Council would seek to delegate all of its powers with respect to the acceptance, layout and alteration of the public ways, or only with respect to curb cuts. Whether the City Council were to decide on a complete or only a partial transfer of its authority, the special act would provide for the transfer of that authority to the City Manager, after following appropriate procedures.

Very truly yours,

Robert W. Healy
City Manager

RWH/dls

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February 1, 1996

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

Re: Communications and Reports from City Officers Item #1 of January 29, 1996

Dear Mr. Healy:

Pursuant to the above-captioned Item #1, I am submitting an opinion regarding the procedures to be followed in the City's processing of an application for a curb cut, and the criteria to be considered by the City Council in reviewing such applications, and have set forth below my analysis of what criteria the City Council may use in considering whether to grant or deny a curb cut application.

A. The City's Policy and Procedures Regarding Curb Cuts

I have attached hereto the City's "Procedure With Respect To Driveway Cuts, Openings And Off-Street Parking Spaces Or Facilities" which has been prepared and recently revised by the City Clerk, and which is available in the City Clerk's Office to persons who wish to apply for a curb cut.

I have also attached the City's "Policy On Applications For Driveway Cuts, Openings And Off-Street Parking Spaces Or Facilities", which was prepared by this Office in coordination with members of your staff and the Department Heads of the several Departments which review curb cut applications prior to submission to the City Council. This Policy Statement outlines a new monitoring procedure recently developed by the Data Processing Department and installed on the City wide VAX that will allow for the control of the flow of information relating to applications for curb cuts among the Inspectional Services Department, the Board of Zoning Appeal, the Traffic and Public Works Departments, the Historical Commission and the City Clerk's office.

B. The City's Authority To Grant Or Deny Curb Cuts

1. The City's Regulatory Powers

Pursuant to the provisions of G.L. c. 82, §21, the City of Cambridge has the authority to lay out, relocate or alter public ways. Under the authority granted the City by this statute, the City Council and Administration have developed the above Policy and Procedures relative to processing and reviewing property owners' applications for curb cuts to their premises. This authority is, however, subject to a property owner's right of reasonable access to their property from the abutting public or private way and, therefore, there must be a balancing of the public interests involved and the private property owners' interests, as set forth below.

2. The Property Owner's Right of Access

There is a common law rule that a property owner has a right of access to the abutting public way. Dwyer v. M.D.C., 269 Mass. 573, 578 (1930). In one case, the Court stated, "Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land and exists when the fee of the way is in the municipality as well as when it is in private ownership." Anzalone v. M.D.C., 257 Mass. 32, 36 (1926) (citations omitted).

It has also been held that although the Massachusetts Highway Department has the authority pursuant to G.L. c. 81, §21 to regulate the digging up or opening of a state highway, this authority does not extend to barring entirely the access of an abutting landowner, Wenton v. Commonwealth, 335 Mass. 78, 80 (1956), and that a property owner's loss of access to their property from a public way may be compensable damage. Betty Corporation v. Commonwealth, 354 Mass. 312 (1968).

However, the property owner's right of access to the street is not absolute but, rather, is subject to reasonable regulation and restriction in the public interest. 39A C.J.S., "Highways", §141(2)(a) (1976). Thus, the rule has been stated as follows:

> In the exercise and enjoyment of his easement of access, an abutting owner has a right to construct a driveway or other suitable approach in front of his premises, from his land to the traveled part of the highway, if reasonably necessary and if done in such a way as not to interfere with the rights of the public, subject to such reasonable regulations as the public authority may prescribe. Cities ... may regulate the access of abutters by granting or withholding permissions to make curb cuts, construct driveways to the road, and the like, although an abutter may not thereby be deprived of all access without compensation.

39 Am. Jur. 2d, "Highways, Streets and Bridges", §181 (1968).

It is important to note that the property owner has the right to construct a driveway in front of his premises only if reasonably necessary and if done in such a way as not to interfere with the rights of the public, and that this right is subject to such reasonable regulations as the public authority may prescribe. Id. Accordingly, as this right is not absolute, it is significantly diminished where the property owner already has access to their premises from a public or private way, where it interferes with the rights of the public to have public shade trees, on-street parking, safe and smooth traffic flow, the preservation of historic structures, streets and neighborhoods, and the provision of services and utilities, etc., and is thus subject to a proper balancing of the private and public interests.

3. Criteria To Be Applied By The City Council In Reviewing Curb Cut Applications

In accordance with the City's authority to promulgate reasonable regulations to protect the public interests and rights, the City's Policy Statement and Procedures Statement set forth the many criteria the various City Departments must consider in their review of a curb cut application. The City Council may reconsider all relevant criteria or may simply ascertain whether the various Departments properly applied the appropriate criteria in their review of an application. The specific criteria to be applied, as set forth in the Procedure Statement, include the following:

a. Compliance with all relevant aspects of the City's Zoning Ordinance;

b. Review of traffic safety concerns and compliance with all relevant traffic regulations, including whether the curb cut will have a detrimental effect on the roadway and a determination of what effect the driveway will have on the street it is on as to the volume of traffic, pedestrians and bicycles, traffic speed, accident history, sight distances and the location of the proposed driveway in relation to other driveways and intersections, and the impact on existing and on-street parking and sign posts;

c. Determination of whether the curb cut is in an historic or neighborhood conservation district or is on the premises of a landmark, so as to prevent developments incongruous to the historic aspects or the architectural characteristics of the surroundings and of the historic district, including a review of the general design, arrangement, texture, material and color of the features involved, including new driveways, paved paths and landscaping structures, and the relation of such features to similar features of buildings and structures in the surrounding area;

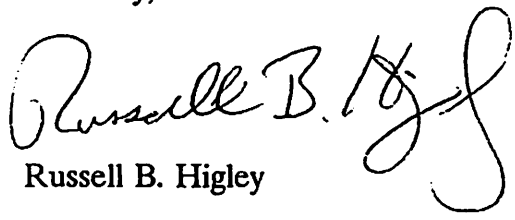
d. Review of the curb cut location for potential interferences with other city utilities and structures, assessing the requested length of the proposed curb cut to insure that it will have minimal impact on existing on-street parking, to insure that utility poles, trees, hydrants, sign posts, etc. will not obstruct or be obstructed by the proposed curb cut, and to insure that the proposed curb cut will not infringe on abutters' property; and

e. Consideration of the concerns and responses of members of the community, including neighbors, abutters and the appropriate neighborhood associations in the area of the applicant.

4. Judicial Review of Curb Cut Decisions

Although the above referenced caselaw suggests that a municipality must permit a property owner access to the premises from a public or private way, we believe that the special circumstances existing in the City of Cambridge, an old, densely developed and populated urban environment might well be sufficient to persuade a Court that a denial of a curb cut for vehicular access to a lot may be justifiable. An even stronger argument can be made for the denial of a curb cut where one already exists. Thus, where a second or third curb cut is requested, and a review of the relevant criteria demonstrates that it would not be in the public's best interests to add another curb cut in that location, a denial of that application would in all likelihood be upheld by the Courts. However, such denials have not been specifically upheld by our Courts, and could therefore be challenged by Court action. Accordingly, where some criteria support a grant of a curb cut and others support a denial, the City Council must balance the various interests identified in this Memorandum and, guided by the appropriate considerations and potential impact on the community, and the Council's best judgment, attempt to arrive at the most reasonable decision. The more objective and demonstrable the criteria, the stronger the case will be for validation of the City Council's decision to grant or deny a curb cut.

Sincerely,



Russell B. Higley

City of Cambridge

PROCEDURE WITH RESPECT TO DRIVEWAY CUTS, OPENINGS AND OFF-STREET PARKING SPACES OR FACILITIES

1. An applicant may obtain an Application for Driveway Cuts and Openings at the Department of Public Works or Inspectional Services Department.

2. In addition to the application itself,(and the sketch required on the application form), the applicant must include a plot plan to scale which illustrates the driveway cut and the layout of the proposed on grade, off-street parking space, spaces or facility.

3. The applicant must also include signed abutter's forms of those abutters in front, side, rear and across the street from the property which the curb cut will be made. If the applicant is unable to obtain these signatures, he/she must include a statement with the application that an attempt was made to secure the required signatures and that it was not possible to obtain them and indicate the reasons why it was not possible to obtain the signatures.

4. The applicant shall submit the application, together with the plot plan and the abutter's forms, shall be first submitted to the Inspectional Services Department, located at 831 Massachusetts Avenue. The Inspectional Services Department will (1)immediately send a copy of the application to the City Clerk's Office to start the neighborhood association notification process,and (2)review the application for completeness of application, inclusion of abutter's forms and compliance with the City of Cambridge Zoning Ordinance.

   Curb cut requirements are detailed in Section 6.40 of the Zoning Ordinance. Following are some of the more significant requirements that must be met to comply with zoning:

   a. A curb cut cannot be located closer that twenty five (25) feet to a street intersection or within fifteen (15) feet of a crosswalk.

   b. The driveway must be at least ten (10) feet wide.

   c. For lots having less than 100 feet of frontage, a maximum of only one curb cut is allowed.

   d. The required size of the parking space is 8 1/2 feet by 18 feet. The parking space cannot be located within the front yard setback.

   If the Inspectional Services Department makes a determination that the curb cut is <u>not</u> in compliance with the Zoning Ordinance, the applicant has the following options: discontinuing the application process; modifying the application to bring it into compliance with the Zoning Ordinance; appealing the Inspectional Services determination to the Board of Zoning Appeals (BZA); or requesting from the BZA a variance from the Zoning Ordinance. If the applicant is not successful with the appeal or variance request before the BZA, recourse is through the courts.

5. The City Clerk will notify neighborhood associations in the area of the petitioner and will send a copy of this notification to the applicant. Notification will include a copy of the plot plan or drawing submitted with the application and will request that the neighborhood association inform the City Clerk whether it approves or

disapproves of the application. Petitioners are urged to contact their neighborhood association early to avoid delay.

6. If the Inspectional Service Department (or the Board of Zoning Appeal) approves the application, Inspectional Services will then send it to the Department of Traffic, Parking and Transportation. If Traffic and Parking refuses to approve the application, it will so inform the applicant, who may appeal to the City Council for action.

7. If the application is approved by Traffic and Parking, that department will then send the application to the Historical Commission. If the Commission approves, the Commission will send the application to the Department of Public Works; if the Commission disapproves the application, the applicant may appeal under statutes and ordinances governing the administration of historically designated properties, information about which may be obtained from the Commission.

8. If the Department of Public Works (DPW) approves the application, DPW will send the application to the City Clerk's Office. If DPW disapproves the application, it will notify the applicant and the applicant may appeal the disapproval to the City Council.

9. No sooner than ten days after the initial notification of the neighborhood associations (see no. 5 above), the City Clerk will place the application on the next City Council agenda. If the City Council approves the application, the City Clerk will notify the applicant and will send the application back to the Department of Public Works. The cost of the driveway construction will be calculated and the driveway will be put on the schedule and a date assigned for construction. The applicant must pay in full for the construction cost, based on the cost indicated, within two weeks before the estimated start of construction. No construction will begin unless the full cost of the driveway has been paid for in advance.

   In certain cases, the Department may arrange with the applicant to have the driveway done by a private contractor; however, the contractor will have to post a bond, obtain a permit from the DPW and have his work inspected as to city standards before the bond is released. In this case the contractor will have a direct relationship with the applicant and the city will not intervene unless the contractor does not meet city requirements for driveway construction.

10. **APPLICANTS ARE CAUTIONED AGAINST EXPENDING ANY MONEY ON MODIFICATIONS TO THEIR PROPERTY IN ANTICIPATION OF THEIR APPLICATION BEING APPROVED BY THE COUNCIL.**

    If a curb cut is required in connection with a project for which a building permit from the Inspectional Service Department is required, the building permit will not be issued until approval for the curb cut is first obtained from the Council. In extraordinary cases, an incremental (foundation, site work, etc) building permit may be issued if the following conditions, as a minimum, are met; the application has been initiated with the Inspectional Services Department, approvals from abutters have been obtained, a hardship is demonstrated, and the applicant states that he/she is proceeding at his/her own risk.