To: All Planning Board Members
From: Marnie Crouch
Re: Contract Zoning and Spot Zoning
Date: December 19, 2022

MEMORANDUM

The following is a brief summary of case law in Massachusetts that may be at play when a potential rezoning provision is considered by the Planning Board. My apologies for the density of the information, but even a cursory review may be helpful in the future as the concepts will not be entirely unfamiliar.

I. Contract Zoning

In the case of Durand v IDC Bellingham, LLC, 440 Mass 45, 46, 793 NE2d 359, 361 (2003), the Massachusetts Supreme Judicial Court considered an appeal involving the following facts:

> On May 28, 1997, residents attending the town of Bellingham's (town's) open town meeting voted to rezone a parcel of land located in the town. Three and one-half years later, several residents living near the parcel brought suit challenging the rezoning. The question before the court is whether the town meeting vote was invalid because the prospective owner of the parcel, IDC Bellingham, LLC (IDC), had offered to give the town $8 million if the rezoning was approved and a power plant was built and operated on the site.

The plaintiffs' asserted the grant of five special permits was arbitrary, capricious, lacking in substantial evidence, and ultra vires. Specifically, they asserted the rezoning was void because it constituted illegal "contract" or "spot" zoning and because the text of the enacted zoning amendment differed substantially from the text of the proposed amendment. The Land Court discussed whether "contract zoning" existed as a "separate ground for invalidating a zoning ordinance." Assuming that it did, the judge found that "contract zoning" had not occurred here, at least within the meaning he ascribed to that term. He then found that "there would be little doubt that the 1997 rezoning was valid" if the $8 million gift offer had not been made, and proceeded to discuss its implications. The Land Court viewed the offer of the gift as an "extraneous consideration," because it was not defended as being in mitigation of the impacts of the project, and therefore concluded that it was "offensive to public policy." Relying on Sylvania Elec. Prods. Inc. v. Newton, 344 Mass. 428, 434, 183 N.E.2d 118 (1962) (stating that developer's consideration to town did not nullify zoning vote because it was not "extraneous consideration" unconnected to project), the Land Court invalidated the rezoning. The Supreme Judicial Court reversed. Id. at 46-50, 793 NE2d at 361-64.

The decision contains a number of points pertinent to any zoning change involving GCTS. While the concepts may be new to Planning Board members, familiarity with the principles set forth in the following cases may be useful when it comes time for the Planning Board to consider proposals for the GCTS site. I have listed the principles and the ruling of the SJC in order.

1. “The Home Rule Amendment granted cities and towns ‘independent municipal powers which they did not previously inherently possess’ to adopt, amend, or repeal local ordinances or bylaws ‘for the protection of the public health, safety and general welfare.’ The zoning power was one of the ‘independent municipal powers’ granted to cities and towns by the Home Rule Amendment, enabling them to enact zoning ordinances or bylaws as an exercise of their ‘independent police powers’ to control "land usages in an orderly, efficient, and safe manner to promote the public welfare as long as their enactments were ‘not inconsistent with the Constitution or laws enacted by the Legislature[.]’” Durand, 440 Mass. at 50-51, 793 NE2d at 364 (citations omitted).

2. The enactment of a zoning bylaw by the voters at town meeting is not only the exercise of an independent police power; it is also a legislative act, carrying a strong presumption validity. Id.

Moreover, “[i]f the reasonableness of a zoning bylaw is even “fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.” Such an analysis is not affected by consideration of the various possible motives that may have inspired legislative action. . . . Id. (citations omitted).

3. “Municipal zoning procedure is governed by G. L. c. 40A. “Section 5 dictates the process a municipality must follow in amending its zoning bylaws. G. L. c. 40A, § 5. In a town, such an amendment must be submitted to the board, which, within fourteen days, must then refer the amendment to the planning board for review. G. L. c. 40A, § 5, first par. The planning board has sixty-five days during which to hold a public hearing, with notice provided beforehand, at which members of the public can offer their views on the amendment. G. L. c. 40A, § 5, second par. Once the hearing has been held, the planning board has twenty-one days to provide its recommendation to the town meeting. Thereafter, the town meeting may adopt, reject, or amend the proposed amendment to the zoning bylaw. The town meeting must act, however, within six months of the planning board hearing. G. L. c. 40A, § 5, fourth par. The amendment will not be enacted unless it receives a two-thirds vote from town meeting. G. L. c. 40A, § 5, fifth par. Neither party claims that this process was not followed, and the record before us indicates that it was.” Durand, 440 Mass. at 52, 793 NE2d 365.

4. “An agreement between a property owner and a municipality to rezone a parcel of land may cause the municipality to the process mandated by § 5. Such an instance of ‘contract zoning,’ as we will refer to it, [involving a promise by a municipality to rezone a property either before the vote to rezone has been taken or before the required § 5 process has been undertaken, evades the dictates of G. L. c. 40A, and may render the subsequent rezoning invalid.” Durand, 440 Mass. at 54, 793 NE2d at 366-66. Thus, if the voters at town meeting are not bound to approve the zoning change, and the procedure dictated by § 5 is followed, the rezoning is not invalid.

5. “The practice of conditioning otherwise valid zoning enactments on agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development is a commonly accepted tool of modern land use planning, *see* 4 A.H. Rathkopf & D.A. Rathkopf, Zoning and Planning § 44.12 (2001) (noting general approval of practice as "valuable planning tool"), constrained, of course, by constitutional limitations not at issue here.” Durand, 440 Mass. at 55, 793 NE2d at 367.

6.. “In general, there is no reason to invalidate a legislative act on the basis of an ‘extraneous consideration,’ because we defer to legislative findings and choices without regard to motive. We see no reason to make an exception for legislative acts that are in the nature of zoning enactments, and find no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is in any way prompted or encouraged by a public benefit voluntarily offered. We conclude that the proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare.” Durand, 440 Mass. at 57, 793 NE2d at 369 (citations omitted).

Thus, the Durand case contains important principles to keep in mind when considering any rezoning provisions. While zoning amendments may be presumptively valid if the principles and conditions set forth in Massachusetts law and in case law are followed, there are other considerations, however, to take into account depending upon circumstances. In an article captioned “Contract and conditional zoning” appearing in the treatise Land Use Planning and Development Regulation Law § 5:11 (3d ed.), the authors observed the following:

> ***C. Conditions Imposed by Private Covenant***
> Where a city imposes conditions by way of a side agreement that takes the form of a covenant, problems of uncertainty arise. In one case the landowner recorded a restrictive covenant limiting the uses of rezoned land contemporaneously with the rezoning. Years later, after the property had changed hands, a building inspector, unaware of the covenant, issued a permit allowing the new owner to proceed with a use permitted by the relevant business classification. Someone, who recalled that the city had obtained a covenant, brought it to the inspector's attention, and the inspector revoked the permit. The court invalidated the rezoning in part because of the fact that an examination of the records in the zoning inspector's office did not reveal the zoning restrictions applicable to the tract. This uncertainty properly troubled the court.
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> Some courts have upheld agreements that take the form of private covenants between a city and landowner, or between neighbors and landowner. Still, unless compelled to resort to such a technique by state law, a city should avoid the practice. While the agreements, if recorded, do provide constructive notice to the public, the land records are not where one expects to find zoning laws. *Conditions should be set out in the rezoning amendment. Not only is the chance for confusion or surprise diminished, but the open acknowledgment of conditions eliminates the suspicion that there is something to hide that is aroused by undisclosed, or difficult to find, contracts.*

(footnotes omitted, emphasis supplied). The authors further observed:

> “Community benefits agreements” (CBAs) involve direct private negotiations between the developer and representatives of affected neighborhoods or communities,[sic] To mollify potential adversaries and buy support, the developer

> may scale down a project or offer amenities benefits to the community that the local government would typically be unable to bargain for in the land approval process. There are dozens of examples of successful CBAs across the country, yet they are still not in widespread use. Challenges, such as identifying who has authority to speak for the community and whether the local government will even approve the application with or without the CBA may be uncertain. In addition, whether the agreements are enforceable and by who is still an untested area of the law as these are private contractual agreements and therefore the local government is not obligated to approve a proposed project just because there is a CBA, nor is the government responsible for the enforcement of the private agreement. The powers and resources that community groups may or may not have to enforce the private agreement may be also uncertain.

Id. (footnotes omitted).

II. Spot Zoning

In Fed. St. Neighborhood Assn. & others v F.W. Webb Co. & others, 1677CV01792-D, 2020 WL 927580, at *8 (Mass Super Feb. 13, 2020,), the court, reiterating principles set forth in Durand observed:

> Whether a municipality's approval of a zoning change constitutes spot zoning "turns not on what parcel has been singled out, or even on the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act." Given "'the wide scope of the purposes of The Zoning Act, it is apparent that the Legislature intended to permit cities and towns to adopt any and all zoning provisions which are constitutionally permissible,' subject only to 'limitations expressly stated in that act (see, e.g., G. L. c. 40A, § 3) or in other controlling legislation.'" Therefore, "every presumption is to be made in favor of the [zoning change] and its validity will be upheld unless it is shown beyond reasonable doubt that it conflicts with the enabling act."
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> At bottom, a plaintiff seeking to challenge rezoning as spot zoning "has the heavy burden of showing that [the zoning change] conflicts with the [zoning] enabling act." The plaintiff must prove "by a preponderance of the evidence that the [zoning change] is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." "Put another way, the party challenging the [rezoning] has the burden of proving 'facts which compel a conclusion that the question [of] whether the [change] falls within the [scope of the] enabling statute is not even fairly debatable.'" "'If the reasonableness of [the zoning change] is fairly debateable, the judgment of the local legislative body ... should be sustained and the reviewing court should not substitute its own judgment.'"

Id. (citations omitted).

Despite the foregoing principles, in McLeod v. Town of Swampscott, 2014 WL 869538 (Massachusetts Land Court March 14, 2014), the court determined that a zoning change was invalid because it constituted spot zoning. Specifically, the court considered "the validity of a rezoning of a 2.2 acre parcel in Swampscott, in the middle of a single-family residence zone, from single-family residence to the "by right" allowance of a multi-story, 41-unit, market-rate apartment/condominium complex without any age, affordability, or historic preservation restrictions. The parcel was at the top of the hill in the Greenwood Avenue neighborhood, overlooking the waterfront, and surrounded on all sides by the neighborhood's homes. It was currently owned by the town and occupied by a now-vacant school building dating from 1893, last used in 2007. The rezoning was done in connection with the town's intended sale of the parcel to a private developer, who would then demolish the historic building, build a 60-foot high new one (the zoning was previously restricted to 35 feet), and then sell its 41 newly-constructed units to the highest bidders. The issue was whether the rezoning of a town-owned parcel, solely to raise maximum revenue for the town is an allowable "public purpose" sufficient to remove it from spot zoning? Id. at 1.

The court initially noted that the plaintiffs would have no grounds to complain if the school had been preserved as originally intended, but that the sole goal of the town after abandoning historic preservation was to generate as much money as possible for the general fund.

The court conducted a jury-waived trial. It rejected the town's argument that the rezoning was driven, in part, by the desire to create smaller residential units for the town's aging population as unsupported by credible evidence, even assuming that to be a valid public purpose for this particular site. The court found that "[i]n light of the lack of age, affordability and town residence restrictions or preferences, leaving the developer free (and, in this location, certain) to build market-rate, luxury-level units and sell them to the highest bidders whomever they may be, the rezoning is unlikely to have an 'empty nester' effect and thus will not have a 'substantive relationship' to that purported goal. The court stated "the sole issue to be determined is whether, as a matter of law, the goal of generating maximum revenue from the sale of this town-owned parcel in and of itself justifies its rezoning to allow by-right, high-density development not permitted elsewhere in the surrounding zoning district." Id. (citations omitted). It concluded that it did not and ruled the rezoning to be invalid spot zoning.

The court stated the following:

> To put the following factual findings in context, I begin by setting out the standard by which spot zoning is judged.
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> Two principles are basic to all zoning. First, "[t]he power to make a division of the town into various districts and to designate the purposes for which land in those districts may be used 'rests for its justification on the police power, and that power is to be asserted *only* if the public health, the public safety and the public welfare'" be thereby promoted and protected.". *Second*, "any zoning ordinance or by-law which divides cities and towns into districts *shall be uniform* within the district for each class or kind of structures or uses permitted. The basic assumption underlying the division of a municipality into zoning districts is that,

> in general, each land use will have a predictable character and that the uses of land can be sorted out into compatible groupings. . . . A zoning ordinance is intended to apply uniformly to all property located in a particular district, and the properties of all the owners in that district must be subjected to the same restrictions for the common benefit of all

2014 WL 869538 at 2.

According to the court, "[s]pot zoning is impermissible because it violates the uniformity principle, and occurs when there is "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot. A zoning amendment that singles out such a lot for less restrictive treatment may be permissible, however, if it advances the "public welfare." "Public welfare," however, has a particular meaning in the zoning context. It must be based on permissible land use planning objectives, and "[t]here must be a showing of some substantial relation between the zoning code amendment and the general objectives of the enabling act," "Among the considerations to be taken into account are the physical characteristics of the land, its location, size, and the nature of adjoining uses." Although there is a strong presumption in favor of validity, and "if the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body … should be sustained … a zoning ordinance or by-law will be held invalid if it is unreasonable or arbitrary, or substantially unrelated to the public health, safety, convenience, morals or welfare." Id.

The court noted that with the exception of exempt religious and educational uses, only two uses more dense than single family homes were allowed in the district at all (group residences and assisted or independent living facilities), and they are allowed only by special permit. It also observed that multi-family homes were prohibited. And the rezoning site was in the middle of that district, on narrow winding streets in an area plagued with traffic problem, and allows by-right development of 41 separate housing units in a new high-rise building.

The court recounted a labored process that led to the rezoning of the parcel. It reiterated that "it is impermissible spot zoning when there is 'a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot.' A zoning amendment that singles out such a lot for less restrictive treatment may be permissible if it advances the "public welfare" in a land planning context, but is invalid if it does not. Thus, whether the rezoning survives the plaintiffs' challenge depends on whether the Greenwood PDD advances a permissible public purpose. Although there is a strong presumption in favor of validity, "the applicable principles are of judicial deference and restraint, not abdication." 2014 WL 869538 at 8.

The court reiterated that historic preservation and the provision of affordable housing promote the public welfare, as does housing for the elderly, but the proposed project had no requirements "nor even a rationally likely consequence (anyone can buy the units, which will go to the highest bidders) and thus cannot serve as justification for the rezoning." Id. The court rejected diversity of housing as an allowable public purpose absent an affordability component, adding units were

not required to be small. “The fact that the developer chose forty-one simply reflects its calculation that it can make the most money by constructing that many units. Id.

The court further considered whether there is a municipal exception to that principle - a different rule when the parcel owner is the municipality itself rather than a private party. The court stated there was no such exception in the absence of “a showing of some substantial relation between the zoning code amendment and the general objectives of the enabling act,” concluding that “[s]imply raising money for the town’s general fund is not within the objectives of that act, and is thus outside the “public purposes” that zoning contemplates. Id.