

In packets Mtg. of 4/5/99



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EXECUTIVE DEPARTMENT
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April 2, 1999

To The Honorable, The City Council:

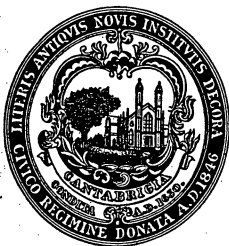
I am hereby transmitting a communication from Deputy City Solicitor Donald Drisdell, in response to a request from several members of the City Council for a general memorandum incorporating the analysis done by Attorney John Leonard during an executive session of the Council.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert W. Healy".

Robert W. Healy
City Manager

RWH/mec
Attachment



CITY OF CAMBRIDGE

Law Department

Donald A. Drisdell
Deputy City Solicitor

RECEIVED
1999 MAR 30 PM 4:07
OFFICE OF THE CITY MANAGER

To: Robert W. Healy, City Manager
From: Donald A. Drisdell
Date: March 29, 1999
Re: ***Spot Zoning and Takings Analysis***

After the executive session held recently to review legal strategy relating to several pending zoning cases, several members of the City Council asked for a general memorandum incorporating the analysis done by Attorney John Leonard during the executive session. I am accordingly providing in this memorandum all of the analysis provided by Mr. Leonard except for the case specific references which have been edited out. This memorandum should be delivered to City Councilors.

Rezoning of Land

(a) General Considerations

The zoning of land is traditionally treated as a matter for local regulation. See, Lanner v. Board of Appeal of Tewksbury, 348 Mass. 220, 228 (1964). In construing a zoning bylaw, a court will make every presumption in favor of the municipality, and the bylaw will usually be enforced unless one can prove that it conflicts with the constitution or the enabling statute. Inspector of Buildings of Lowell v. Stoklosa, 350 Mass. 52, 62 (1924); Crall v. Leominster, 362 Mass. 95, 102 (1972). Specifically, one must show that there was no rational relationship between the bylaw and the furtherance of public safety, public health, public welfare, or some other permissible public goal. See, Caires v. Building Commissioner of Hingham, 323 Mass. 589, 593 (1949); Sturges v. Chilmark, 380 Mass. 246, 256 (1980). Alternatively, one may show that the bylaw is arbitrary, unreasonable, and oppressive as applied to the land in question. Barney & Carey, Co. v. Milton, 324 Mass. 440, 444 (1949); Jences v. Building Commissioner of Brookline, 341 Mass. 162, 165 (1960). The factors which courts consider in determining the reasonableness of the bylaw include "the location, size, and characteristics of the land, the nature and use of adjoining land and other land in the general vicinity, and all physical aspects that are involved." Barney & Carey, Co. v. Milton, 324 Mass. at 449. If

the reasonableness of the bylaw is only questionable, the bylaw will be sustained. Caires v. Building Commissioner of Hingham, 323 Mass. at 594-595.

(b) Spot Zoning

The term "spot zoning" has been defined in two ways. The term is used to designate the actual classification of a small parcel (or parcels) of land for a use classification which is totally different (either more or less restrictive) from that of the surrounding area. The second, and more common definition of spot zoning, is used to describe a zoning amendment which is invalid because it is not in accordance with a comprehensive or well-considered plan. Powell on Real Property, Section 79C.03[3][a]. Spot zoning is said to be the very antithesis of planned zoning. Rodgers v. Village of Tarrytown, 302 NY 115 (1951).

In trying to resolve the issue whether a particular amendment constitutes invalid "spot zoning," the courts consider a number of related factors including, the benefit and detriment to the property owner and public, the size of the classified area, the character of the area adjacent to the reclassified land, and whether the decision is the result of community planning. Powell on Real Property, 79C.03[3][b][i]. In Massachusetts, the size of the spot does not determine whether unlawful zoning has occurred. See, Marblehead v. Rosenthal, 316 Mass. 124, 126 (1994). Compare, Cohen v. Lynn, 333 Mass. 699, 704 (1956).

The case of National Amusements, Inc. v. City of Boston, 29 Mass. App. Ct. 305 (1990), is instructive.

National's property consisted of a 13.8-acre vacant tract which had been formerly used as an outdoor movie theater. The subject property was surrounded for substantial distances by active commercial uses.

The zoning history reflected that in 1924 the property was zoned for industrial use. Prior to 1964, it was rezoned to general business use.

In January of 1986, National began the process of applying for a building permit to build a shopping center on the subject property. That use was permissible as a matter of right under the zoning classification. By letter dated April 16, 1986, the Mayor of the City of Boston wrote to the Boston Redevelopment Authority (the planning arm of Boston) and instructed the Director to take the most appropriate and immediate action "necessary to protect the residential and local business district from unwanted large scale commercial development." National Amusements, 29 Mass. App. Ct. at 307-308. Thereafter, the BRA applied to the Zoning Commission to change the zoning classification to two-family residential. An immediate consequence of the BRA action was for the Inspectional Services Department of Boston to decline to consider National's applications or to issue any permits.

In the Land Court, National challenged the amendment to the Boston zoning code as constituting disparate treatment from similar land in the same zoning area. The Land Court ruled the zoning amendment invalid. On appeal, the Appeals Court affirmed the decision of the Land Court. After reciting the familiar principles that all rational presumptions favor the validity of an amendment by a municipality of its zoning code, the Appeals Court stated that these applicable principles are of judicial deference and restraint, not abdication. The Court noted, "What is striking about the record is the absence of analysis of land use planning considerations by the municipal authority before the decision to change the zoning was taken." National Amusements, 29 Mass. App. Ct. at 310. The Court reasoned that, had there been a change in land use patterns in the general neighborhood which the zoning code ought to take into account, such a trend could justify a zone change; however, recent construction on land surrounding the subject property was consistently commercial and industrial.

The Court concluded that what appears to have occurred is that, in response to National's application for building permits, "The decision to change the zone was made, following which a few fig leaves of rationalization were decorously draped by the BRA around the submission to the Zoning Commission." National Amusements 29 Mass. App. Ct. at 311.

The Court struck down the zoning amendment ruling:

... Indeed, there is nothing inherently unlawful in "reactive zoning." Development proposals do act as incentives to reexamination of land use objectives. **The point that the judge correctly made, however, is that under our cases zone changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable. The vice is the singling out of a particular parcel for different treatment from that of the surrounding area, producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner.**

National Amusements, 29 Mass. App. Ct. at 311 [emphasis added]; see also, Shapiro v. Cambridge, 340 Mass. 652, 659 (1960); Schertzer v. Somerville, 345 Mass. 747, 752 (1963); Canteen Corp. v. Pittsfield, 4 Mass. App. Ct. 289, 292-294 (1976).

National Amusements should be contrasted with Sullivan v. Town of Acton, 38 Mass. App. Ct. 113 (1995). In Sullivan, the plaintiff owned a parcel of land, 9 acres of which abutted Route 2A which was zoned for general business since 1953. The remainder of the parcel was zoned for single family residential use. In 1988, the Town began a comprehensive planning effort which culminated in "downzoning" amendments to the Zoning Bylaw. The 9-acre frontage of plaintiff's property was rezoned single family residential. "Open Space Development" was allowed upon issuance of a special permit. The plaintiffs brought an action in the Land Court to have the rezoning declared invalid. The judge ruled that, since the area was already substantially developed with a

mixture of commercial activity and multifamily uses, the rezoning was arbitrary and unreasonable because residential use of the locus was inappropriate and invalid as a species of “spot zoning.” Sullivan, 38 Mass. App. Ct. at 115. On appeal, the Appeals Court reversed the judgment of the Land Court reasoning:

In this instance, the rezoning was adopted not to confer an economic benefit or harm on any particular owner but as a result of a long-range study and recommendations by the planning board. Along the full length of Route 2A in Acton, several undeveloped parcels fronting it were rezoned for single family residential use. All the rezoned parcels were large and undeveloped. The fact that the land was undeveloped was a relevant factor. See, Cohen v. Lynn, 333 Mass. 699, 704 (1956). Other “downzoning” changes were made at the same time. Commercially developed lots zoned for general business use were rezoned to limited business use to control future commercial development. Parcels containing multifamily housing were rezoned for multifamily use to prevent their conversion to commercial uses. The overall goal was the reduction of future growth of traffic by maintenance of a mixture of uses along the corridor. A comprehensive plan designed to preserve a mixture of uses over a substantial area of a municipality does not necessarily run afoul of the uniformity principle expressed in spot zoning law.

Sullivan, 38 Mass. App. Ct. at 116.

The Sullivan court believed that the trial judge focused too narrowly on the subject property and concluded:

Although the case is close, we think there was an inadequate basis for declaring the amendments invalid as they affected the locus. While a debatable proposition, the town planners believed the change would slow commercial expansion to some extent and, thus, decrease the traffic along Route 2A. The town’s concern with concentrating future commercial development in particular areas was also proper. As we conclude that the April, 1990, rezoning affecting the locus was not unreasonable

Sullivan, 38 Mass. App. Ct. at 117.

(c) Spot Zoning Conclusion

Sullivan v. Town of Acton teaches that Appellate Courts are more likely to be deferential to municipal zone changes that are enacted after comprehensive planning and study of particular areas of a municipality rather than relating to a particular parcel of property.

Regulatory Takings

(a) General Considerations

Every presumption is to be indulged in in favor of a bylaw, and its enforcement will not be refused unless it is shown beyond a reasonable doubt that it conflicts with some constitutional provision or the enabling statute. Where the reasonableness of a zoning bylaw is fairly debatable, the judgment of the local legislative body upon which rested the duty and responsibility for its enactment must be upheld. Foster v. Mayor of Beverly, 315 Mass. 567, 572 (1944); Caires v. Building Commissioner of Hingham, 323 Mass. 589, 594-595 (1948).

Indeed, the Supreme Judicial Court has observed: "A city or town is expressly empowered to adopt zoning ordinances or bylaws 'for the purpose of promoting the health, safety, convenience, morals, or welfare of its inhabitants' and to 'regulate ... the size and width of lots.'" Nevertheless, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. Pennsylvania Coal v. Mahon, 260 US 393, 415 (1922). "There is no set formula to determine where regulation ends and taking begins. Although a comparison of value before and after is relevant ... it is by no means conclusive" Turnpike Realty Company v. Dedham, 362 Mass. 221 (1972). The Court further noted: "We realize that it is often extremely difficult to determine the precise line where regulation ends and confiscation begins. The result depends upon 'peculiar circumstances of the particular instance.'" Turnpike Realty Company at 236.

According to the Supreme Court in Andrus v. Allard, 441 US 51, 65 (1979), the Taking Clause "... preserve[d] governmental power to regulate, subject only to the dictates of 'justice and fairness.'" "Resolution of each case ... calls as much for the exercise of judgment as for the application of logic." Id. at 65. The analysis depended "... largely upon the particular circumstances" of the case, Penn. Central Transportation Company v. City of New York, 438 US 101, 124 (1978), and consisted of "essentially ad hoc factual inquiries." Lucas v. South Carolina Coastal Council, 505 US 1003, 1071 (Stevens, J. dissenting).

The United States Supreme Court set out a comprehensive framework for analyzing the ordinary regulatory taking claim where there is no particular reason to believe that the government is attempting to evade its obligations under the Fifth Amendment. In Penn. Central, the Court articulated three factors for identifying a regulatory taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. Penn. Central, 438 US at 104-138. The Court rejected the notion that mere diminution in value, even if substantial, results in a taking when it observed, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for each such change in the general law," citing Pennsylvania Coal, 260 US at 413.

In Lucas v. South Carolina Coastal Council, 505 US 1003 (1992), the Supreme Court of the United States held that an application of a regulation results in a regulatory taking if it deprives an owner of all economically beneficial use of his property unless it merely duplicates the results that government could otherwise obtain under state nuisance or property law. Lucas, 505 US at 1029. In setting out the above categorical takings test, the Supreme Court of the United States preserved the viability of the Penn. Central test in cases where the landowner has not been deprived of all economically beneficial use. Indeed, the Court specifically noted that, although an owner may not be able to claim the benefit of the Lucas test, if the value of the property diminishes by 75%, the owner can still attempt to show that a regulatory taking occurred under the traditional Penn. Central test. Lucas, 505 US at 1019, n.8.

(b) Analysis of Massachusetts Regulatory Taking Cases

An analysis of the Massachusetts regulatory taking decisions pre- and post-Lucas reflects a pattern of conservative decisions evidencing a reluctance to fully and immediately embrace the liberal concepts of Lucas. Instead, the Supreme Judicial Court seems intent to incorporate the Lucas rationale into Massachusetts case law on a more moderate case-by-case basis.

Massachusetts courts have long held that, "A regulation which deprives the owner of the most beneficial use to which his property is suited is not confiscatory." Turner v. Walpole, 10 Mass. App. Ct. 515, 516 (1980).

Property owners in Massachusetts have a heavy burden of proof to show that they have been deprived of all economically beneficial uses. Lopes v. City of Peabody, 417 Mass. 299, 307, n.13 (1994). A review of Massachusetts decisions demonstrates that it is very difficult for a plaintiff to make this showing. In Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979), the Court advised that, "[w]hat may be characterized as forbidden takings are those governmental actions which strip private property 'of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it.'"

In Darack v. Marzimas, 1996 Mass. Super. Lexis 369, the Superior Court declined to interpret Lucas to require the application of a categorical taking test to a flood plain ordinance that prohibited construction of a residence but would allow conservation, recreation, and sporting uses, forestry or storage. In FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681, 694 (1996), the Appeals Court noted that, even if one unbuildable lot was to be considered in isolation from the rest of the parcel, then it may still be devoted to "woodland, wetland, and recreational purposes, which are beneficial uses, or as additional acreage for residential abutters' properties, a use valued at \$1,200." The Supreme Judicial Court in several pre-Lucas decision has determined that property which is essentially unbuildable retains "beneficial" uses. The Appeals Court in Monaghan v. Town of North Reading held that a zoning bylaw that precluded construction of a residence did not amount to a confiscatory taking since the property

could be used as woodland, grassland, or a farm, including agricultural and floricultural uses. 7 Mass. App. Ct. 846, 922 (1979). Likewise, Turnpike Realty Company v. Town of Dedham, held that flood plain zoning bylaw that restricted structures or buildings except for structures accessory to flood plain uses did not result in a taking. The Court observed that the property owner "has not been deprived of all beneficial uses of its property" when the "bylaw specifically permits 'Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling.'" 362 Mass. 221, 235 (1972).

(c) Analysis of Federal Regulatory Taking Cases

In sharp contrast to the conservatism demonstrated in Massachusetts case law, recent federal court decisions have more willingly found that the government affects a taking when it requires a property owner to leave its property open with only incidental development possibilities. In City of Monterey v. Del Monte Dunes At Monterey, Ltd., the federal court upheld a jury verdict that a city denied a developer all economically viable uses of its property by only allowing uses that maintain the property in its natural state. As a result of development restrictions, there was no competitive market for the property; it was desirable only to the government, which bought it and made it a public park. The case stands for the proposition that the City had essentially forced the property owner "to be at the burden of creating open space for the public to enjoy." Del Monte Dunes, 95 F.3rd 1422, 1432-34 (9th Cir. 1996), cert. granted 118 S.Ct. 1359 (1998). Also, the Federal Court in Monroe County v. Gonzales, held that a 90% open space requirement deprived the plaintiff of all reasonable, economic uses of his property. 539 So.2nd 1143, 1144 (Fl. Dist. Ct. App. 1992).

Cases where zoning ordinances have been enacted motivated by a desire to preserve open space and limit development have been construed as resulting in constructive takings. See, Kopetzke v. County of San Mateo, 396 F.Supp. 1004, 1009 (1975), where the Court observed, "This Court concurs with rulings that such goals [open space preservation] are properly achieved by exercise of the power of eminent domain since they are clearly calculated to benefit the public at large and closely resemble the taking of scenic easements to that end."

Closer to home, in Aronson v. Town of Sharon, 346 Mass. 598 (1964), the subject property was zoned for single residence lots of at least 40,000 square feet and a minimum frontage of 150 feet. The Town's zoning bylaw was amended to require lots to have an area of at least 100,000 square feet and a frontage of at least 200 feet. The purpose of the amendment was to encourage leaving the land in its natural state so as to advance the living and recreational amenities that are fundamental to mental and physical health.

The Supreme Judicial Court Opinion by Chief Justice Wilkins determined that the amended zoning bylaw was unreasonable and invalid as applied to the subject property. The Court ruled:

... We cannot resist the conclusion that, however worthy the objectives, the bylaw attempts to achieve a result which properly should be the subject of eminent domain. As Mr. Justice Holmes said in Pennsylvania Coal v. Mahon, 260 US 393, 415-416, "While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change [T]his is a question of degree - and therefore cannot be disposed of by general propositions ... granting the value of recreational areas to the community as a whole, the burden of providing them should not be borne by the individual property owner unless he is compensated."

Aronson, 346 Mass. at 604.

cc. Nancy E. Glowa
Arthur Goldberg

26/ 5

Response to a request from several members of the City Council for a general memorandum incorporating the analysis done by Attorney John Leonard during an executive session of the City Council.