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EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT



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AMENDING A ZONING PROPOSAL

LAND

In the last issue of the Land Use Manager, we took a step by step look at the necessary procedural requirements for the adoption of a local zoning proposal. As was discussed, one of the steps requires that the Planning Board give notice and hold a public hearing on the proposed zoning bylaw or ordinance. Following the public hearing, the Planning Board has an opportunity to submit a report with recommendations to the legislative body.

Question

After a Planning Board has held a public hearing on a proposed zoning proposal, how much can it change the original proposal, when making a recommendation to the Town Meeting or City Council, without holding a new hearing with a new publication of notice?

Question

How far can a Town Meeting or City Council go in amending the original proposal?

USE

The answers to these two questions have revolved around the statutory requirements found in Chapter 39 of the General Laws, which deals with the issuance and contents of a Town Meeting warrant, and Chapter 40A, which requires notice and a public hearing by the Planning Board prior to legislative action on a zoning proposal.

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Chapter 39, Section 10, MGL, requires that the warrant for a Town Meeting specify the time and place of the meeting and the "subjects to be acted upon thereat." No action by Town Meeting is valid unless the subject matter is contained in the warrant. It is a settled principle that warrants for Town Meeting are to be liberally interpreted and are not to be construed with great strictness. It has been held sufficient if the warrant indicates "with substantial certainty the nature of the business to be acted on." Coffin v. Lawrence, 143 Mass. 110. Also, as was noted in Haven v. Lowell, 5 Met. 35, "The articles ... are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action."

Presently, Chapter 40A, Section 5, MGL requires that the Planning Board hold a public hearing on any zoning proposal. The notice of the public hearing must specify "the subject matter, sufficient for identification." As the court has noted, the purpose of the public hearing is to obtain public sentiment so that proper revisions can be made. Doliner v. Town Clerk of Millis, 343 Mass. 10 (1961). After the public hearing, the Planning Board is given an opportunity to make a report to the legislative body. When dealing with the question of amending the original zoning proposal, the court has also paid attention to the statutory authorization which provides that a City Council or Town Meeting "may adopt, reject, or amend" any zoning proposal after the required notice, hearing and opportunity to report. The following review of various Massachusetts cases may provide some insight.

One of the earlier cases was Nelson v. Belmont, 274 Mass. 35 (1931), where the Town voted to modify its existing zoning bylaw by establishing a zone boundary line between a general residence and business district. The proposed zoning district boundary line described in the warrant article and recommended by the Planning Board placed the front part of Nelson's land in the business district. However, Town Meeting amended the proposal so that all of Nelson's land would fall within the general residence district. The State zoning statute at that time required that no zoning by-law could be repealed or modified until "after reasonable notice of the proposed repeal or modification and an opportunity to objectors to be heard thereon." The notice given was the warrant which described the original boundary line recommended by the Planning Board. The court interpreted the State zoning statute to require reasonable notice for any proposed modification. Since there was no notice given in the warrant for the new zoning boundary line, the court held that the amended proposal was not rightly before Town Meeting.

As was previously noted, it is a well settled principle that warrants for Town Meeting are to be liberally interpreted and are not to be construed with great strictness. That principle was not applicable in Nelson because of the requirement in the State zoning statute which specified that no zoning bylaw could be modified "except after reasonable notice of the proposed ... modification." However, the court has looked favorably at the ability of Town Meeting to modify zoning proposals under comparable language which presently exists in The Zoning Act, Chapter 40A, Section 5, MGL.

In Burlington v. Dunn, 318 Mass. 217 (1945), the court noted that the decision in Nelson which was required by the wording of the State zoning statute in existence at that time had no application to the very different wording of the State zoning statute in effect at the time of the Dunn decision. The Planning Board had held a public hearing on a proposed comprehensive zoning bylaw in which districts were delineated by reference to an accompanying map. The proposal was approved by the Planning Board and inserted in the warrant for a special Town Meeting. However, before the Town Meeting, the Planning Board held two more meetings of which no public notice was given. As a result of those meetings, the Planning Board decided to change the map which had been inserted in the warrant by zoning for business purposes five additional small parcels of land in scattered locations. The final report submitted by the Planning Board to the Town Meeting was accompanied by the amended map showing the changes. The Town Meeting voted to adopt the bylaw together with the amended map. Dunn contended that the Planning Board should have held another hearing on the proposed bylaw as changed and that the Town Meeting vote was invalid because the map so adopted differed from that inserted in the warrant with respect to the five parcels.

DUNN V. BURLINGTON

318 Mass. 217 (1945)

Excerpts:

Qua, J. ...

We see no necessity for this. The planning board, after adequate notice, held a hearing on the proposed by-law and submitted its final report with recommendations to the town meeting. The board therefore complied with the statute. This is

true whether the action of the board be construed as a recommendation of the original map or of the amended map. There is nothing in the statute requiring another hearing whenever, after one hearing, the board decides to amend what had previously been proposed. The amendments were not of a fundamental character. They did not change the identity of the proposal before the board. They were designed merely to perfect that proposal. From their terms it is apparent that they were intended to preserve permanently for business uses certain lots on which business was already being conducted. They could not deprive any landowner of any right which he already possessed, since no zoning by-law at all was then in force. Where a public hearing is required or is had before an officer or board upon a proposed measure it is at least very unusual to require or to hold successive public hearings in respect to perfecting amendments of this character. . . .

General Laws (Ter. Ed.) c. 39, s. 10, as last amended by St. 1939, c. 182, includes provisions that the warrant "shall state . . . the subjects to be acted upon" at the meeting and that "no action shall be valid unless the subject matter thereof is contained in the warrant." This means only that the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meeting is authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the meeting will take upon those subjects. . . . Moreover, G.L. (Ter. Ed.) c. 40, s. 27, as appearing in St. 1941, c. 320, contains a provision that the "town meeting may adopt, reject, or amend and adopt any such proposed . . . by-law," showing that the bylaw as adopted need not exactly follow any proposal set forth in the warrant.

In Doliner v. Town Clerk of Millis, 343 Mass. 10 (1961), the court again dealt with a comprehensive revision to a zoning by-law. The Planning Board had held a public hearing on a proposed revision to the bylaw and map. Various changes, involving shifts in the classification of relatively small parcels from one district to another, were suggested both during and after the public hearing. The Planning Board recommended 13 changes to the Town Meeting which affected about 339 acres of the Town's total acreage of 7,788 acres. These changes were included on maps posted in the town meeting room and the chairman of the Planning Board explained the proposal including the recommended changes made since the public hearing. The court held that the trial judge was warranted in concluding that the changes "did not change the substantial character of the by-law" so as to require a new public hearing under the provisions of the State Zoning Enabling Act. The applicable provisions of the State statute read in part that, "Zoning ... by-laws may be adopted and from time to time changed by amendment ... no such ... by law ... shall be adopted until after the planning board ... has held a public hearing thereon after due notice given and has submitted a final report with recommendations to the ... town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report ... After such notice, hearings and report ... a ... town meeting may adopt, reject, or amend and adopt any such proposed ... bylaw."

DOLINER V. TOWN CLERK OF MILLIS

343 Mass. 10 (1961)

Excerpts:

Cutter, J. ...

Changes made by the planning board after the public hearing ... did not render the zoning revisions invalid ... The planning board at the public hearing had before it a tentative proposed by-law and proposed zoning map. It then received suggestions for changes of zoning for certain small areas. These were embodied in maps posted in the town meeting room and were explained. The trial judge was warranted in concluding that these changes "did not change the substantial character of the (by-) law so that ... a new public hearing was required." As the judge pointed out "the purpose of such public hearing is to obtain public sentiment so that proper revision can be made." ... The recorded written approval of the proposed revised by-law by the planning board was a sufficient recommendation by the board to the town meeting that the by-law be adopted, particularly when taken with the explanations given by the chairman at the meeting. ... The persons at town meeting had ample knowledge of the position and advice of the planning board.

One of the more interesting cases dealing with a zoning map change was Sullivan v. Board of Selectman of Canton, 346 Mass. 784 (1964). The Town Meeting amended the zoning map by changing an area of land from a single residence district to a general residence district. The locus, as described in the warrant, fronted for 181.6 feet on a certain street in the Town. However, by amendment at Town Meeting the distance along the street was extended to 401.6 feet, with the depth of the locus remaining constant at 200 feet. The court found that the extension of the general residence district was not so fundamental a departure from the provisions of the article contained in the warrant so as to be an improper amendment which would require a new public hearing and notice by the Planning Board.

Reducing the amount of area to be rezoned has also been held valid. In Morgan v. Banas, 331 Mass. 694 (1954), it was contended that a previous hearing before the Planning Board and the recommendations of that Board were insufficient because they related to a petition by Banas for rezoning his entire 28 acre parcel. The City Council ultimately rezoned only about 17 acres out of that tract. It was argued by Banas that the amendment adopted by the City Council was not the same as that proposed and that a new public hearing by the Planning Board was necessary so as to comply with the State zoning statute, Chapter 40, Section 27, MGL (Ter. Ed.).

MORGAN V. BANAS

331 Mass. 694 (1954)

Excerpts:

Qua, C.J. ...

One answer to this contention is that paragraphs 8 and 9 of the plaintiffs' bill, the truth of which (with an exception not here material) is admitted in the defendants' answers, can only be construed as alleging that the entire tract included in the petition, whatever its area, was rezoned. The amended ordinance itself does not appear in the record. But even if it be the fact that only seventeen acres were rezoned out of twenty-eight petitioned for, and if that fact could be shown in spite of the pleadings, there would be nothing in the point. Section 27 provides that after the required hearings and the report by the planning board the city council "may adopt, reject, or amend and adopt any such proposed ordinance or by-law." An amendment as the result of which only part of the tract originally described is rezoned is within the wording above quoted. No further reference to the planning board was necessary.

Johnson v. Town of Framingham, 354 Mass. 750 (1968), dealt with a textual change to a zoning proposal. The Planning Board had held a public hearing on the following warrant article.

Article 56 To see if the Town will vote to amend Section 111. A (1), SINGLE RESIDENCE, of the Zoning By-Laws, by adding the following:
k. Private and public golf clubs, tennis courts; pass any vote or take any action relative thereto."

At the Town Meeting it was voted to amend another section of the zoning bylaw so that golf clubs would only be permitted by special permit from the Zoning Board of Appeals. The bylaw was also amended so that private and public golf clubs had to be located on a parcel or parcels of land containing a minimum of 50 acres. Johnson argued that such amendments required another public hearing by the Planning Board.

JOHNSON V. FRAMINGHAM

354 Mass. 750 (1968)

Excerpts:

Wilkins, C.J.

We do not agree. Article 56 authorized the voters to act upon the amendment of the zoning by-law to permit golf clubs and tennis courts in single residence zones. The subject was stated very broadly in these words, "pass any vote or take any action relative thereto." This was the subject on which the town meeting undertook to act in passing the amendment. It was not outside the scope of the article to omit tennis courts, to prescribe a minimum size for golf clubs, or, instead of an unconditionally permitted use, to provide for action of the board of appeals by way of exception as to any such use. No logic requires that there must be tennis courts in order that there might be golf clubs. The fifty acre minimum and the board of appeals' action on exceptions both tend to restrict the number of clubs which may be authorized. It is not a serious matter that the proposed amendment was of a different subsection of Section III A.

Fish v. Canton, 322 Mass. 219 (1948), was a case where the amendments adopted by Town Meeting utterly changed the identity of the original zoning proposal. A petition was submitted to the Planning Board to see if the Town would vote to repeal in its entirety the existing zoning bylaw of the town of Canton. The Planning Board held a public hearing on the proposal and recommended that it not be adopted. The same proposal appeared as Article 28 in the town warrant for the annual Town Meeting. At the annual Town Meeting Article 28 did not pass and was dismissed. The Town Meeting was adjourned to another date. At the adjourned meeting Article 28 was reconsidered. Instead of repeal, it was unanimously voted to amend the existing bylaw by reducing minimum lot area and lot frontage in certain zoning districts and by changing a specific area in the community from one zoning district to another.

FISH V. CANTON

322 Mass. 219 (1948)

Excerpts:

Wilkins, J. ...

The judge in substance ruled the action of the town meeting to be invalid because the warrant did not contain the subject matter of that action, and because statutory preliminaries to amendment of a zoning by-law were not complied with. There are two material statutes. "The warrant for all town meetings shall state . . . the subjects to be acted upon thereat . . . No action shall be valid unless the subject matter thereof is contained in the warrant." G. L. (Ter. Ed.) c.39 s. 10, as most recently amended by St. 1939, c. 182. Zoning "by-laws may be adopted and from time to time be changed by amendment, addition or repeal, but only in the manner hereinafter provided. No . . . by-law originally establishing the boundaries of the districts or the regulations and restrictions to be enforced therein, and no . . . by-law changing the same as aforesaid, shall be adopted until after the planning board . . . has held a public hearing thereon after due notice given and has submitted a final report with recommendations to the . . . town meeting, or until twenty days shall have elapsed after such hearing without the submission of such report. . . . After such notice, hearings and report, or lapse of time without report, a . . . town meeting may adopt, reject, or amend and adopt any such proposed . . . by-law." G.L. (Ter. Ed.) c. 40, s. 27, as appearing in St. 1941, c. 320.

In the case at bar, however, even if the action in form amending article 28 of the warrant be treated as an attempted amendment of the zoning by-law, the change thereby sought to be wrought was truly fundamental and could not be valid in the absence of a hearing and report on the new proposal by the planning board. The original article upon which the planning board held its hearing and which was inserted in the warrant for the town meeting sought to repeal the zoning by-law in its entirety. It was no mere perfecting amendment which was sought to be adopted reducing the area requirements in two kinds of districts and transferring certain land from one district to another. In brief, the identity of the original proposed article was utterly changed. The substance of the amendment involved too great a departure to be covered by the provisions of G.L. (Ter. Ed.) c. 40, s.27, as appearing in St. 1941, c. 320, under which, in certain circumstances, a "town meeting may adopt, reject, or amend and adopt" a proposed by-law. Furthermore, article 28 in the warrant did not sufficiently apprise the voters of the subject matter of the vote finally taken. It did not "indicate with substantial certainty the nature of the business to be acted on. . . . For these reasons, the amendment of the zoning by-law voted at the adjourned meeting was invalid.

SUMMARY

Town Meeting does have the flexibility to make amendments to a zoning proposal. Obviously, if the identity of the zoning proposal is utterly changed by a recommendation of the Planning Board or by an amendment by Town Meeting, then the Planning Board must hold a new public hearing. As has been noted by the court, a new notice, hearing and opportunity to report by the Planning Board will be required if the amendment to the zoning proposal:

1. changes the identity or substantial character of the original zoning proposal;
2. fundamentally departs from the original proposal;
or
3. radically differs from the original proposal.

Perhaps a good rule of thumb to remember is whether a reasonable man could have foreseen the final action from reading the initial notice.

City of Cambridge

5-2763
Comm. from the Mass. Executive Office of Com-
munities & Development transmitting a copy of
"Land Use Manager" dated May, 1987 Re: amending a
zoning proposal.

December 28, 1987