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MASSACHUSETTS SUPREME JUDICIAL COURT STRIKES DOWN “RATE OF DEVELOPMENT” BYLAW

On August 24, 2004, the Massachusetts Supreme Judicial Court decided that the Town of Hadley's Rate of Development (“ROD”) bylaw, permanently restricting the number of single-family residences a developer could construct each year, is unconstitutional. Developers should welcome this well-reasoned decision as it recognizes both the need to provide an adequate housing supply in the Commonwealth and the importance of private land development rights. Davis Malm attorney Howard Speicher participated actively in this successful challenge, filing an *amicus curiae* (Friend of the Court) brief on behalf of the Home Builders Association of Massachusetts, the Greater Boston Real Estate Board, the National Association of Industrial and Office Properties, the Massachusetts Association of Realtors, Associated Industries of Massachusetts, Citizens' Housing and Planning Association and the Massachusetts Business Roundtable.

Since 1980, when the SJC upheld a temporary ROD restriction in the Town of Chilmark, as many as 50 municipalities in Massachusetts have enacted ROD bylaws similar to the Hadley bylaw struck down by the Court in this decision. These bylaws have severely limited housing development in the Commonwealth. Many of these bylaws may be unconstitutional under this recent decision entitled *Zuckerman v. Town of Hadley*. Therefore, we encourage our developer clients, and landowners considering selling property for development, to review with us ROD bylaws that may affect your property. These bylaws may be subject to challenge after the *Zuckerman* decision.

THE HADLEY ROD BYLAW

The Hadley bylaw at issue was essentially a permanent control by the town as to when single-family homes could be built in the town. Under the bylaw, if a developer owned land sufficient to build ten or fewer dwellings, the developer could build only one dwelling each year for ten years. If the total area of land was sufficient to build more than ten dwellings, one tenth of the number of dwellings permitted to be built could be constructed each year for ten years. Thus, a developer permitted under the bylaw to develop a subdivision of 100 homes could construct only ten homes each year for ten years.

THE FACTS OF THE CASE

Martha and Brian Zuckerman owned a 66-acre parcel in Hadley, which could, under the Subdivision Control Law, accommodate a subdivision of 40 single-family homes. They had raised thoroughbred horses on the land for many years, but wanted to retire from the business. They sought to either develop the land or sell it for development. They established before the Land Court that it was not economically feasible to sequence the development of the property over a ten-year period (four homes each year for ten years). Indeed, as Davis Malm pointed out in its brief, costly infrastructure improvements (such as installation of roads, sidewalks, sewer, water, and power lines) must be substan-

tially completed before a developer can obtain building permits. Because substantial upfront costs cannot be fully recouped for ten years, the practical application of a ROD bylaw such as Hadley's is a *de facto* moratorium on the construction of most residential subdivisions. Moreover, Hadley's ROD bylaw, while enacted ostensibly to allow the town time to plan and expand its public services, was permanent and the town had not implemented many of the measures recommended in planning studies it undertook to manage population growth. Indeed, in the 15 years since the adoption of the ROD bylaw, the town had not even implemented a comprehensive land use plan.

THE DECISION

The Court had to decide whether the Hadley ROD bylaw bore a rational relation to a legitimate zoning purpose. In 1980, in *Sturges v. Chilmark*, the Court had determined that a temporary, restrictive ROD bylaw, adopted by the Town of Chilmark, was constitutional. The purpose of the Chilmark bylaw was to control the rate of growth for a limited period to allow time for that town to carry out various planning studies and to implement measures necessary to protect the water supply and to ensure proper sewage disposal. In contrast, in *Zuckerman* the Court was faced with a permanent bylaw intended to control growth for an unlimited duration in order to assist the town in managing its fiscal resources more efficiently and to preserve Hadley's agricultural character. Instead of using the bylaw as a stopgap to provide time for planning, the bylaw itself *was* the planning.

The Supreme Judicial Court struck down the bylaw, narrowly limiting the situations in which a ROD bylaw will be permitted. The Court ruled: "Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case...such zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional." In short, the desire for better fiscal management is not a valid zoning purpose. The Court had harsh words for the town of Hadley: "Despite the perceived benefits that enforced isolation may bring to a town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular town to

deflect that wave onto its neighbors."

ZUCKERMAN'S IMPLICATIONS

Sturges and *Zuckerman* set the outer limits as to which ROD bylaws are and are not acceptable. As in *Sturges*, a bylaw that contains specific time limitations or makes it clear that the limitations are temporary and is enacted to assist a particular planning process will likely pass constitutional muster when adopted to assist the municipality in planning for growth. And such bylaws may, said the Court, be extended by a town for such limited time as is reasonably necessary to effect its specific purpose. Permanent bylaws, such as Hadley's, which are adopted to better enable fiscal management, do not. What fate will befall ROD bylaws setting limitations in between these is yet to be determined. How long a period of planning will be deemed "reasonable" will be decided on a case-by-case basis. It is likely that time for growth planning and planning to address specific concerns that are not simply local in nature will be allowed and that ROD restrictions enacted solely to address local fiscal concerns will not.

As with any change in the law, time will tell how the courts define the parameters of the decision. The best advice is to consult counsel and keep apprised of the ongoing evolution of these changes. ♦

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