

By Howard P. Speicher

## Land Court Invalidates Zoning Bylaw

as Impermissible "Contract Zoning"  
If Affirmed, Ruling Will Be a First for Massachusetts



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In a February 2002 ruling that is a first for a Massachusetts court, former Land Court Chief Justice Peter W. Kilborn held that a rezoning of a parcel of land from residential and agricultural to industrial constituted invalid "contract zoning." The Supreme Judicial Court has taken the case, *Durand v. Bellingham Board of Appeals*, SJC D.A.R. 8942, on direct appellate review, and, at press time, was expected to hear oral arguments in April 2003. If affirmed, the decision will force developers and municipalities to take a closer look at how they negotiate the inducements that are often offered by developers or extracted by municipalities in connection with the rezoning of land to accommodate new development.

The developer, IDC Bellingham LLC ("IDC"), proposed rezoning land in the town of Bellingham in order to build a 700-megawatt power plant. Aware that rezoning of the parcel had been turned down just two years earlier, and that the town was facing an \$8 million dollar expense for its share of the cost of a new high school, IDC proposed giving an \$8 million gift to the town as an inducement for the rezoning. The promise of the \$8 million was conditioned on the rezoning and the issuance of all necessary permits for the construction of the power plant. The offer was posed to the town as a gift for allowing the plant to be located in the town. No effort was made to justify the gift as mitigation for the impact of the plant or to relate the payment

to any effects the plant might have on the town. With much of the discussion centered on the gift, and not on the merits of the rezoning, the proposed zoning change was adopted at a town meeting. A group of abutters challenged the validity of the rezoning, arguing that it constituted impermissible "contract zoning."

After discussing the nature of "contract zoning," and the standards for invalidating a zoning amendment on contract zoning grounds, Chief Justice Kilborn ruled that the Bellingham rezoning was invalid because the \$8 million gift was an "extraneous" influence, not tied to the impacts of the project. As such, the gift amounted to the town bargaining away its police power and was offensive to public policy.

In past cases, and most recently in *The McLean Hospital Corp. v. Town of Belmont*, 56 Mass. App. Ct. 540 (2002), Massachusetts courts have rejected contract zoning challenges to rezoning. The inquiry is based on a determination whether any contractual arrangement exerted undue influence on the municipality that adopted the zoning change and whether the contractual obligations agreed upon were extraneous to the subject of the rezoning. Past challenges failed because the courts found that restrictions imposed on the rezoned parcel, such as traffic improvements and a "mitigation fund" related to the impact of the proposed development, were sufficiently related to the subject of the rezoning that they did not constitute "extraneous" consid-

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eration for the rezoning, and thus did not offend public policy. See *Sylvania Electric Products, Inc. v. City of Newton*, 344 Mass. 428 (1962); *Rando v. Town of North Attleborough*, 44 Mass. App. Ct. 603 (1998). By contrast, in *Bellingham*, no effort was made to characterize the gift as a mitigation measure designed to blunt the impact of the proposed power plant.

As Chief Justice Kilborn noted in his decision, the point at which a mitigation payment or developer-funded improvement becomes an extraneous gift that is unrelated to the proposed rezoning is not always clear. In the case of various mitigation measures or other payments, "there may be a large element of 'gift' involved." Even a tenuous link between the offered mitigation and the subject of the rezoning may be enough to allow the rezoning to survive a

challenge. Where the gift is clearly unrelated to the impact of the project, however, the gift will invalidate even an otherwise valid zoning change.

Whatever the outcome of the *Bellingham* case on appeal, municipalities and developers are on notice that in these days of financially stressed cities and towns, inducements offered by developers or sought by municipalities in return for zoning concessions should be demonstrably related to the impact of the proposed development. In other words, the old adage, "Don't look a gift horse in the mouth," does not apply in the case of the give and take between cities and towns and developers when negotiating zoning changes and approvals. Municipalities must look at that gift horse directly, and make sure that "linkage" is truly linked, and that "mitigation" truly mitigates. ■