

COMMENT

DURAND V. IDC BELLINGHAM, LLC: **TOWNS FOR SALE?**

*What kind of community are you going to have your children growing up in when you're telling them money is more important than a quality of life?*¹

INTRODUCTION

In August of 2003, the Massachusetts Supreme Judicial Court (SJC) overturned a controversial Massachusetts Land Court decision, which declared invalid a Bellingham Town Meeting vote on the basis that the rezoning action was tainted and improperly influenced by the presence of a large cash gift from a developer.² In what was heralded as a landmark decision, then-Land Court Chief Justice Peter Kilborn overturned a 1997 Bellingham Town Meeting rezoning vote, because the circumstances of the vote indicated the presence of impermissible contract zoning.³ This case gained enough attention that the SJC review was considered one of the most important Massachusetts judicial opinions of 2003.⁴ The Land Court's decision illustrated the limited treatment of contract zoning in Massachusetts jurisprudence, and also highlighted the standards employed

-
1. Franco Ordonez, *SJC to Rule on Deals Between Developers, Towns*, BOSTON GLOBE, Jan. 22, 2003, at B1 (highlighting the statement of a Bellingham resident responding to the controversial practice of offering a cash gift as an inducement for a rezoning action under the guise that the funds are intended to offset the negative impacts of development projects).
 2. *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 369 (Mass. 2003); see also Kathleen Burge, *Top Court Lets Town Take Gift from Firm: Lower Court Had Barred \$8M Offer in Rezoning*, BOSTON GLOBE, Aug. 16, 2003, at B1.
 3. *Durnad v. Paturzo*, 10 Land Ct. Rep. 36, 36 (Mass. 2002); see also Jenna Russell, *Land Court Warns About 'Win-Win' Deals: Bellingham Rezoning Considered 'Offensive'*, BOSTON GLOBE, Mar. 8, 2002, at B1.
 4. *The Most Important Opinions of 2003*, MASS. LAW. WKLY., Jan. 5, 2004, at B1. This "closely watched" case ranked fifth in importance among all Massachusetts cases decided in 2003. *Id.*

when rezoning amendments are reviewed judicially under Massachusetts law.⁵ Much of the interest, however, was generated by Chief Justice Kilborn's ruling which reasoned that a gift of \$8 million from a power plant developer to the town of Bellingham constituted "extraneous consideration," which was sufficient to warrant an invalidation of the rezoning action.⁶

In January of 2003, the SJC granted an appeal of the Land Court's ruling, *sua sponte*, to establish a clear definition of contract zoning and clarify which types of "deals" between towns and developers are permissible.⁷ Writing for the majority, Justice Cordy found that Bellingham was permitted to rezone a developer's parcel of land in exchange for the developer's promise to pledge a gift of \$8 million to the town for any municipal purpose.⁸ Integrated within the majority's decision was the premise that courts generally defer to the findings of a legislative body without regard for any underlying motives, especially in the exercise of the police powers.⁹ The majority's ruling appears to signal the SJC's willingness to permit broad deal-making powers in the land development process, especially with respect to the procurement of rezoning amendments.¹⁰

-
5. See *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 36 (Mass. 2002). Prior to the Land Court's ruling, there were only two Massachusetts appellate cases dealing with contract zoning in Massachusetts. See *Sylvania Elec. Prods. Inc. v. City of Newton*, 183 N.E.2d 118 (Mass. 1962); *Rando v. Town of N. Attleborough*, 692 N.E.2d 544 (Mass. App. Ct. 1998).
 6. See *Durand*, 10 Land Ct. Rep. at 44; see also Howard Speicher, *Land Court Invalidates Zoning Bylaw*, 47 BOSTON B.J. 14 (2003).
 7. See Franco Ordonez, *Highest Court Reviews Local Autonomy Issue: Case Likely to Clarify Rights of Developers*, BOSTON GLOBE, Apr. 10, 2003, at Globe West 4 (highlighting the oral arguments made before the Supreme Judicial Court (SJC) on Apr. 7, 2003). By most accounts, the ruling of the SJC was closely monitored by town officials and developers alike, because the court's ultimate decree was expected to set a "far-reaching" standard governing developers in their attempts to procure community support for unpopular projects. *Id.*
 8. See *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 369 (Mass. 2003).
 9. *Id.*
 10. See *id.* at 368 ("a voluntary offer of public benefits is not, standing alone, an adequate ground on which to set aside an otherwise valid legislative act"). The notion of "extraneous consideration" will be removed from the court's view; instead, "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." *Id.* at 369. The court had "no reason" to treat an otherwise valid rezoning action differently from other legislative acts, even if the rezoning action includes a public benefit offered by or extracted from a proponent of the amendment. *Id.*

Writing a separate opinion, Justice Spina concurred in the majority's conclusion, but disagreed with the reasoning employed.¹¹ Spina and his brethren agreed "that the zoning change [was] valid on its face."¹² Those writing for the minority, however, were troubled by the process that brought this rezoning action to fruition.¹³ The minority believed that the rezoning action was tainted because the record was devoid of any evidence indicating an identifiable relationship between the \$8 million gift and the rezoning of the locus.¹⁴ Incidentally, the minority was compelled to concur in the judgment of the majority because the plaintiffs lacked the requisite standing to bring the case.¹⁵ Even in agreement, however, the minority justices were troubled by the result of this dispute, especially the effect that the result may have on smaller communities as these localities scramble to combat their fiscal shortfalls.¹⁶

On its face, this case might appear to be nothing more than an isolated incident in which a few neighboring landowners were merely dissatisfied with what they thought was a questionable act of local governance; however, an examination of the underlying facts and arguments made on behalf of either side reveals that the ultimate decision was expected to have broader legal and public policy implications.¹⁷ In terms of negotiations

-
11. *Id.* at 369 (Spina, J., concurring in part and dissenting in part). Justice Spina was joined by Justices Ireland and Cowin. *Id.*
 12. *Id.* at 370.
 13. *Id.*
 14. *Durand*, 793 N.E.2d at 371.
 15. *Id.* at 369, 371.
 16. *See id.* at 371 ("Sadly, these circumstances demonstrate government and private interests at their shameful worst, and are most likely to involve the most needy towns.").
 17. *Compare* Brief of the Massachusetts Chapter of the American Planning Ass'n Amicus Curiae at 14-15, *Durand* (No. 2002-P-940) [hereinafter APA's Amicus Brief] (arguing, inter alia, that property owners seek consistency in the land planning process and that a reversal of the Land Court's decision would "subvert the planning process" by allowing factors outside the actual merits of the proposal to bear on the decision-making processes of local legislative bodies), *with* Brief of the Massachusetts Chapter of the National Ass'n of Industrial and Office Properties (NAIOP) Amicus Curiae at 33, *Durand* (No. 2002-P-940) [hereinafter NAIOP's Amicus Brief] (contending, inter alia, that "[i]f there were a requirement that public benefits must be tied to proposed projects, the litigation floodgates would open and the enactments of local legislatures would be subject to second guessing to an unprecedented degree"). NAIOP, an organization representing developers, property managers and real investors, claimed that an affirmation of the Land Court's decision would curtail the ability of developers to have early discussions with local officials concerning zoning and permitting matters, thus restricting what has become a "common" practice in the area of land development. NAIOP's Amicus Brief, *supra*, at 2-5. Moreover, the Land Court's ruling was attacked by NAIOP which cited the

during the early stages of land development, the SJC's decision appears to open the door for greater and more creative "deal-making" in this context;¹⁸ however, the instant decision has given rise to numerous concerns. One of the strongest arguments against the result is highlighted by the abutting landowners' claim that the legitimacy of local government action is clouded when municipal land use decisions are motivated by offers of gifts and concessions from developers, which cannot be logically tied to the impacts arising from such developments.¹⁹ Supporters of the Land Court's decision expressed concerns that its reversal may create disadvantages for all developers, even those with the financial wherewithal to negotiate for a favorable rezoning amendment.²⁰ On the other hand, the SJC's decision received praise from those who viewed the ruling as a signal for "cities and developers to work more closely on town improvements."²¹ Other supporters of the result have stated that it "acknowledges and accepts as both legal and realpolitik" that negotiations between municipalities and developers are both necessary and effective in the land development context.²² This Comment will address the major aspects of the dispute in order to illustrate how the result was conditioned on the court's successful navigation through an intersection of strong legal and public policy principles.

likelihood of a "chilling effect on what public benefits developers are willing to offer and localities are willing to seek." *Id.* at 4-5. *But see* APA's Amicus Brief, *supra* at 3-5 (acknowledging the utility of collaboration between municipalities and developers during project proposals, but arguing that "[o]ffers ... of unrestricted funds having no relationship to a proposed project are *not* typically made during the normal collaborative process").

18. *Durand*, 793 N.E.2d at 369 ("[W]e defer to legislative findings and choices [i.e., rezoning actions] without regard to motive.").
19. *See* Brief of Plaintiffs-Appellees at 17-22, *Durand* (No. 2002-P-940) (advocating for affirmation of the Land Court's decision on grounds that IDC Bellingham's offer of \$8 million was, in part, tantamount to bribery). Moreover, one authority has echoed the sentiment of the abutting landowners by stating that "the outcry against development exactions generally has come from neighbors claiming the town has sold out its zoning scheme through 'contract zoning.'" Paul D. Wilson, *Contract Zoning and Development Exactions: IDC Bellingham and Its Implications*, 48 BOSTON B.J. 10, 10 (2004).
20. APA's Amicus Brief, *supra* note 17, at 7 (questioning whether opponents of the Land Court's decision would maintain the same position "if the municipality, acting through one or more of its boards, were to condition a required approval for the proposed project upon the applicant paying the municipality say \$16,000,000?").
21. John O. Cunningham, *With Ruling, Lawyers Can Counsel Clients with Greater Reliability*, MASS. LAW. WKLY., Aug. 25, 2003, at A27.
22. Paul C. Bauer & Harry P. Grill, *Ground Shifts Under Developers As Court Hands Down Decision*, BANKER & TRADESMAN, Sept. 29, 2003, at B2.

Part I of this Comment is dedicated to an overview of the zoning power, specifically the placement of zoning within the overall construct of the police powers. Part I also examines the mechanisms employed by states, specifically Massachusetts, in delegating these powers to municipalities. Part II details the historical background of this dispute in order to illustrate the events that led up to the 1997 Town Meeting vote and the subsequent litigation. Part III focuses on then-Land Court Chief Justice Peter Kilborn's controversial decision characterizing the 1997 Town Meeting vote as illegal contract zoning based on "extraneous consideration." Part IV tracks the changes in Massachusetts contract zoning jurisprudence prior to the resolution of the SJC appeal. Part V explores the Massachusetts SJC's decision to vacate the ruling of the Land Court with particular focus on the divergent opinions of the justices. Part VI outlines the standard of review applied to zoning decisions by highlighting its development through some of Massachusetts's most noteworthy zoning decisions. Evaluating the facts of the Bellingham rezoning action in conjunction with the applicable reviewing standards explores whether this particular case expanded upon or merely upheld the spirit of prior decisions. Part VII attempts to reconcile the SJC's holding in *Durand* with the rationales of prior Massachusetts precedent. The final portion addresses recent efforts to revise the Massachusetts Zoning Act while discussing how these changes could help strike a balance between public and private interests in the land development process.

I. AN OVERVIEW OF CONTRACT ZONING

Zoning exists as a device employed by municipalities not only to regulate the uses of land within their boundaries, but also to establish a systematic and uniform system of land development.²³ Supported by its decision upholding the constitutionality of zoning as a legitimate exercise of the police power,²⁴ the United States Supreme Court has determined that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-

23. See 1 ARDEY H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S LAW OF ZONING AND PLANNING § 1:3 at 1-16 (revised by Edward H. Zeigler, Jr., rev., 4th ed. 2001). Although zoning was initially used as a device to insulate and protect residential neighborhoods from the adverse effect of burgeoning commercial and industrial developments, planners now make use of this device to regulate a vast array of land use schemes. See 1 *id.* § 1:3 at 1-19.

24. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926). In classifying zoning and the police powers as constitutional issues, the Court, aware of the potential embarrassment generated by "out of hand attempts to establish general rules," recognized a case-by-case analysis as the proper vehicle to address emerging questions under the "flexible" construct of the police powers. *Id.*

balanced as well as carefully patrolled.”²⁵ A number of jurisdictions, including Massachusetts, have delegated some of these police powers to municipal governments.²⁶ Although the use of police power regulations to control use of land has been expanding in scope and intensity during the years since the Court’s decision in *Euclid*,²⁷ not every exercise of the zoning power by a municipality has been met with judicial approval.²⁸

The emerging trend of including collateral agreements in local government land use decisions, together with the multitude of litigation arising from these actions, has led one commentator to characterize this movement as indicating an “almost incurable propensity in many local governments to make a deal[.]”²⁹ Many of these deal-driven land use decisions fall under the auspices of contract zoning. In its simplest form, the doctrine of contract zoning is construed as a “bilateral agreement between a developer and legislative officials entered into as a condition for the rezoning of land.”³⁰ Simplicity, however, is not a characteristic

-
25. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1973).
 26. *See, e.g.*, MASS. CONST. art. LXXXIX (amended 1966). Under the language of the Massachusetts Home Rule Amendment, “[a]ny city or town may ... exercise any power ... which is not inconsistent with the constitution or laws enacted by the general court ... and which is not denied, either expressly or by implication, to the city or town by its charter.” *Id.* § 6.
 27. 272 U.S. 365. In the years following *Euclid*, the Supreme Court had distanced itself from the business of land use issues until its decision in *Belle Terre*. *See* NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* § 5A.01 (1998). During this forty-eight year period, the Court only considered a few minor land use issues, allowing the states to take the lead in this area. *Id.* The Court’s renewed interest in land use issues, as evinced by *Belle Terre* and subsequent cases, is thought to be the Court’s attempt to organize a field of law that had been “settling fairly well into a sort of amiable chaos.” *Id.*
 28. *See* 1 RATHKOPF & RATHKOPF, *supra* note 23, § 1:2. Although land use decisions enjoy a presumption of validity as legislative acts, every police power regulation, including zoning, must pass constitutional muster in order to survive an attack on its validity. *See* 1 *id.* As an initial matter, any municipal action taken under the guise of the police power must bear “a rational and substantial relation between [the] governmental regulation and the alleged purposes for its enactment.” 1 *id.* at 1-15. In terms of municipal zoning enactments, each regulation must withstand a test of both its facial validity and its reasonableness as applied to the tract of land in question. 1 *id.* § 1:2.
 29. WILLIAMS, JR. & TAYLOR, *supra* note 27, § 29.01.
 30. 1 RATHKOPF & RATHKOPF, *supra* note 23, § 1:23. Contract zoning has been defined at the state level as a “process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property.” *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 547 (Mass. App. Ct. 1998) (quoting MARK BOBROWSKI, *HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW* § 3.4.4

typically associated with contract zoning. Although contract zoning only occupies a small niche in the overall scheme of zoning, there appears to be some uncertainty as to an exact definition.³¹

Courts have often been divided on whether contract zoning can validly exist in a system that places a high value on sound public policy.³² Instances of contract zoning are sometimes disapproved on the grounds that a municipality cannot bargain away its police power (zoning power) to regulate on behalf of the general welfare.³³ In a dissenting opinion, one SJC justice argued in favor of nullifying instances of contract zoning because the concomitant agreement was not consistent with the applicable zoning enabling act.³⁴ Meanwhile, other courts have been inclined to reject any zoning action that was conditioned upon a restrictive covenant or an attendant agreement.³⁵

On the other hand, some courts have allowed alleged occurrences of contract zoning when there was no evidence that the municipality had bargained away its police power, even though a rezoning action was conditioned on the landowner's assent to a collateral agreement.³⁶ Another court has permitted contract zoning citing the basic right of a municipality

(1993)).

31. See *Church v. Town of Islip*, 168 N.E.2d 680, 683 (N.Y. 1960) (classifying zoning as a legislative act afforded the highest level of judicial deference and upholding the ordinance provided there is evidence supporting its validity). The court in *Church* intimated that a successful resolution of a contract zoning problem requires one to view the issue as one of "actualities not phrases." *Id.* Another court has construed contract zoning as a term lacking legal significance. See *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 419 (1969).
32. See Steven B. Fishman, *The "Contract Zoning" Method and Public Policy*, 1972 URB. L. ANN. 219. See generally David D. Trager, *Contract Zoning*, 23 MD. L. REV. 121 (1963); Bruce R. Bailey, Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L. REV. 897 (1965).
33. See MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW § 3.04(d) (2d ed. 2002) (citing Edward H. Ziegler, 1A RATHKOPF'S ZONING AND PLANNING 29A-25 (4th ed. 1982)).
34. See *Sylvania Elec. Prods., Inc. v. City of Newton*, 183 N.E.2d 118, 123-26 (Mass. 1962) (Kirk, J., dissenting).
35. See, e.g., *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956) (invalidating rezoning action based, in part, on a landowner agreement; such arrangements destroy uniformity in zoning); *Houston Petroleum Co. v. Automotive Prods. Credit Ass'n*, 87 A.2d 319, 322-23 (N.J. 1952) (invalidating a rezoning action clearly made in consideration of a contract between the municipality and the landowner; contracts have no place in the rezoning process).
36. See, e.g., *Scrutton*, 275 Cal. App. 2d at 417-20; *Church*, 168 N.E.2d at 683 (allowing rezoning action even though it bound the landowner to certain conditions).

to impose conditions upon its rezoning actions as grounds for approval.³⁷

There is little doubt that the ability to make deals and other arrangements with developers enhances the efficacy of local government, particularly in the context of land use decisions. This power, however, can create a myriad of issues and unintended consequences if its exercise is unrestrained.³⁸ Although generally regarded as a useful tool for land use planning, this process of bargaining may, under certain circumstances, serve as a vehicle for government corruption, at least in the eyes of the general public.³⁹ Earlier courts, sympathetic to the needs of local government, recognized the utility of certain developer agreements because they were of great benefit to the public generally.⁴⁰ Courts continually provided their approval of rezoning actions taken pursuant to developer agreements even when the “arrangements” involved greater concessions than the granting of a restrictive covenant.⁴¹ Even though these

-
37. See *Giger v. City of Omaha*, 442 N.W.2d 182, 190 (Neb. 1989) (“[T]he city should be permitted to condition rezoning ordinances on the adoption of an agreement between the developer and the city, or any other means assuring the developer builds the project as represented.”). This case highlights another point of confusion surrounding the doctrine of contract zoning: the apparent interchangeability that seems to exist between the terms “contract zoning” and “conditional zoning.” Conditional zoning is often referred to as “[zoning] that will become permanent only if the land is developed or certain events occur within a specified period of time, otherwise the land reverts to its previous zoning classification.” 1 RATHKOPF & RATHKOPF, *supra* note 23, at § 1.21.
38. See *Wilson*, *supra* note 19, at 13 (acknowledging that the “practice of assessing development exactions”—some containing offers of benefits with no connection to the proposed development—is a growing trend among cities and towns as they explore new and creative ways to fund municipal services). Echoing the sentiment of the minority in *Durand*, *Wilson* has expressed fear that the SJC’s reluctance to scrutinize the connection between these benefits (either as proffered by developers or as enticed by municipalities) and any potential developmental impact “creates a self-perpetuating system in which poor towns will never experience an increase in land value because they are forced by economics to play host to the businesses that no other town will take.” *Id.*
39. See *id.* at 10 (arguing that critics of these “development exactions” may view the current process as one tantamount to “legalized bribery ... or extortion”).
40. For an example of two courts that were not disturbed by rezoning actions taken in conjunction with agreements by the respective developers to restrict the use of their land, see generally *Sylvania Elec. Prods., Inc. v. City of Newton*, 183 N.E.2d 118 (Mass. 1962), and *Bucholz v. City of Omaha*, 120 N.W.2d 270 (Neb. 1963). Although it could not entirely dismiss the argument that the developer’s agreement had essentially induced the rezoning action, one court recognized that the covenant agreement allowed the municipality to exert greater control over the development of the rezoned land. See *Bucholz*, 120 N.W.2d at 277.
41. See, e.g., *McLean Hosp. Corp. v. Belmont*, 778 N.E.2d 1016 (Mass. App. Ct. 2002);

arrangements involved developer concessions that were not directly tied to the rezoned land itself, courts continued to approve these actions because they were neither offensive to the constitution nor harmful to the general welfare.⁴² The following situation, however, not only illustrates the extent to which these previous holdings have been stretched, but also raises serious concerns about the legitimacy of local-level land use decisions if this practice is to continue unabated.

II. *DURAND V. IDC BELLINGHAM*: THE HISTORICAL BACKGROUND

A. Bellingham's Economic Development Task Force

In 1993, the town of Bellingham initiated a study to determine how it could expand its property tax base.⁴³ Bellingham's Board of Selectmen appointed the Economic Development Task Force (Task Force) to address, among other issues, the ever-increasing gap between the demand for public services and the revenue yielded by Bellingham's existing zoning scheme.⁴⁴ The Task Force determined that an increase of Bellingham's tax base was required if Bellingham was to continue providing traditional government services.⁴⁵ The Task Force calculated that the revenue generated from current residential tax assessments was insufficient to match the existing expenditures on additional town services, specifically education.⁴⁶ Finding that Bellingham's "recent budget cuts ha[d] reduced

Rando v. Town of N. Attleborough, 692 N.E.2d 544 (Mass. App. Ct. 1998). Although each of these cases involved mitigation payments and conveyances of land, the presiding courts were reluctant to overturn the rezoning amendments on grounds of contract zoning because these concessions were not "extraneous" (i.e., unconnected to the impacts arising from either the rezoning or the subsequent development of the land). *See infra* notes 130-48, 160-90 and accompanying text.

42. *See infra* Parts III.A-B, IV, V.A.

43. *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 361 (Mass. 2003).

44. *Id.*; *see also* Affidavit of Roland LaPrade in Support of Defendant's Motion for Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 543, *Durand* (No. 2002-P-490) [hereinafter LaPrade Affidavit].

45. ROLAND LAPRADE, ET AL., ECONOMIC DEVELOPMENT TASK FORCE, OPPORTUNITY BELLINGHAM: PROPOSAL FOR THE DEVELOPMENT OF INDUSTRIAL LAND IN THE TOWN OF BELLINGHAM (1994), *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 548-49, *Durand* (No. 2002-P-940) [hereinafter OPPORTUNITY BELLINGHAM]. According to the report, "Bellingham historically has had difficulty in providing the services requested by its voters within the amount of dollars raised by taxation." *Id.* at 548. In its findings, the Task Force also determined that Bellingham's population had more than doubled since 1960, largely due to an increase in residential development. *Id.*

46. *See id.* at 548-49. During the 1993 fiscal year Bellingham's per pupil cost equaled \$3656, while the average tax bill for a \$150,000 home amounted to only \$1995. *Id.* at 549. Accordingly, the tax revenue collected from the typical household was usually

whatever fat there may have been in Town departments,” the Task Force recommended that the town focus the expansion of its tax base in an area that would not require the use of additional services.⁴⁷ Ultimately, the Task Force concluded that this goal could be achieved through an expansion of its industrial tax base.⁴⁸

A portion of the Task Force’s report outlined areas that were zoned for industrial use, including a discussion of potential targets within these areas suitable for future rezoning considerations.⁴⁹ Among the sites listed was the location (locus) at issue in this case.⁵⁰ At the time of the study, the locus was zoned for suburban and agricultural use.⁵¹ The Task Force, however, recommended that the locus be rezoned for industrial use in the near future, but only after assessing the potential impacts of such a zoning change.⁵²

In 1995, the Task Force submitted an article to Bellingham’s Town Meeting (Town Meeting) seeking the rezoning of the locus for industrial use.⁵³ Upon review, the rezoning measure was rejected, failing to secure the two-thirds majority vote required for its adoption.⁵⁴ Because the article

insufficient to meet the cost of municipal services demanded by that household. *Id.* at 548. This revenue/expenditure problem was further exacerbated by households enrolling one or more children in the public school system. *Id.* at 549.

47. *Id.* (demonstrating that the growth of educational costs significantly outstripped the revenue generated by residential tax assessments).
48. *Id.* Although industrial development requires some additional servicing, specifically roadways and traffic management, the Task Force felt that any negative effects would be outweighed by the positive effects on Bellingham’s revenue. *Id.* Interestingly, the Task Force’s report concludes by urging Bellingham to take a proactive approach to its industrial planning, which to this point had been characterized as “fitful and unplanned.” *Id.* at 550. Determining that the “[s]iting of industry should be a partnership between landowners, Town and developers[.]” the Task Force stated that industry planning would be more effective if guidelines were established before developers and landowners entered into the planning process. *Id.*
49. *See id.* at 557.
50. *Id.* The report refers to the locus as the “area West of Depot Street, North of Box Pond[.]” *Id.*
51. OPPORTUNITY BELLINGHAM, *supra* note 45, at 557.
52. *Id.* The Task Force was concerned with traffic increases and the impact on surrounding residents. *Id.*
53. Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 361 (Mass. 2003).
54. *Id.* No zoning amendment can be adopted without a two-thirds majority vote of a town meeting. MASS. GEN. LAWS ch. 40A, § 5 (2002). At the 1995 Town Meeting, the motion to rezone the locus failed by garnering sixty-four “yes” votes along with forty-four “no” votes; eight “yes” votes shy of the required two-thirds majority of seventy-two. *See* Record of Town of Bellingham Annual Town Meeting, Article 24, Depot Street Rezoning, May 24, 1995, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 833, Durand (No. 2002-P-940).

2005]

DURAND V. IDC BELLINGHAM, LLC

881

failed to garner the necessary votes, the Town Meeting was precluded from revisiting the proposed rezoning amendment for at least two years.⁵⁵

B. 1997 Town Meeting and the “Gift”

In late 1996, IDC Bellingham (IDC) initiated an effort to erect a second power plant in Bellingham.⁵⁶ Already aware of the locus, IDC began to take the steps necessary to secure the site for its proposed plant.⁵⁷ Upon retaining counsel to examine the zoning of the locus, IDC discovered that the property would need to be rezoned for industrial use and that such an amendment was rejected by the Town Meeting in 1995.⁵⁸

Aware of the need to rezone the locus, IDC approached town officials and announced its interest in constructing a second power plant in the town.⁵⁹ Along with an announcement of its intention to build another power plant, IDC began discussions with town officials about its desire to rezone the locus in order to facilitate the construction of its plant on this parcel of land.⁶⁰ At this point, a representative of IDC and Bellingham’s town manager went through a “laundry list” of contributions that IDC could make to the town.⁶¹ During the course of this conversation, the town official mentioned to the IDC representative that the town could use \$8 million for its share of the cost associated with the construction of its new high school.⁶²

In March 1997, after the conversation with Bellingham’s town administrator, counsel for IDC filed two articles with the Board of Selectmen seeking a town meeting vote to allow the rezoning of the locus for industrial use.⁶³ IDC’s proposal was submitted for consideration at

55. MASS. GEN. LAWS ch. 40A, § 5 (2002).

56. *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 37 (Mass. 2002). The addition of IDC’s second power plant would bring the overall number of such plants in Bellingham to three. See Jenna Russell, *Panel Considers Request for Third Power Plant*, BOSTON GLOBE, July 1, 2001, at Globe West 4.

57. *Durand*, 10 Land Ct. Rep. at 37. Apparently, IDC was already aware of the locus in late 1996; it had previously investigated the use of this parcel in siting a power plant operated by an IDC affiliate. *Id.*

58. *Id.*

59. *Durand*, 793 N.E.2d at 361.

60. *Id.* The failure of the 1995 rezoning effort was apparently brought up at some point during these discussions. *Durand*, 10 Land Ct. Rep. at 37.

61. *Durand*, 10 Land Ct. Rep. at 37.

62. See *Durand*, 793 N.E.2d at 361; see also Deposition of Denis Fraine, reprinted in Brief of Plaintiffs-Appellees, app. vol. 2, at 668-69, *Durand*, 793 N.E.2d at 361 (No. 2002-P-940) [hereinafter Fraine Deposition]. Fraine was Bellingham’s town administrator at time IDC sought to rezone the locus. *Id.* at 667.

63. *Durand*, 10 Land Ct. Rep. at 37; see also Deposition of Bruce Lord, reprinted in Brief

Bellingham's annual town meeting scheduled to commence on May 28, 1997.⁶⁴

After submitting the rezoning proposals to town officials, IDC's president contacted Bellingham's town administrator and informed him that IDC would pledge \$8 million to the town to defray its share of the cost of constructing a new high school.⁶⁵ Following this conversation, a press conference was scheduled at which IDC would announce its intention to present the town with a "gift" of \$8 million.⁶⁶ The press conference was held at the high school, about seven weeks before the town meeting vote on the proposed rezoning of the locus.⁶⁷ According to its president, IDC's "gift" was contingent upon the satisfaction of the following conditions: IDC's ultimate decision whether to proceed with the power plant project in Bellingham; IDC's procurement of all the necessary permits; IDC's ability to secure financing for the project; IDC's actual construction of the plant; and IDC's successful operation of the plant for a period of one year.⁶⁸

Although portrayed as a contribution to the town's construction of a new high school, IDC's offer of \$8 million was actually intended to gather support for both the rezoning of the locus and the eventual construction of the power plant.⁶⁹ Bellingham town officials conceded that the proposed

of Plaintiffs-Appellees app. vol. 2, at 649, *Durand*, 793 N.E.2d at 361 (No. 2002-P-940) [hereinafter Lord Deposition]; Letter from Bellingham Board of Selectmen, to the Bellingham Planning Board (Mar. 14, 1997), *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 674-78, *Durand*, 793 N.E.2d at 361 (No. 2002-P-940). Enclosed with this letter were the rezoning proposals submitted by Lord (on behalf of Northeastern Energy Associates) for Town Meeting consideration, including maps and the rezoning proposal of the locus. *Id.*

64. *Durand*, 10 Land Ct. Rep. at 37.

65. *Id.*; *Durand*, 793 N.E.2d at 361-62; *see also* Fraine Deposition, *supra* note 62, at 669 (discussing the conversations between IDC Bellingham and town officials regarding IDC Bellingham's offer of the \$8 million "gift" to the town).

66. *Durand*, 10 Land Ct. Rep. at 37; *see also* Fraine Deposition, *supra* note 62, at 669-70 (discussing, in greater detail, IDC's meetings with town officials).

67. *Durand*, 10 Land Ct. Rep. at 37; *see also* Brief of the Defendants-Appellants at 7, *Durand*, 793 N.E.2d 359 (No. 2002-P-940); Brief of the Plaintiffs-Appellees at 5, *Durand* (No. 2002-P-940) (discussing the press conference and the "get-out-the-vote" effort).

68. *See Durand*, 793 N.E.2d at 361-62. Town officials understood that the term "permits" included the rezoning of the locus. *Durand*, 10 Land Ct. Rep. at 37-38.

69. *See Durand*, 793 N.E.2d at 362. Apparently, it became "common knowledge" among Bellingham's citizens that IDC's offer of an \$8 million "gift" was tendered to generate community support. *Id.* Moreover, IDC's president testified that his company "believed the \$8 million offer would build community support for the plant." *Durand*, 10 Land Ct. Rep. at 38.

plant did not generate an \$8 million need to build a new high school.⁷⁰ IDC attached few conditions to Bellingham's expenditure of the funds; instead, it stated that the gifted funds could be utilized for "any municipal purpose."⁷¹ Statements from some town officials, however, highlight the fact that most officials in Bellingham viewed the \$8 million as a gift intended to help the town complete the construction of its new high school.⁷² Once IDC's offer of the gift became public knowledge, many town committees became involved in the promotion of the rezoning proposal and the future construction of the plant.⁷³

On May 28, 1997, Bellingham opened its annual town meeting with IDC's rezoning proposal as part of the meeting's agenda.⁷⁴ Since Bellingham has an open form of town meeting, that night's meeting was open to all registered voters who wished to attend.⁷⁵ The town meeting was also attended by representatives of IDC who gave a presentation in support of its proposed rezoning of the locus.⁷⁶ In some instances, the \$8 million "gift" dominated the discussion of the rezoning proposal thus

70. *Durand*, 10 Land Ct. Rep. at 38. When asked whether the power plant created an \$8 million dollar need for a new high school the town responded, "the rezoning of the land as industrial would result in a significant diminishment of potential residents and their school age children." *Id.* In fact, Bellingham further acknowledged that the construction and operation of the proposed power plant did not give rise to the town's need for \$8 million at all. *Id.*

71. *Durand*, 793 N.E.2d at 362.

72. See Deposition of Craig Dennis at 23, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 711, *Durand*, 793 N.E.2d 359 (No. 2002-P-940). According to the head of the Bellingham's high school building committee, the high school was in deplorable condition. *Id.*; see also Deposition of Roger Oakley, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 718, *Durand* (No. 2002-P-940) (noting that it was a "general consensus" that the future needs of the town required the construction of a new high school to accommodate the growth of the community).

73. *Durand*, 793 N.E.2d at 362; see also *Durand*, 10 Land Ct. Rep. at 38. Some town officials started a campaign to inform the public of the town meeting vote and encouraged registered voters to turn out in support of the forthcoming proposal. *Durand*, 793 N.E.2d at 362. In its findings, the Land Court noted that "[e]ven though the [high school building] committee ordinarily did not involve itself in zoning matters, it met on at least two occasions to plan a public relations/get-out-the-vote strategy for the rezoning warrant article." *Durand*, 10 Land Ct. Rep. at 38.

74. *Durand*, 793 N.E.2d at 362.

75. See *Durand*, 10 Land Ct. Rep. at 38. A total of 386 registered voters participated in the 1997 rezoning vote. See Town Clerk Certification of Article 19 Vote, Depot Street Rezoning, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 596, *Durand* (No. 2002-P-940).

76. *Durand*, 793 N.E.2d at 362. According to the court, IDC "reiterated its offer of an \$8 million gift to the town if the plant was built and became operational." *Id.*

overshadowing the proposal's actual merits.⁷⁷ Other portions of the debate, however, were dedicated to a discussion of the potential impacts of the project.⁷⁸ Whether the discussion focused on its merits, the rezoning article was easily passed, receiving the two-thirds majority vote required by law.⁷⁹

C. After the Town Meeting: Closing the "Deal"

In October 1997, Bellingham held another town meeting where voters decided whether to appropriate the \$35 million needed for the construction of the new high school.⁸⁰ According to town officials, Bellingham was unwilling to go forward with the construction of the new high school unless either IDC came through with its \$8 million gift, or another power plant developer was willing to provide similar compensation.⁸¹

Between May 1997 and January 2001, IDC expended around \$7 million to ready the locus for further development.⁸² In the early summer of 1998, Bellingham's Board of Selectmen (Selectmen) informed the Massachusetts Energy Facilities Siting Board that the town no longer supported the development of IDC's power plant because IDC had expanded the size of its proposed plant in the time since the original proposal was approved at the May 1997 town meeting.⁸³ In late July 1998, IDC met with the Selectmen to discuss the town's recent withdrawal of

77. *Durand*, 10 Land Ct. Rep. at 39. Some voters expressed feelings that the \$8 million was "great news" for Bellingham. *Id.* In addition, other voters used the discussion period to sound their concerns over the validity of the offer and the trustworthiness of IDC to deliver the funds upon the satisfaction of all contingencies. *Id.* The town, however, assured the voters that they could trust IDC to fulfill its promise. *Id.*

78. *Id.* Upon the conclusion of his presentation, IDC's president responded to questions about the potential impacts on both the town's environment and quality of life. *Id.*

79. See MASS. GEN. LAWS ch. 40, § 5 (2002); see also Town Clerk Certification of Article 19 Vote, Depot Street Rezoning, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 596, *Durand* (No. 2002-P-940) (tallying the hand count vote as: "YES"-310; "NO"-76; Total-386.) *Id.* There were no audio, video or written recordings of the events of the May 1997 town meeting besides the Clerk's summary of the rezoning proposal and the results of the vote. *Durand*, 10 Land Ct. Rep. at 39.

80. *Durand*, 10 Land Ct. Rep. at 39; see also Record of Fall Special Town Meeting, Oct. 8, 1997, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 820-21, *Durand* (No. 2002-P-940). Article Nine passed unanimously with the town meeting members agreeing, in part, "to raise and appropriate a sum of money for the purpose of constructing a new Senior High School[.]" *Id.*

81. See *Durand*, 10 Land Ct. Rep. at 39. Apparently, the town's statements were made in reference to ANP, another power plant developer that had proposed a second power plant in the vicinity of the locus. See *id.* at 39 n.7 (stating that the record in this case is devoid of information relating to the details of ANP's proposal).

82. *Durand*, 793 N.E.2d at 362.

83. *Id.*

support from the project.⁸⁴ At this meeting, IDC's president informed the Selectmen that the \$8 million "gift" was now "under review" in light of the town's lack of support.⁸⁵ The issue was eventually resolved and the Selectmen's support was reinstated when IDC agreed to scale back the size of the plant.⁸⁶

In April 1999, long after IDC and the town had resolved their disputes, an "Agreement for Water/Wastewater Services" was executed delineating the terms of the understandings reached between the two parties.⁸⁷ The initial portion of the agreement stated that IDC was "willing to fund various municipal projects" and that Bellingham was "willing to provide water and wastewater services" to the development site.⁸⁸ The agreement further established that "IDC shall provide funds (\$8,000,000.00) to [Bellingham] for its various capital expenditures, municipal projects and municipal improvements" upon the satisfaction of certain conditions.⁸⁹ The thrust of the agreement was to "memorialize, without duplicating the \$8,000,000 commitment IDC and its affiliates previously made to [Bellingham] in connection with the Plant."⁹⁰

In May 2000, IDC filed applications with Bellingham's Zoning Board of Appeals (ZBA) for five special permits necessary for the construction of the power plant.⁹¹ IDC sought the special permits in order to gain exemptions from certain dimensional and environmental requirements of Bellingham's zoning bylaw.⁹² In January 2001, Bellingham's ZBA granted

84. See *Durand*, 10 Land Ct. Rep. at 39.

85. See *id.* Apparently, IDC's president became "irritated" with the town as he perceived the town's shift in stance as a means of extracting a larger sum of money from IDC in exchange for all the necessary permits. See *id.*

86. See *Durand*, 793 N.E.2d at 362.

87. *Id.*

88. Agreement for Water/Wastewater Services, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 824, *Durand* (No. 2002-P-940) [hereinafter Agreement for Water/Wastewater Services].

89. *Id.* Under the terms of the agreement, IDC would disburse the entire \$8 million after the plant's first year of operation; however, the agreement also contained a provision that would allow the Selectmen to request a fifty percent disbursement after the receipt of the necessary financing and permits. *Id.* at 2. Such action would then allow IDC to delay disbursement of the remaining fifty percent until the end of the plant's sixth year of operation. *Id.*

90. *Durand*, 793 N.E.2d at 362; *Durand*, 10 Land Ct. Rep. at 39; Agreement for Water/Wastewater Services, *supra* note 88, at 824.

91. *Durand*, 793 N.E.2d at 362.

92. *Durand*, 10 Land Ct. Rep. at 40. Specifically, the exemptions were sought for: (1) building height; (2) air quality; (3) use of temporary structures and parking of commercial vehicles; (4) exterior lighting; and (5) storage of hazardous materials. *Id.*

all five of the special permits requested by IDC.⁹³ Three weeks later, eight landowners living in the vicinity of the locus filed suit against IDC, the Town of Bellingham, the ZBA and the owners of the locus.⁹⁴

III. LAND COURT DECISION: *DURAND V. PATURZO*⁹⁵

The plaintiffs, residents of Bellingham, initiated suit in the Land Court⁹⁶ seeking, *inter alia*, a declaration that the 1997 town meeting vote, which rezoned the locus, constituted impermissible contract zoning and spot zoning.⁹⁷ Along with this declaration, the plaintiffs also sought to repeal certain special permits, which would have allowed IDC to construct its power plant on the locus.⁹⁸ In September 2001, the defendants moved for partial summary judgment arguing, in part, that the plaintiffs had insufficient evidence to prove that the 1997 town meeting rezoning vote constituted illegal contract zoning.⁹⁹ The defendants also advanced the following position: even if contract zoning did occur, the landowners' claims were untimely and thus barred.¹⁰⁰ At the close of the pre-trial proceedings,¹⁰¹ then-Land Court Chief Justice Peter W. Kilborn examined

93. *Durand*, 793 N.E.2d at 362.

94. *See Durand*, 10 Land Ct. Rep. at 36. The Land Court case, No. 269096, was consolidated with No. 269896 for purposes of summary judgment. The latter filing is identical to the former and was originally filed in Norfolk Superior Court on the same day. *Id.* at 36 n.2.

95. 10 Land Ct. Rep. 36 (Mass. 2002). The plaintiffs were Maurice Durand, Gerard Novicki, Lorraine Spencer, Donald Keller, Debra E. Ferullo, Robert Loftus, Jr., and Kenneth M. Hamwey. The defendants were the Town of Bellingham, a Municipal Corporation, IDC Bellingham, LLC, Varney Brothers Sand & Gravel Co., Inc., and Members of the Bellingham Zoning Board of Appeals (Arturo Paturzo, Robert Andrews, Morton Benmaor, Edward Clair, and William Hermistone). *Id.*

96. *See* MASS. GEN. LAWS ch. 185, § 1 (2002). Pursuant to this section, the Land Court shall have jurisdiction over claims "to determine the validity and extent of municipal zoning ordinances, by-laws and regulations." *Id.* § 1(j 1/2).

97. *Durand*, 10 Land Ct. Rep. at 36. Of note, the plaintiffs eventually abandoned their claim of spot zoning by stipulation at the summary judgment hearing. *Id.*

98. *Id.* Meanwhile, the defendants responded by raising numerous affirmative defenses, including laches and the statute of limitations. *Id.*

99. *Id.*

100. *Id.* at 40. The defendants argued that the plaintiffs' claims were barred by the doctrine of laches because the plaintiffs waited from May of 1997 until January of 2001 to file the suit, after IDC had spent over \$7 million in preparing to construct its new power plant. *Id.* The Land Court, however, did not find the defendants' arguments persuasive; rather, it ruled that the plaintiffs' had no duty to bring suit until the special permits were issued by the ZBA in January of 2001. *Id.* at 41.

101. *Durand*, 10 Land Ct. Rep. at 36. The neighboring landowners also sought to invalidate the rezoning action on the grounds that the language of the actual rezoning

the remaining issues of contract zoning and the validity of the special permits issued by the ZBA in a decision dated February 20, 2002.¹⁰²

For their contract zoning claim, the plaintiffs were required to satisfy a rather strict burden to prove that the rezoning amendment was invalid.¹⁰³ As a general rule, a court will not overturn a town's rezoning action if its reasonableness is "fairly debatable."¹⁰⁴ In order to declare a rezoning action invalid, the plaintiffs "must prove by a preponderance of the evidence, that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare."¹⁰⁵

The defendants argued that nothing in the laws of Massachusetts bars the process of contract zoning.¹⁰⁶ In addition, the defendants contended that the Massachusetts courts that have discussed contract zoning have relied solely on legal treatises to formulate an actual definition of contract zoning.¹⁰⁷ Those Massachusetts courts that have deliberated over the existence of contract zoning have only been able to hypothesize as to possible examples of contract zoning.¹⁰⁸

The plaintiffs disputed the defendants' primary claim that contract zoning does not exist as a separate claim by arguing that Massachusetts courts, namely the SJC, have recognized the existence of contract zoning as an independent claim even though the merits of those cases did not require the court to invalidate the rezoning amendment.¹⁰⁹ Further arguing that the

enactment differed from the language used in the rezoning advertisement prior to the town meeting. *Id.* The plaintiffs, however, conceded this point because they were time-barred from any procedural challenge under MASS. GEN. LAWS ch. 40A, § 5. *Id.* at 36 n.4.

102. *See Durand*, 10 Land Ct. Rep. at 36.

103. *Id.* at 41.

104. *Id.* (quoting *Johnson v. Edgartown*, 680 N.E.2d 37, 40 (Mass. 1997)).

105. *Id.* (quoting *Johnson*, 680 N.E.2d at 40).

106. *See* Memorandum in Support of Defendants' Motion for Partial Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 531, *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359 (Mass. 2003) (No. 2002-P-940) [hereinafter Defendants' Motion for Summary Judgment]. Unlike spot zoning, Massachusetts law does not spell out a ban against contract zoning. *See generally* MASS. GEN. LAWS ch. 40A, §§ 1-17 (2002). Moreover, the defendants further argued that no Massachusetts court has ever invalidated a rezoning action on the basis of contract zoning. Defendants' Motion for Summary Judgment, *supra*, at 531.

107. *Id.*

108. *Id.* (citing *Sylvania Elec. Prods. Inc. v. City of Newton*, 183 N.E.2d 118, 121 (Mass. 1962)). The defendants concluded their argument with the assertion that the jurisprudence of Massachusetts makes it clear that contract zoning does not exist as a separate ground to invalidate a zoning amendment. *Durand*, 10 Land Ct. Rep. at 42.

109. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 622, *Durand* (No.

existence of a binding contract is not required for a court to find an instance of contract zoning, the plaintiffs claimed that the instant case was distinguishable from the other Massachusetts cases.¹¹⁰ In light of the arguments advanced by either side, then-Chief Justice Kilborn dedicated a substantial portion of his opinion to a discussion of the defendants' use of Massachusetts cases in order to establish that previous courts have consistently relied upon secondary authority to construe the meaning of contract zoning.¹¹¹

A. *Sylvania Electric Products, Inc v. City of Newton*

After considering the defendants' argument that contract zoning is not codified under Massachusetts law, the court turned its attention to *Sylvania Electric Products, Inc. v. City of Newton*,¹¹² the first Massachusetts case dealing with contract zoning.¹¹³ In *Sylvania*, the SJC was faced with a landowner-challenge assailing the validity of a rezoning action involving an agreement between city officials and a developer allowing a tract of land to be rezoned from a single residence district to a limited manufacturing district.¹¹⁴ In exchange for the approval of the rezoning amendment, the developer voluntarily assented to certain restrictions on the use of his land while also providing the city with the option of purchasing a portion of the rezoned land.¹¹⁵ The main issue in *Sylvania* concerned the imposition of these restrictions in exchange for the city's approval of the developer's rezoning proposal.¹¹⁶ The restrictions placed on the land were primarily

2002-P-940) [hereinafter Plaintiffs' Memorandum in Opposition].

110. *Id.* at 618-22. The plaintiffs buttressed their argument by advocating that a finding of illegal contract zoning does not necessarily require the presence of a formal binding agreement. *Id.* at 622-23. The SJC in *Sylvania* posited that a rezoning amendment could be invalid if influenced by the existence of "extraneous consideration." Plaintiffs' Memorandum in Opposition, *supra* note 109, at 622 (citing *Sylvania Elec. Prods., Inc.*, 183 N.E.2d at 122).

111. *See Durand*, 10 Land Ct. Rep. at 41-43.

112. 183 N.E.2d 118 (Mass. 1962).

113. *Durand*, 10 Land Ct. Rep. at 42. At the time of the Land Court's decision, *Sylvania* was the only SJC case dealing with the issue of contract zoning. *Id.*

114. *Sylvania*, 183 N.E.2d at 119 (stating that the landowners were challenging a Land Court decision which upheld the validity of this particular rezoning amendment).

115. *See id.* at 120. These restrictions were set forth in a deed and were sought, in relevant part, to limit the floor area of all the buildings created through future construction. *Id.*

116. *Id.* at 119. These restrictions raised concerns because they were over and above those imposed upon a typical limited manufacturing zone under the zoning laws. *See id.* These additional restrictions included: (1) giving the town a thirty-year option to purchase a thirty acre strip of adjoining land for \$300; (2) creating a buffer-zone upon which no buildings could be constructed; (3) limiting the floor area of the planned buildings; and (4) establishing a traffic pattern in conjunction with future construction

2005]

DURAND V. IDC BELLINGHAM, LLC

889

intended to enable the city to retain some control over the character of the rezoned parcel.¹¹⁷

Although the court ultimately determined that no illegal contract zoning existed, it began its discussion by stating that “the conclusion is inescapable that the option proposal was a significant inducement of the zoning amendment and the amendment induced the giving of the option.”¹¹⁸ The inducement, however, did not contaminate the rezoning vote, because the restrictions and the option to purchase were rationally related to the effects of the rezoning action.¹¹⁹ Specifically, the court determined that it was reasonable for the city to ask the developer to take action to “ameliorate the effect of the pending drastic change of zoning classification.”¹²⁰

Responding to claims that the rezoning action was an invalid exercise of the city’s police power, the court noted that the voluntary actions of Sylvania, rather than the rezoning vote of the city, caused the restrictions to be placed upon the land.¹²¹ The court further held that the rezoning action was neither contrary to the best interests of the city nor offensive to the public as a whole.¹²² The court reached its “best interest” determination by establishing the absence of “extraneous consideration.”¹²³ Because the court was unable to discern any extraneous consideration, it was unable to impeach the rezoning vote as a decision based solely on an exchange of promises.¹²⁴ By classifying these actions as voluntary, the court was able to distinguish this case from those actions that may violate public policy.¹²⁵ Of note, the court hypothesized that extraneous consideration may well be established if a rezoning action involves something akin to an agreement by a petitioner (i.e., a developer) to provide a parcel of land unconnected to the rezoned area, in exchange for favorable treatment of the proposed amendment.¹²⁶ While the court acknowledged that the rezoning action’s likelihood of success was closely tied to Sylvania’s acquiescence regarding the restrictions, the court declined to hold that city officials had exercised

projects on the premises. *Id.* at 120.

117. *See id.* at 120.

118. *Id.* at 121-22.

119. *See id.* at 122.

120. *Sylvania*, 183 N.E.2d at 123.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. *See Sylvania*, 183 N.E.2d at 122.

authority beyond the scope of their zoning powers.¹²⁷ Instead, the court deferred to the city officials' informed discretion to grant the rezoning action by choosing to uphold the amendment on grounds that any negative impact or possible impropriety was outweighed by the city's need to protect its community character in the face of a drastic zoning change.¹²⁸

B. *Rando v. Town of North Attleborough*

After examining the initial contract zoning case in Massachusetts, the Land Court turned to a more recent case attacking an amendment to reclassify a tract of land.¹²⁹ In the case of *Rando v. Town of North Attleborough*,¹³⁰ the only other Massachusetts appellate case on contract zoning at the time of the Land Court decision,¹³¹ the Massachusetts Appeals Court reviewed and affirmed the Land Court's dismissal of a claim seeking an assessment of the validity of a town meeting vote.¹³² The Land Court's decision to dismiss was reached after determining that the rezoning amendment was a valid exercise of local zoning power.¹³³

Similar to *Sylvania*, the rezoning action in *Rando* also involved a number of concessions given by the developer in exchange for favorable treatment of its rezoning proposal.¹³⁴ Along with the creation of a "no build" buffer zone to shield residential abutters, the developer also agreed that he would not seek a tax abatement on any of the rezoned land for a period of five years.¹³⁵ The developer also proposed a grant of funds for

127. *See id.* at 123.

128. *See id.*

129. *See Durand*, 10 Land Ct. Rep. at 42.

130. 692 N.E.2d 544 (Mass. 1998).

131. *See Durand*, 10 Land Ct. Rep. at 42. *Rando* was the only other Massachusetts appellate case concerning contract zoning when the decision in *Durand* was handed down in February 2002. Later on in November of 2002, the Massachusetts Appellate Court delivered its decision in *McLean Hospital Corporation v. Town of Belmont*, 778 N.E.2d 1016 (Mass. 2002). The importance of this timing is highlighted by the SJC's reliance on *McLean* in its decision to overturn the Land Court's decision in *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 369 (Mass. 2003). These cases will be reviewed in subsequent sections. *See infra* notes 160-90, 197-238 and accompanying text.

132. *See Rando*, 692 N.E.2d at 545-46. The vote at issue caused a thirty-seven acre tract to be rezoned for commercial use, in order to facilitate the construction of a shopping mall and movie theater. *Id.*

133. *Id.* at 545.

134. *See id.* at 546. These "concessions" given by the developer were allegedly given to mitigate any potential impacts flowing from the developer's proposed commercial development. *Id.*

135. *Id.*

certain traffic improvements.¹³⁶ Beyond these concessions, the developer agreed to supply the town with a mitigation fund in the amount of \$260,000.¹³⁷

The plaintiffs, adjoining landowners,¹³⁸ claimed, in relevant part, that the rezoning action constituted illegal contract zoning.¹³⁹ Specifically, the plaintiffs argued that the town meeting approval of the rezoning amendment was invalid because the town illegally bargained away its police power in exchange for the acceptance of the developer's concessions.¹⁴⁰ The landowners claimed that the existence of "extraneous consideration" is evinced by the developer's gift of \$260,000 to the town for the purpose of establishing a mitigation fund.¹⁴¹ Relying on the SJC's reasoning in *Sylvania*, the plaintiffs argued that the rezoning amendment should be invalidated because the mitigation funds would be bestowed upon the town without any specific connection to costs arising from the proposed commercial development.¹⁴²

Although the court recognized language from *Sylvania* indicating that a rezoning vote could be impeached upon a showing that the rezoning approval was conditioned upon a required payment of funds into a general municipal fund, the court was not persuaded to conduct such an

136. *See id.* Since the rezoning of this parcel would expand the existing commercial strip along Route 1, the developer voluntarily agreed to provide the Massachusetts Highway Department with mitigation payments between \$400,000 and \$450,000 to off-set the cost of roadway improvements. *Id.*

137. *Rando*, 692 N.E.2d at 546. Apparently, the amount of money given as mitigation represented one dollar for every square foot of retail space that would be available once the proposed commercial development was erected. *Id.* at 546 n.4. The developer also agreed to provide an additional gift of mitigation funds for every square foot leased in excess of the proposed 260,000 square feet. *Id.* at 546.

138. The plaintiffs in this case were not actually residents of North Attleborough; rather, the plaintiffs owned a tract of land abutting the boundary between Attleboro and North Attleborough. The developer owned a tract of land in North Attleborough that abutted both the town line and a portion of the plaintiffs' property. *See Rando*, 692 N.E.2d at 545.

139. *See id.* The court defined contract zoning as a "process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property." *Id.* at 547 (quoting BOBROWSKI, *supra* note 33, § 3.04(d)). As a matter of course, a municipality's attempt to engage in contract zoning is typically disapproved on the grounds that a town cannot bargain away its police power (zoning power) to regulate on behalf of the general welfare. BOBROWSKI, *supra* note 33, § 3.04(d).

140. *Rando*, 692 N.E.2d at 547.

141. *Id.* at 548.

142. *See id.*

impeachment.¹⁴³ The court distinguished the action at issue from the hypothetical situation illustrated in *Sylvania* by delineating the difference between a required payment and one which is made voluntarily.¹⁴⁴ Relying on scholarly commentary, the court chose not to characterize a developer's voluntary contribution as the type of extraneous consideration necessary to impeach a rezoning action.¹⁴⁵

First, the court did not believe that funds given both voluntarily and in the public interest were those that should be classified as an "extraneous consideration."¹⁴⁶ Although the term "gift" had been affixed to the developer's offer of mitigation funds, the court declined to treat the funds purely as a "gift" in light of evidence that such funds were intended to help off-set the potential costs resulting from the new development.¹⁴⁷ Along with establishing a connection between the developer's "gift" and the costs arising from the project, the court also found that the rezoning approval was not influenced by factors beyond the merits of the action itself.¹⁴⁸

143. *See id.*

144. *See id.*

145. *Id.* at 548 (citing Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 991 n.181 (1987)) (stating that obligations to provide services or contribute money to a general fund in exchange for favorable treatment of rezoning proposals will be closely scrutinized by courts on grounds of proper public policy).

146. *Rando*, 692 N.E.2d at 548.

147. *Id.* Communications between the town and developer showed that the mitigation fund was established to benefit both the surrounding residential neighborhoods and the town of North Attleborough as a whole. *Id.*

148. *Id.* at 548-49. The minutes of the town meeting did not show that the approval of the rezoning action was influenced by anything beyond the best interests of the town. *See id.* The court affirmed the Land Court's determination that the super-majority of the town meeting members was not improperly influenced by the developer's offerings, thereby acting contrary to the best interests of the town. *See id.* In dicta, the court infers agreement with the assertion that such "general-purpose" funds provided by developers are necessary and beneficial to local communities, especially in the early stages of the development process. *See id.* The defendants offered this illustration to justify the legitimacy of permitting a favorable zoning change based, in part, on the town's receipt of funds, from a developer, earmarked for no specific purpose:

The rationale for an early establishment of a general mitigation fund is especially applicable "in areas that are expanding quite rapidly in which there is a great deal of development activity, and a lot of the commercial development tends to get clustered around the malls, so you see development expanding in corridors. [Because of] [t]he uncertainty of the phasing and the speed and the exact type of development, from the town's perspective it's an advantage to have some dedication of funds so they can actually look at the real problems as the real problems

C. Chief Justice Kilborn's Rationale

The *Durand* Land Court did not agree with the defendants' assertion that contract zoning does not exist as a distinct cause of action under Massachusetts law.¹⁴⁹ To the contrary, the court points to the reasoning of both *Sylvania* and *Rando* as evidence that contract zoning *does* exist as a distinct cause of action.¹⁵⁰ Chief Justice Kilborn suggested that contract zoning may occur when a developer and a town enter into an agreement whereby a town agrees, in advance of a vote, to rezone in lieu of a promise by a developer to furnish some form of consideration.¹⁵¹ Determining that an analysis of contract law principles would not adequately resolve the issue, the court focused its attention on the \$8 million "gift" and the effect it had, if any, on the 1997 town meeting vote.¹⁵²

develop.

Id. at 549.

149. *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 43 (Mass. 2002). The defendants claimed that contract zoning is nowhere defined in the law of Massachusetts and those courts that have discussed the issue have never invalidated a rezoning action on grounds of illegal contract zoning. Defendants' Motion for Partial Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 531, *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359 (Mass. 2003) (No. 2002-P-940). The defendants further claimed that Massachusetts courts dealing with contract zoning have relied solely on treatise definitions because the concept of contract zoning has never been codified. *See id.* Relying on these treatises, defendants adopted the position that "the disapprobation of contract zoning is not so much legal as 'largely political,' and is based upon the 'risk of fraud, corruption and undue influence.'" *Id.* at 14-15 (citing *BOBROWSKI*, *supra* note 33, § 3.04(d)). Citing to other Massachusetts jurisprudence, the defendants argued that political considerations should have no bearing in any discussion regarding the validity of a zoning enactment. *See* Defendants' Motion for Partial Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 533, *Durand* (No. 2002-P-940). Moreover, it is not within the court's province to judge the wisdom or effectiveness of a particular zoning action; therefore, a zoning action is impeachable only if the plaintiffs can prove "by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals or general welfare." *Id.* (citing *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 40 (Mass. 1997)).
150. *Durand*, 10 Land Ct. Rep. at 43.
151. *Id.* at 43; *see also Sylvania*, 183 N.E.2d at 122; *Rando*, 692 N.E.2d at 547. Although the reasoning of *Sylvania* indicates that contract zoning may exist where rezoning is expressly conditioned upon a developer's promise, Chief Justice Kilborn found no such agreement in advance of the rezoning vote. *Durand*, 10 Land Ct. Rep. at 43.
152. *Durand*, 10 Land Ct. Rep. at 43-44. The court implicitly agreed with the plaintiffs' argument that according to *Rando*, a bilateral contract between a town and a developer is not a necessary element of contract zoning, but merely a possible example. *See id.* at 43; Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 623,

Absent the \$8 million “gift,” the court reasoned that the rezoning action would have been valid because of the broad discretion granted to local communities with respect to zoning powers by the Home Rule Amendment to the Massachusetts Constitution.¹⁵³ According to the court, the presence of the \$8 million “gift” was particularly troublesome because it was offered by IDC not to mitigate costs arising from its development, but purely to engender the public’s support for the proposed rezoning action.¹⁵⁴ Without a connection to costs arising from the development, the court determined that the \$8 million “gift” was the type of “extraneous influence” contemplated by the court in *Sylvania*.¹⁵⁵ Because the “gift” was not specifically connected to the potential impacts of the proposed development, the defendants were unable to avail themselves of prior decisions affirming the validity of rezoning actions similarly motivated.¹⁵⁶

In reversing Bellingham’s 1997 rezoning vote, then-Chief Justice Kilborn recognized that many of these “gifts” given by developers in mitigation will often have a “tenuous” link to costs arising from the rezoning action.¹⁵⁷ The court rested its invalidation of the rezoning vote on

Durand (No. 2002-P-940).

153. *See Durand*, 10 Land Ct. Rep. at 44; *see also* MASS. CONST. art. LXXXIX, § 6 (amended 1966). “Any city or town may ... exercise any power or function ... not inconsistent with the constitution or laws enacted by the general court ... and ... not denied, either expressly or by clear implication, to the city or town by its charter.” *Id.*
154. *See Durand*, 10 Land Ct. Rep. at 44. On this particular point, the plaintiffs argued that public policy requires a demonstrated connection between the consideration and the rezoning action. *See* Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 620, *Durand* (No. 2002-P-940). To allow such exchanges without an identifiable nexus between the money given and the action taken, would condone an action tantamount to bribery. *See id.* According to the plaintiffs, the legitimacy of the democratic process is ensured when legislators are motivated to act based on the merits of the action and not the potential for pecuniary gain. *Id.*
155. *See Durand*, 10 Land Ct. Rep. at 44.
156. *See id.* Specifically, defendants could not persuade the court to analogize the \$8 million “gift” by IDC Bellingham with the \$260,000 general mitigation fund established by the developer in *Rando*. Unlike the establishment of a general mitigation fund, IDC’s “gift” could not be characterized as a “payment ... reasonably intended to meet public needs arising out of the proposed development....” *Rando*, 692 N.E.2d at 548.
157. *Durand*, 10 Land Ct. Rep. at 44. Recognizing the utility of such developer “gifts,” the court implicitly indicates that it would approve this practice as long as the funds were intended to mitigate project impacts in some way. *See id.* Even though many of these “deals” serve a valid purpose, the line between a legitimate mitigation payment and “extraneous consideration” is blurred when such offers contain a large “gift” element. *See id.* Without an express statement, the court’s language illustrates its reluctance and inability to formulate a bright-line standard to assess the validity of such “gifts.”

the fact that IDC's promise was extraneous, but its conclusion highlights the difficulty experienced by the court in reaching its ultimate decision.¹⁵⁸ Although recognizing that a presumption of validity is typically afforded to local rezoning actions, the court, with some reluctance, concluded that *Sylvania's* reference to "extraneous consideration" warranted a reversal of the rezoning action in this particular case.¹⁵⁹

IV. INTERIM DEVELOPMENT: *MCLEAN HOSPITAL CORP. V. TOWN OF BELMONT*

During the appeals period of the Land Court decision, the Appeals Court of Massachusetts added another wrinkle in the fabric of contract zoning jurisprudence with its holding in *McLean Hospital Corp. v. Town of Belmont*.¹⁶⁰ Decided in November 2002, *McLean* sought to provide clarity to the doctrine of contract zoning by addressing a challenge to a municipal zoning amendment on grounds that the rezoning action and the surrounding agreements implicated an occurrence of impermissible contract zoning.¹⁶¹

In the mid-1990s, McLean Hospital Corporation (McLean) began to explore options with respect to the development of a large tract of open space it owned in the town of Belmont, Massachusetts.¹⁶² Working together with town officials, McLean formed a task force to formulate "certain municipal objectives" for the future development of this 190 acre parcel.¹⁶³ After various failed proposals, McLean and Belmont entered into a

See id. As such, the legitimacy of this deal and others will undergo a case-specific analysis in view of all the relevant circumstances. *See id.*

158. *Id.* at 44. In reaching its decision, the court acknowledged the fact that this case was before the court on summary judgment. *Id.* Chief Justice Kilborn discussed alternative resolutions, such as conducting a trial to determine if the 1997 Town Meeting vote was improperly influenced. *Id.* In doing so, the court would have conducted an inquiry to discover if the rezoning vote had been influenced by factors outside the actual merits of the action. *See id.* Noting the "seductive appeal" of such an inquiry, the court declined to pursue this option citing the difficulty of resolving such an issue at trial. *Id.*

159. *Id.* at 44.

160. 778 N.E.2d 1016 (Mass. 2002).

161. *See id.* at 1017-18.

162. *See id.* at 1018. McLean's tract measured approximately 238 acres, the majority of which had been preserved as open space for an extended period of time. *Id.* Although this tract of land had been primarily used for a teaching hospital, the area in dispute was located inside a single residence district. *Id.* Apparently, fiscal concerns in the mid-1990s caused McLean to explore options to either develop or divest itself of nearly 190 acres (eighty percent) of its land holdings. *Id.*

163. *Id.* Among its stated objectives, the task force sought to acquire land for town purposes and minimize all adverse effects flowing from the new development upon the quality of life of the community. *Id.*

memorandum of understanding which, in part, called for the comprehensive rezoning of the 190 acres into six separate districts.¹⁶⁴

At a specially convened town meeting, the rezoning of the parcel into sub-districts was submitted for consideration under the warrant article.¹⁶⁵ A second article sought to authorize certain “understandings” reached between McLean and the town.¹⁶⁶ Drawing the most criticism were provisions for mitigation payments totaling \$1.5 million and conveyance to the town of all rights to a particular portion of the parcel.¹⁶⁷ The rezoning article, although endorsed by the town’s planning board after successive adjournments, failed to garner the two-thirds vote necessary for enactment of the amendment.¹⁶⁸ After passing motions to dismiss the remaining articles, the special town meeting moved for adjournment and reconsideration of the failed proposal.¹⁶⁹

The special town meeting was reconvened once McLean and Belmont agreed to certain revisions of the articles, including reductions to the amount of money McLean would pay to the town.¹⁷⁰ These revised articles

164. *Id.* at 1019. Along with preserving a section of open-space, the rezoning of the parcel would allow additional uses such as senior living, a cemetery, and a research and development district. *Id.*

165. *See id.* A total of five articles were put to vote at this special town meeting, all concerning the development of this 190 acre tract. *Id.*

166. *See McLean*, 778 N.E.2d at 1019. Among these “understandings” were provisions to convey fourteen acres to the town for a cemetery and to preserve approximately seventy-nine acres as open space. *Id.*

167. *See id.* at 1019-20. In terms of monetary payments, the relevant town meeting article, if approved, would have authorized Belmont to extract from McLean a \$1 million payment for certain traffic improvements in addition to a \$500,000 reimbursement for the town’s consultant fees. *Id.* at 1019.

168. MASS. GEN. LAWS ch. 40A, § 5 (2002).

169. *See McLean*, 778 N.E.2d at 1019. Since the rezoning amendment had failed, it was unnecessary to proceed on the remaining articles dealing with the “understandings” surrounding the after effects of the rezoning process. *See id.* Even though the rezoning amendment did not garner the necessary two-thirds majority vote, continued consideration of the articles was permissible because the planning board’s endorsement of the proposals exempted the articles from the two-year moratorium imposed upon failed rezoning amendments per the Zoning Act. MASS. GEN. LAWS ch. 40A, § 5.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a ... town meeting shall be considered by the ... town meeting within two years after the date of such unfavorable action *unless* the adoption of such proposed ordinance or by-law is *recommended* in the final report of the planning board.

Id. (emphasis added).

170. *McLean*, 778 N.E.2d at 1019-20. The revisions eliminated the \$500,000

were reconsidered and adopted after receiving the required two-thirds majority vote required by statute.¹⁷¹

Upon approval and execution of the agreement between McLean and the town,¹⁷² interveners¹⁷³ filed suit attacking the rezoning, in part, as an instance of impermissible contract zoning.¹⁷⁴ The Land Court judge found no evidence of impropriety arising from the “understandings” between McLean and Belmont.¹⁷⁵ Because all of the elements of the agreement bore some relation to the rezoning of the parcel, the Land Court was convinced that the rezoning constituted a “comprehensive land use plan” for the parcel.¹⁷⁶ Acknowledging the lengthy deliberations of the special town meeting, the Land Court was satisfied that the actions of the voters were reasonable in adopting the amendment.¹⁷⁷

Interveners subsequently brought an appeal in order to revisit the Land Court’s ruling on the issue of contract zoning.¹⁷⁸ Although the interveners fashioned numerous arguments, the court consolidated the assertions to one simple contention: the rezoning action was a product of “so-called” contract zoning and was therefore impermissible.¹⁷⁹ The appeals court, rejecting these arguments, reasoned that the existence of agreements between a town and a landowner would not compel a per se invalidation of the rezoning action.¹⁸⁰ Instead, the appeals court held that any invalidation of the rezoning action would be appropriate if the nature of the agreement and the character of the rezoning indicate some level of

reimbursement charged to McLean and reduced McLean’s traffic improvement contribution to \$800,000. *Id.* at 1019. The most drastic revision would require the town to pay \$1.5 million to McLean. *Id.* The court noted that subsequent revisions of the “understandings” cost the town \$2.2 million. *Id.* at 1019-20.

171. *McLean*, 778 N.E.2d at 1020. The articles were passed upon a vote of approximately 69.5% in favor and 30.5% against. *Id.*

172. *Id.* at 1020.

173. Interestingly, the Land Court assumed that the interveners had standing to bring suit. Since neither party, McLean nor Belmont, disputed standing upon appeal, the reviewing court proceeded on the same assumption that standing was present. *Id.* at 1017 n.2.

174. *McLean*, 8 Land Ct. Rep. at 159-61.

175. *Id.*

176. *Id.* at 160.

177. *Id.*

178. *McLean*, 778 N.E.2d at 1017.

179. *Id.* at 1020. Interveners sought to invalidate the rezoning action by alleging: (1) the town had improperly bargained away its police power; (2) the town wrongly entered into a bi-lateral agreement which created a duty to rezone; and (3) the town was acting to further the interests of a private landowner over that of the town. *Id.*

180. *Id.*

impropriety.¹⁸¹

Examining prior precedent, the appeals court distilled two major points of inquiry:¹⁸² (1) whether the agreement and subsequent rezoning action were “contrary to the best interest of the city and hence offensive to general public policy;”¹⁸³ and (2) whether the agreement involved extraneous consideration “which could impeach the enacting vote as a decision solely in respect of rezoning the locus[.]”¹⁸⁴ Determining that the Land Court’s inquiry upheld the spirit of these prior holdings, the appeals court found no evidence to suggest that the interests of Belmont were not being served by the rezoning action.¹⁸⁵ In terms of extraneous consideration, the benefits flowing to the town under the agreement involved none of the elements of an improper bargain as contemplated by prior holdings.¹⁸⁶

The appeals court declined to apply a strict test that would classify “extraneous” any consideration that was not directly intended to remedy a deleterious effect arising from the rezoning action.¹⁸⁷ Finding this standard too constrictive, the appeals court settled on a test that would uphold the validity of a rezoning action so long as the consideration “bear[s] some identifiable relationship to the locus so that there can be assurance that the town’s legislative body did not act for reasons irrelevant to the zoning of the site at issue.”¹⁸⁸ Since each of the “understandings” was reasonably related to the rezoning action, the rezoning vote of Belmont’s town meeting was upheld.¹⁸⁹ Affirming the decision of the Land Court, the appeals court reasoned that such agreements between a town and a landowner are “consistent with good government in general and with effective land use planning in particular.”¹⁹⁰

181. *See id.*

182. *See id.* at 1020-22.

183. *Sylvania*, 183 N.E.2d at 122.

184. *Rando*, 692 N.E.2d at 548 (quoting *Sylvania*, 183 N.E.2d at 122).

185. *McLean*, 778 N.E.2d at 1022. The Land Court trained its focus on the alleged existence of improper influence and extraneous consideration in the rezoning process. *See McLean Hosp. Corp. v. Belmont*, 8 Land Ct. Rep. 155, 160 (Mass. 2000).

186. *McLean*, 778 N.E.2d at 1022; *see also Sylvania*, 183 N.E.2d at 122 (hypothesizing possible examples of extraneous consideration which could invalidate a rezoning vote as “a decision solely in respect of rezoning the locus”).

187. *McLean*, 778 N.E.2d at 1022.

188. *Id.*

189. *Id.* at 1023.

190. *Id.* Nothing in the Zoning Act prohibits negotiations and agreements between town and private landowner as long as the zoning bylaw is properly enacted and all the resulting benefits are reasonably related to the rezoned parcel. *See generally* MASS. GEN. LAWS ch. 40A, §§ 1-17 (2002).

V. SUPREME JUDICIAL COURT CASE: *DURAND V. IDC BELLINGHAM, LLC*

In the wake of *McLean* and Chief Justice Kilborn's ruling, the defendants filed a timely appeal seeking review of the trial court's ruling which granted summary judgment in favor of the plaintiffs, thereby invalidating the 1997 Town Meeting vote to rezone the locus.¹⁹¹ Upon the filing of notice, the defendants' appeal was transferred, sua sponte, to the Massachusetts Supreme Judicial Court.¹⁹²

The defendants' primary argument focused on the Land Court's denial of their motion for summary judgment, specifically the lower court finding that the 1997 Town Meeting vote was contract zoning and was improperly influenced by "extraneous consideration."¹⁹³ The landowners, however, sought affirmation of the Land Court decision by arguing, *inter alia*, that the lower court correctly established an amount of "extraneous consideration" sufficient to invalidate the 1997 Town Meeting rezoning action.¹⁹⁴

The SJC reversed the decision of Chief Justice Kilborn, concluding that a "voluntary offer of public benefits beyond what might be necessary to mitigate the development of a parcel of land does not, standing alone, invalidate a legislative act...."¹⁹⁵ Although the SJC stood in unanimity on the decision to reinstate the 1997 Town Meeting vote, the court was divided with respect to the reasoning employed in reaching its decision.¹⁹⁶

A. Majority Opinion

The majority commenced discussion of its decision to reverse the lower court ruling by examining applicable state law relevant to the zoning powers possessed by local municipalities.¹⁹⁷ Recognizing the zoning power as one of the independent powers granted to local municipalities through the Home Rule Amendment,¹⁹⁸ the majority held that municipalities may use this power as a means of both policing and promoting the public

191. *See generally* Brief of the Defendants-Appellants/Cross-Appellees, *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359 (Mass. 2003) (No. 2002-P-940).

192. *See Durand*, 793 N.E.2d at 363.

193. *See* Brief of the Defendants-Appellants/Cross-Appellees at 12-13, *Durand* (No. 2002-P-940).

194. *See* Brief of Plaintiffs-Appellees at 17, *Durand* (No. 2002-P-940).

195. *Durand*, 793 N.E.2d at 363.

196. *See id.* at 369. Justice Spina, along with Justices Ireland and Cowin, filed a separate opinion concurring in the decision but dissenting in the reasoning employed by the majority in reaching its decision.

197. *See id.* at 364-65. This opinion was delivered by Justice Cordy who was joined by Chief Justice Marshall along with Justices Greaney and Sosman.

198. *See* MASS. CONST. art. LXXXIX (amended 1966).

welfare so long as the exercise of these powers does not contravene either the Constitution or the laws promulgated by the legislature.¹⁹⁹

As a legislative act, the majority reasoned that a town meeting's vote to rezone a particular parcel of land is afforded a strong presumption of validity and will not be overturned unless the petitioning party can "demonstrate 'by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety ... or general welfare.'"²⁰⁰ Apart from the presumption of validity, the court also set several guidelines applicable to judicial review of zoning amendments, including the scope of review and plaintiffs' burden of proof.²⁰¹

Finding that Bellingham had followed proper procedure when it enacted the rezoning amendment requested by IDC,²⁰² the court moved its discussion to contract zoning and its indicia.²⁰³ Impermissible contract zoning may exist where the municipality and a private developer enter into an agreement as an inducement to rezone a particular parcel of land.²⁰⁴ The majority speculated that any such zoning action motivated by an agreement may become inoperative either if state law procedures are not adhered to or if the municipality agrees to the rezoning prior to any vote by the town meeting.²⁰⁵ The majority did, however, confirm the lower court's finding

199. *See Durand*, 793 N.E.2d at 364.

200. *Id.* (quoting *Johnson v. Edgartown*, 680 N.E.2d 37, 40 (Mass. 1997)).

201. *See id.* at 365. Plaintiffs "bear a heavy burden" of showing that the rezoning enactment violated state law and establishing that the rezoning action did not bear a reasonable relationship to the furtherance of the public welfare. *See id.* at 365. Moreover, a court will sustain the validity of a legislative act if the reasonableness of its adoption is "fairly debatable." *Id.* (quoting *Crall v. City of Leominster*, 284 N.E.2d 610, 614 (Mass. 1972)).

202. *See id.* at 365. Under state law, an individual seeking a rezoning amendment must present her proposal to the planning board for review. *See MASS. GEN. LAWS*, ch. 40A, § 5 (2002). Upon receipt of the proposal, the board must schedule a public hearing within sixty-five days where the general public can offer comments on the proposed action. *Id.* After a public hearing, the planning board then has twenty-one days to submit its finding to the town meeting. *Id.* Once submitted to the town meeting, the zoning action will only become effective if the planning board's recommendations are acted upon within a six month period from the date of the public hearing. *Id.* Even if this temporal element is satisfied, the zoning amendment must be approved by a super-majority (two-thirds plus one) of the town meeting members in order to become effective. *Id.*

203. *See generally Durand*, 793 N.E.2d at 365-69.

204. *See WILLIAMS JR. & TAYLOR, supra* note 27, § 29.01. Even though courts have often frowned on instances of contract zoning, a growing number of states have begun to look favorably on this process. *See id.*

205. *See Durand*, 793 N.E.2d at 365. If the municipality fails to follow the dictates of

2005]

DURAND V. IDC BELLINGHAM, LLC

901

that there was neither evidence of a premature agreement nor a procedural violation.²⁰⁶

The majority was able to distinguish *Sylvania* based on the definition of contract zoning employed by that decision.²⁰⁷ According to *Sylvania*, contract zoning is the process by which a municipality expressly agrees to enact a rezoning amendment on the condition that the developer/landowner agrees to restrict the usage of his land while providing some tangible benefit to the town as consideration.²⁰⁸ This definition, however, was formulated in 1962, and in the court's view, the thoughts and feelings surrounding the placement of contractual principles in land use decisions had changed in the forty-one years since the first Massachusetts case concerning contract zoning.²⁰⁹ An example of this attitudinal shift is reflected in recent commentary which supports a system allowing municipalities to hold rezoning actions contingent upon a landowner's consent to certain conditions/restrictions because the system is a beneficial land use planning instrument.²¹⁰ The majority echoed the sentiment of this commentary by stating that "[a] court examining a zoning arrangement should not affix a formalistic label to it, but rather should engage in [a] substantive inquiry ... [to determine] whether the zoning action is consistent with State law and constitutional requirements, and otherwise

chapter 40A, section 5, the rezoning action may be assailed as invalid. *See* MASS. GEN. LAWS ch. 40A, § 5. Likewise, the rezoning action may be impeached if there is evidence that the municipality and the private developer had closed their deal in advance of any action by the voters at the town meeting. *See Durand*, 793 N.E.2d at 365-66.

206. *Durand*, 793 N.E.2d at 366. The majority found that no agreement existed between Bellingham and IDC Bellingham in advance of the 1997 Town Meeting vote to rezone. *Id.* Since the rezoning of the locus was merely one of the many conditions attached to IDC Bellingham's offer of \$8 million dollars, the court was not inclined to find that Bellingham had committed itself to any agreement prior to the rezoning vote. *Id.*; *see also* Agreement for Water/Wastewater Services, *supra* note 88, at 824. The agreement describes, in relevant part, IDC Bellingham's pledge of \$8 million and the fact that payment of these gifted funds are conditioned upon the occurrence of certain events, including the receipt of certain permits. The agreement further establishes the manner in which these funds are to be disbursed upon fulfillment of all the conditions.
207. *See Durand*, 793 N.E.2d at 366-67; *see also supra* notes 114-29 and accompanying text (explaining how the *Sylvania* court defined contract zoning).
208. *See Sylvania*, 183 N.E.2d at 121.
209. *Durand*, 793 N.E.2d at 366-67. *Compare Sylvania*, 183 N.E.2d at 121 (defining contract zoning as an agreement by a municipality to rezone based on a landowner's agreement to satisfy certain conditions), *with McLean*, 778 N.E.2d at 1020 (holding that a rezoning action taken in connection with an agreement between a town and a landowner is not per se invalid; rather, the nature and character of the agreement should be examined in order to ascertain the existence of any improper influence).
210. 3 RATHKOPF & RATHKOPF, *supra* note 23, § 44.12.

meets the criteria for a valid exercise of police power.”²¹¹

The majority next sought to determine whether the enactment of the zoning bylaw was a valid exercise of the police powers conferred upon local municipalities by the Home Rule Amendment.²¹² In considering the lower court’s finding that the rezoning was otherwise valid absent the \$8 million “gift,” the majority inferred that the lower court did not consider the rezoning act to be either arbitrary, unreasonable, or substantially unrelated to the furtherance of the general welfare.²¹³ The fact that the rezoning action was predicated, in part, upon an independent determination finding the locus suitable for industrial use²¹⁴ supported the majority’s belief that IDC’s rezoning proposal was adopted with a valid public purpose,²¹⁵ especially in view of the narrowly defeated 1995 rezoning proposal.²¹⁶

Concluding that the 1997 Town Meeting vote was not in violation of any state law or constitutional provision, the majority turned its focus to the Land Court’s characterization of the \$8 million “gift” as extraneous consideration.²¹⁷ By determining that IDC’s voluntary offer of \$8 million, standing alone, was not an adequate ground on which to invalidate the 1997

211. *Durand*, 793 N.E.2d at 366 n.17.

212. *See id.* at 368; *see also* MASS. CONST. art. LXXXIX (amended 1966).

213. *Durand*, 793 N.E.2d at 368; *see also Durand*, 10 Land Ct. Rep. at 44 (stating that “[i]f the promised \$8,000,000 gift were not in the picture, there would be little doubt that the 1997 rezoning was valid.”)

214. *See* OPPORTUNITY BELLINGHAM, *supra* note 45, at 557. The majority’s approval of Bellingham’s exercise of its zoning power was also motivated by the character of the area surrounding the locus. *See Durand*, 793 N.E.2d at 368. The majority was apparently persuaded by defendants’ effort to point out that the locus was contiguous to other land zoned for industrial use. *See id.* Moreover, the majority also seemed to be influenced by the close proximity of electrical and gas transmission lines to the locus. *See* Brief for the Defendants-Appellants/Cross-Appellees at 18-19, *Durand* (No. 2002-P-940).

215. *Durand*, 793 N.E.2d at 368. Not only was the locus an ideal location for an industrial operation, but according to the defendants, the rezoning of the locus also served a legitimate public purpose because the proposed power plant would generate a yearly tax bill of \$3.3 million. *See* Brief for the Defendants-Appellants/Cross-Appellees at 20, *Durand* (No. 2002-P-940). Because Bellingham was already seeking ways to increase its tax base, the defendants argued, and the majority implicitly agreed, that the rezoning action had an independent basis apart from the IDC Bellingham’s \$8 million gift. *See id.* at 18-22; *see also* OPPORTUNITY BELLINGHAM, *supra* note 45, at 547-50.

216. *See supra* notes 53-55 and accompanying text.

217. *Durand*, 793 N.E.2d at 368. Specifically, Chief Justice Kilborn invalidated IDC’s \$8 million dollar “gift” because it was neither connected to any of the impacts arising from the project nor beneficial to the general welfare. *See Durand*, 10 Land Ct. Rep. at 44.

Town Meeting vote, the majority obviated the need to discuss whether the motives of the town meeting voters were tainted by the existence of this cash “gift.”²¹⁸

The foundation of the majority’s reversal rests on the idea that zoning amendments should be given the same treatment as other legislative decisions: the principles which preclude judicial review of the latter should also apply to the former.²¹⁹ Instead of focusing its effort on a characterization of any benefit conferred, the majority believes that judicial review of a zoning amendment should focus on whether it violates the law or is substantially unrelated to the general welfare.²²⁰ Because the majority could not find any “infirmity” other than the existence of IDC’s \$8 million “gift,” the decision of the Land Court was vacated.²²¹

B. Minority Opinion

Even though the minority justices concurred with the result reached by the majority, the minority employed a different line of reasoning in reaching its decision.²²² Unlike the majority, the minority justices focused

218. *See Durand*, 793 N.E.2d at 368.

219. *See id.* at 369. The majority reasoned that legislative choices and findings should be reviewed without regard to the motive of the voters. *Id.* Furthermore, the majority found no persuasive authority to support the plaintiffs’ argument that an otherwise valid zoning amendment should be invalidated if the vote was encouraged by a voluntary offer of public benefits. *Id.*; *see also* Brief of the Plaintiffs-Appellees at 37-41, *Durand* (No. 2002-P-940) (arguing that IDC Bellingham’s “gift” was a deliberate inducement offered solely to garner voter support for its rezoning proposal; therefore, subsequent adoption of IDC’s proposal was not based on the best interests of the public).

220. *Durand*, 793 N.E.2d at 369. According to the majority, a proper review of a zoning enactment should train its focus on “whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare.” *Id.* In Massachusetts, the legislature is “the sole judge as to how and when the [zoning] power is to be exercised as long as it acts in accordance with the powers reserved to it by ... the Home Rule Amendment.” Bd. of Appeals of Hanover v. Housing Appeals Comm., 294 N.E.2d 393, 424 (Mass. 1973). Accordingly, judicial review of zoning enactments is “limited to the determination of whether the legislation adopts a reasonable means to serve a legitimate public purpose.” *Id.*

221. *See Durand*, 793 N.E.2d at 369. The majority chose to uphold the 1997 Town Meeting vote by determining that the existence of IDC’s gift did not improperly influence the voters. *Id.* By characterizing IDC’s conduct as a “voluntary offer to make a gift to the town at some time in the future when the power plant became operational,” the majority concluded that the Land Court erred by invalidating the rezoning vote on grounds of “extraneous consideration.” *Id.*

222. *Id.* Justice Spina, joined by Justices Ireland and Cowin, authored the opinion concurring in part and dissenting in part. *Id.*

their attention on the conduct of the town meeting members concluding that a town meeting vote may be impeached if there is evidence that the “dominant motives or reasons for the action were unlawful.”²²³ Further departing from the rationale of the majority, the minority justices drew a distinction between the actions of the town meeting and those of the legislature.²²⁴

Classifying the zoning power as a police power, the minority justices acknowledged the fact that municipalities may not contract away their police powers.²²⁵ In light of this contractual restriction, the minority justices thought it necessary to determine “whether the town meeting entered into an unlawful agreement that called for [Bellingham] to relinquish its zoning power.”²²⁶ Regarding the proposed zoning change as a condition precedent to the receipt of the \$8 million gift from IDC, the minority justices found that the record established facts sufficient to conclude that the 1997 Town Meeting vote had operated as an improper bargaining away of Bellingham’s zoning power.²²⁷

The minority justices’ classification of the 1997 Town Meeting rezoning vote as invalid was motivated, in part, by IDC’s admission that construction of the proposed plant would have minimal adverse effects

223. *Id.* Relying on language from *Sylvania*, the minority indicates that a rezoning vote can be impeached if there is evidence that the vote was motivated by considerations other than the actual merits of the rezoning proposal. *Id.* (citing *Sylvania Elec. Prods., Inc., v. City of Newton*, 183 N.E.2d 118, 121-22 (Mass. 1962)).

224. *See Durand*, 793 N.E.2d at 369. Unlike the motives of the legislature, the minority justices felt that the court should be permitted to inquire into the motives and reasons behind the decision of the town meeting. *Id.* Although not expressly stated, the justices’ decision to distinguish between these types of legislative bodies may be derived from the fact that Bellingham had an open form of town meeting. *See id.* Instead of electing representatives to vote on behalf of the residents, Bellingham’s town meeting was open to all registered voters. *Cf. MASS GEN. LAWS ch. 43A, §§ 1-12* (2005) (detailing the guidelines for establishing and administering a representative town meeting government).

225. *See Durand*, 793 N.E.2d at 369-70 (citing *Opinion of the Justices*, 168 N.E.2d 858, 872 (Mass. 1960)).

Cities and towns, as agencies of the State, may be given, subject to constitutional limitations, such functions and powers, including power to make contracts, as the Legislature may determine. The Legislature, however, has no power to make, or to delegate the power to make, a contract which in effect is a surrender of the sovereign powers of the commonwealth.

Opinion of the Justices, 168 N.E.2d at 872 (citations and alterations omitted).

226. *Durand*, 793 N.E.2d at 370.

227. *Id.*

upon Bellingham and its residents.²²⁸ The minority justices' belief that the 1997 Town Meeting vote was improper was buttressed by the town's own admission that IDC's proposed plant did not create a need for \$8 million.²²⁹ Additional support for the minority justices' belief that the 1997 Town Meeting rezoning vote was tainted is established by their finding that the deliberation of IDC's proposal centered on the gifted funds of \$8 million, rather than the actual merits of the proposed action.²³⁰ Citing prior precedent, the minority justices supported their conclusion that the rezoning vote was improperly influenced on grounds that the \$8 million "gift" did not "bear some identifiable relationship to the locus so that there can be assurance that [Bellingham's] [Town Meeting] did not act for reasons irrelevant to the zoning of the site at issue."²³¹ Applying the reasoning of *Sylvania*, the minority justices found that the existence of "extraneous consideration" warrants an examination of the rezoning vote.²³²

Upon closer examination, the minority justices construed IDC's \$8 million "gift" as an extraneous consideration, which bore no identifiable relationship to any impacts flowing from the development project.²³³ Absent an established nexus between IDC's "gift" and Bellingham's need to ameliorate the effects of the proposed zoning change, the minority justices were inclined to believe that Bellingham had impermissibly sold its police power.²³⁴

228. *See id.*

229. *Id.* Apart from not generating an \$8 million dollar need, IDC's rezoning proposal would also result in a significant diminution in potential residential development. By eliminating a residential zone, the town acknowledged that the rezoning would actually diminish the number of potential school age children in town, inferentially decreasing the need for school expansion in the process. *See id.*; *see also* Town of Bellingham's Answer to Plaintiff's First Set Interrogatories, *reprinted in* Brief of Plaintiffs-Appellees app. vol. 2, at 485, *Durand* (No. 2002-P-940).

230. *Durand*, 793 N.E.2d at 370. Apart from the actual discussions at the 1997 Town Meeting, the minority justices viewed the activity of other town boards in encouraging citizens to vote on IDC Bellingham's proposal as further evidence that the approval of the rezoning action was motivated by influences outside the merits of the proposal itself. *See id.*

231. *Durand*, 793 N.E.2d at 371 (quoting *McLean Hosp. Corp. v. Belmont*, 778 N.E.2d 1016, 1022 (Mass. 2002)).

232. *Durand*, 793 N.E.2d at 371. Considerations found unrelated to the potential impacts arising from the proposed project should be scrutinized because the presence of any extraneous benefit may diminish the legitimacy of a town's choice to exercise its police powers. *Id.* (citing *Sylvania Elec. Prods. Inc., v. City of Newton*, 183 N.E.2d 118, 122 (Mass. 1962)).

233. *Durand*, 793 N.E.2d at 371.

234. *See id.*

Although they believed that the 1997 Town Meeting vote was improperly influenced by the presence of extraneous consideration, the minority justices were obligated to concur with the conclusion reached by the majority.²³⁵ Without a particularized injury or a statute conferring authority to bring suit, the plaintiffs lacked the requisite standing to maintain an action to invalidate the rezoning vote.²³⁶ Moreover, the minority justices reasoned that contract zoning does not stand as an independent cause of action available to those individuals who are not parties to the disputed contract.²³⁷ Because the landowners failed to adduce any evidence of an injury arising from the 1997 Town Meeting rezoning vote, the minority justices were moved to overturn the results of the lower court.²³⁸

VI. JUDICIAL REVIEW OF ZONING AMENDMENTS

The SJC refused to overturn the results of the 1997 Town Meeting rezoning vote when landowners challenged the validity of the amendment as violating constitutional principles.²³⁹ A long line of Massachusetts jurisprudence recognizes that local zoning bylaws are afforded every presumption of validity.²⁴⁰ In accordance with this presumption, a court will not obstruct the enforcement of a locally enacted zoning bylaw if its adoption is shown to be at least “fairly debatable.”²⁴¹ Although some

235. *Id.* at 369.

236. *Id.* at 371. Even though the issue of standing was not raised by other side, the court can raise the issue on its own as it concerns subject matter jurisdiction. *Id.*

237. *Id.*

238. *Id.*; see also Wilson, *supra* note 19, at 12-13. Wilson raises an interesting issue concerning the minority’s statements regarding the landowners’ lack of standing. See *id.* Drawing on the rationale of previous decisions, he noted that the landowners failed to garner standing even under the “looser” standard often applied during zoning disputes, at least in the eyes of the minority. *Id.* at 13 (citing Van Renselaar v. Springfield, 787 N.E.2d 1148 (Mass. App. Ct. 2003) for the proposition that Massachusetts courts, in determining whether the plaintiff has standing to challenge a zoning enactment, have departed from the “person aggrieved” standard dictated by Massachusetts General Laws chapter 40A, section 17).

239. See *Durand*, 793 N.E.2d at 369; see also Brief of Plaintiffs-Appellees at 17-22, *Durand* (No. 2002-P-940) (arguing that evidence of an illegal inducement is sufficient to warrant the invalidation of a municipal land use decision).

240. See, e.g., *Simon v. Town of Needham*, 42 N.E.2d 516, 519 (Mass. 1942); *Aronson v. Town of Sharon*, 195 N.E.2d 341, 344 (Mass. 1964); *Wilson v. Town of Sherborn*, 326 N.E.2d 922, 924 (Mass. 1975); *Sturges v. Town of Chilmark*, 402 N.E.2d 1346, 1352 (Mass. 1980); *MacNeil v. Town of Avon*, 435 N.E.2d 1043, 1045 (Mass. 1982); *National Amusements, Inc. v. City of Boston*, 560 N.E.2d 138, 140 (Mass. 1990).

241. See *Sturges*, 402 N.E.2d at 1352. Even though zoning actions enjoy a presumption of validity, courts have “never dealt with a zoning regulation in a vacuum.” *Id.* at 1353.

2005]

DURAND V. IDC BELLINGHAM, LLC

907

disagreement has existed regarding the proper reviewing standard, the general rule in Massachusetts is that a zoning bylaw will be sustained upon a showing that the reasonableness of the amendment is “fairly debatable.”²⁴²

Satisfaction of the “fairly debatable” requirement of the court’s test is only one step in determining the validity of a zoning bylaw. In order to pass muster, the zoning bylaw must not violate or conflict with any constitutional provision or any pertinent enabling statute.²⁴³ To satisfy constitutional requirements, the zoning bylaw must not be clearly arbitrary and unreasonable.²⁴⁴ A successful challenge of the constitutionality of a rezoning action requires the challenging party to prove that the bylaw is substantially unrelated to the promotion of public safety and the general welfare.²⁴⁵ Under Massachusetts law, zoning is established for myriad reasons, ranging from the promotion of public health safety to the avoidance of undue concentration of the population.²⁴⁶ A properly drawn

Historically, judicial review of a zoning enactment requires the municipality to offer some evidence that its actions were both reasonable and of “a tangible benefit to the community.” *Id.*

242. *Johnson v. Edgartown*, 680 N.E.2d 37, 40 (Mass. 1997). Before the decision in *Edgartown*, there existed two separate tests to assess the validity of a local zoning bylaw. In some cases, courts have relied upon the criminal law concept of “proof beyond a reasonable doubt” when determining the burden of proof applicable to a party challenging a zoning amendment. *See Crall v. City of Leominster*, 284 N.E.2d 610, 615 (Mass. 1972); *see also Caires v. Building Comm’r of Hingham*, 83 N.E.2d 550, 554 (Mass. 1949) (“Every presumption is to be made in favor of the by-law, and its enforcement will not be refused unless it is shown beyond reasonable doubt that it conflicts with the Constitution or the enabling statute.”). In *Edgartown*, however, the court found little utility in relying upon a criminal law standard to assess the validity of what is essentially a legislative decision. *See Edgartown*, 680 N.E.2d at 40. Instead, the SJC found instructive a standard requiring a challenger to prove “by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.” *Id.* The adoption of the “preponderance” standard has been reflected in subsequent zoning challenges, including the instant case. *See Durand*, 793 N.E.2d at 364 (quoting *Edgartown*, 680 N.E.2d at 40); *see also McLean Hosp. Corp. v. Belmont*, 778 N.E.2d 1016, 1022 (Mass. App. Ct. 2002) (finding that challengers of an agreement-induced rezoning action failed to prove that the best interests of the town were not served by the adoption of the rezoning action).

243. *Aronson*, 195 N.E.2d at 344.

244. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

245. *Id.*

246. *See generally* MASS. GEN. LAWS ch. 40A, §§ 1-17 (2002). Currently, the Massachusetts Zoning Act does not contain a section specifically outlining the purposes of the Zoning Act. *See id.* Recently, the Zoning Reform Working Group (ZRWG), a group of Massachusetts developers, planners, local officials and

regulation will account for the character differences between two otherwise similar parcels “with a view to conserving the value of buildings and encouraging the most appropriate use of the land throughout a municipality.”²⁴⁷

Although Bellingham’s 1997 Town Meeting vote was not unconstitutional, the enactment of the rezoning amendment (and the surrounding circumstances) raises numerous policy concerns. In an environmental context, the addition of IDC’s second power plant would have raised the overall number of such plants in Bellingham to three, thus subjecting the surrounding areas to the threat of increased air and noise pollution.²⁴⁸ Even though the addition of this power plant would bring a financial wind-fall to Bellingham in the form of tax revenue,²⁴⁹ the elimination of residential areas actually decreased the amount of available residences in the town.²⁵⁰ Moreover, the Task Force appointed to explore

legislators, drafted a series of proposed changes to the Zoning Act in an attempt to address some key concerns of developers and municipalities not covered by language of the present statute. *See* Brief History of the Zoning Reform Working Group, at <http://www.massmunilaw.org/zoning.htm?cid=2169> (last visited Feb. 15, 2005) [hereinafter History of the ZRWG]. Entitled “The Massachusetts Land Use Reform Act” (MLURA), this proposed legislation is aimed at bringing greater clarity to the objectives and purposes of the Zoning Act. *See* The Massachusetts Land Use Reform Act, at <http://www.massmunilaw.org/pdf/m/uratext.pdf> (last visited Feb. 15, 2005) [hereinafter MLURA]. The MLURA proposal contains a section outlining nineteen separate objectives that a municipality can advance through its zoning power. Some of these objectives include: (1) utilizing “innovative” development techniques, such as development agreements and impact fees; (2) expanding the availability of the affordable housing; (3) preserving existing community establishments of “significant” interest; (4) promoting the combination of compatible land uses to “reduce dependence upon the private automobile”; and (5) retaining open space for various agricultural and recreational purposes. *Id.* at § 40A:2. Although its ultimate adoption remains uncertain, perhaps the inclusion of concrete objectives in the Zoning Act will provide greater assistance to developers, municipalities, and even courts, in determining whether a proposed zoning action is “arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.” *Edgartown*, 680 N.E.2d at 40. For further discussion of MLURA’s potential benefits, see notes 320-29.

247. *Caires*, 83 N.E.2d at 554.

248. *See* Russell, *supra* note 56. None of the \$8 million that Bellingham would have received from IDC was earmarked to offset any of these environmental impacts. *See Durand*, 793 N.E.2d at 361-62. Rather, IDC’s offer of \$8 million was to be used for “various capital expenditures, municipal projects and municipal improvements” so as to “generate support for the plant.” *Id.*

249. *See* OPPORTUNITY BELLINGHAM, *supra* note 45, at 548-50.

250. *See* Town of Bellingham’s Answer, *supra* note 229, at 485. Hypothetically, reducing the number of potential students may, by consequence, alleviate the pressure exerted

this issue had noted that Bellingham's industrial planning had been very disorganized to this point.²⁵¹ Striving to foster a partnership between landowners and developers, the Task Force determined that the efficacy of the industrial planning process would be enhanced if there were more stringent guidelines in place.²⁵² The development of IDC's power plant, however, was not undertaken pursuant to any of these guidelines; rather, the rezoning and subsequent development of the parcel was initiated when IDC recognized an opportunity to curry favor with town officials.²⁵³

The offer of the \$8 million to the town was more than an exercise of goodwill by IDC. Power plant officials had explored the possibility of locating a power plant on this site and were likely aware that an attempt to rezone this parcel had failed no more than two years before these negotiations were commenced.²⁵⁴ It was readily admitted by IDC's officials that the \$8 million "gift" was being offered as means of gathering support for their proposed project.²⁵⁵ Without IDC's offer of \$8 million it is arguable that the rezoning proposal would have failed otherwise. Participants in the 1997 Town Meeting vote felt that the night's discussion was dominated by the issue of the \$8 million gift instead of the actual merits of the rezoning action.²⁵⁶ An official record of the Town Meeting discussion, however, was non-existent apart from the final vote tally as reported by the Town Clerk.²⁵⁷ Without a detailed record of the discussions, the Land Court was unable to: (1) accurately assess the nature of the discussions; (2) ascertain whether the rezoning amendment was adopted on its actual merits; and (3) determine whether the rezoning action had been improperly influenced by IDC's cash offering.²⁵⁸ Had there been a record of the discussions, the Land Court may have been able to reach a conclusion as to any extraneous influence caused by the \$8 million gift, if

upon the school system. Had the proposed development involved a residential development rather than an industrial development, a pledge of \$8 million to help upgrade the school system would be wholly reasonable because the funds could be rationally tied to the town's effort to meet the increased demands on town services caused by an influx of new residents.

251. See OPPORTUNITY BELLINGHAM, *supra* note 45, at 549.

252. See *id.*

253. See *Durand*, 793 N.E.2d at 361-62.

254. See *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 37 (Mass. 2002); see also Record of Bellingham Annual Town Meeting, Article 24, Depot Street Rezoning, May 24, 1995, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 833, *Durand* (No. 2002-P-940) (detailing the failed attempt to rezone that same parcel in 1995).

255. See *Durand*, 793 N.E.2d at 362.

256. See *Durand*, 10 Land Ct. Rep. at 39.

257. See *id.*

258. See *id.* at 44.

any. Faced with two undesirable options,²⁵⁹ the Land Court was forced to summarily dismiss this case without exploring whether the presence of the \$8 million unduly influenced the legislative process.²⁶⁰ Perhaps this long litigation process (trial and subsequent appeal) could have been avoided had someone simply thought to record that night's meeting.²⁶¹ Without such a record detailing the actual deliberations, the reviewing court was unable to determine whether this rezoning action was taken to promote the health, safety or morals of the general public, or to support some unrelated private interest.

VII. AT WHAT POINT DOES "EXTRANEOUS CONSIDERATION" BECOME TRULY EXTRANEOUS?

Although several courts have weighed in on the utility and validity of contract zoning, the most common concern among both courts and commentators is that contract zoning is a flawed legal construct constituting a "problematic blend of contract and police powers."²⁶² One of the strongest arguments against contract zoning is structured on the belief that zoning, as an exercise of the police power, should be used only to promote the "common good and general welfare."²⁶³ This argument is supported by the belief that the zoning process should not be "surrendered or curtailed" by any arrangements or considerations that implicate the law of contracts.²⁶⁴

As stated in previous sections of this Comment, courts and commentators have failed thus far to establish a consistent definition of "contract zoning."²⁶⁵ A survey of the literature on contract zoning suggests that it can manifest itself in many forms, including either a unilateral or bilateral contract between the municipal government and the landowner.²⁶⁶

259. *See id.* Citing the impracticality of conducting a trial to determine the mind-set of the town meeting voters, then-Chief Justice Kilborn was compelled to resolve this case on the inescapable conclusion that some level of impropriety was present through the existence of IDC's gift. *See id.*

260. *See id.*

261. According to Massachusetts law, "[a] meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment ... provided, that in such recording there is no active interference with the conduct of the meeting." MASS. GEN. LAWS ch. 39, § 23B (2002).

262. Wegner, *supra* note 145, at 982.

263. *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131 (N.J. 1952).

264. *Id.*

265. *See supra* Part I.

266. *See* Nolan M. Kennedy, Jr., *Contract and Conditional Zoning: A Tool for Zoning*

The New Mexico Supreme Court has determined that zoning involving a bilateral contract between a municipality and a developer/rezoning proponent would be invalid because a municipality cannot promise to rezone in exchange for “some action or forbearance” by the landowner.²⁶⁷ The same court, however, stated that a unilateral contract between the municipality and the landowner would be a valid exercise of contract zoning since the municipality theoretically never enters into an enforceable contract with the landowner.²⁶⁸

Other courts and commentators have gone further in expressing their distaste for any agreements in the zoning process by advocating for a per se invalidation of any zoning action taken pursuant to a landowner agreement.²⁶⁹ As support for their position, proponents of a per se ban on contract zoning implicitly allude to the impropriety that arises when private interests factor into zoning decisions.²⁷⁰ Opponents of an across-the-board ban, however, reason that private interests invariably factor into all zoning decisions, and that it is “disingenuous to condemn a method of zoning because it benefits private interests in some way.”²⁷¹ Instead, each particular instance of contract zoning should be handled on an ad hoc basis because a categorical rejection of such arrangements would contravene the best interests of the public generally.²⁷²

Flexibility, 23 HASTINGS L.J. 825, 837-38 (1971-1972). Among the other possible forms of contract zoning are: (1) a zoning change conditioned on a physical act to the rezoned parcel; (2) a zoning change conditioned upon an act to a disassociated parcel of land; and (3) a zoning change conditioned upon the issuance of a restrictive covenant. *See id.* at 839-42.

267. *Dacy v. Village of Ruidoso*, 845 P.2d 793, 797 (N.M. 1992). The disapproval of bilateral agreements between the municipality and the landowner rests on the idea that a promise to rezone, made in advance of a formal rezoning hearing, “denigrates the statutory process” because in doing so, the municipality basically takes action without any benefit of public commentary. *Id.*

268. *Id.* Under a unilateral contract, the municipality does not undertake any promise or commitment to rezone in advance of a proper hearing, and the execution of the landowner’s promise occurs only if and when the municipality takes action to rezone. *Id.*

269. *See, e.g., Wegner, supra* note 145, at 982-83. According to this commentator, the distinction between unilateral and bilateral contracts cannot be reconciled “because even unilateral agreements can serve as an incentive to government action.” *Id.* at 979 n.122.

270. *See, e.g., Hartnett v. Austin*, 93 So.2d 86, 89 (Fla. 1956); *Houston Petroleum Co. v. Automotive Prods. Credit Ass’n*, 87 A.2d 319, 322 (N.J. 1952).

271. *Dacy*, 845 P.2d at 798. This court reasons—at least in the context of unilateral agreements—that the courts can be used to undo an improper decision made by the local zoning authority. *Id.*

272. *See Note, Contract Zoning: A Flexible Technique for Protecting Maine Municipalities*, 24 ME. L. REV. 263, 270 (1972); Steven B. Fishman, *The “Contract*

Massachusetts has subscribed to the latter view: alleged instances of contract zoning are subject to a case-by-case determination on the particular facts of each rezoning action.²⁷³ A rejection of a per se ban on contract zoning is appropriate considering the usefulness of landowner agreements in combating the often rigid nature of traditional zoning.²⁷⁴ By determining contract zoning issues on a case-by-case basis, Massachusetts courts have implicitly recognized that the granting of land donations and other amenities often facilitate the negotiation process in local zoning actions.²⁷⁵ The existing cases, however, fail to clarify the permissible outer-limits of a zoning action taken in conjunction with a concomitant agreement.

A. *Sylvania* Set the Standard

After *Sylvania*, the critical issue to be resolved by a landowner challenging the validity of an alleged instance of contract zoning was whether the agreement between the developer and the municipality contained “extraneous consideration ... which could impeach the enacting vote as a decision solely in respect of rezoning the locus.”²⁷⁶ Although *Sylvania* provided an example of an extraneous consideration that could warrant an invalidation of a rezoning action, it is merely one possible situation.²⁷⁷ Both before and after this ruling, courts throughout the country deliberated over these disputed agreements in order to construct the parameters of impermissible contract zoning.²⁷⁸ Under the terms of

Zoning” Method and Public Policy, 1972 URB. L. ANN. 219, 225 (1972); Bailey, *supra* note 32, at 914.

273. See, e.g., *Durand v. IDC Bellingham*, 793 N.E.2d 359 (Mass. 2003); *McLean Hosp. Corp. v. Belmont*, 778 N.E.2d 1016 (Mass. App. Ct. 2002); *Rando v. Town of N. Attleborough*, 692 N.E.2d 544 (Mass. App. Ct. 1998); *Sylvania Elec. Prods. v. City of Newton*, 183 N.E.2d 118 (Mass. 1962).

274. See Note, *supra* note 272, at 276.

275. ALEXANDER A. RANDALL & DAVID P. RIES, *Procedure for Amending a Zoning Ordinance or Bylaw*, MASS. ZONING MANUAL § 3.3.3 (Mass. Cont. Legal Educ., 2002).

276. *Sylvania*, 183 N.E.2d at 122.

277. See *id.* According to the court’s hypothesis, an agreement providing a parcel of land in one area of town in exchange for the town’s rezoning of an uncontested parcel of land would be classified as impermissible contract zoning. See *id.*

278. Compare *Hartnett v. Austin*, 93 So.2d 86, 89-90 (Fla. 1956) (holding invalid a zoning action predicated, in part, upon an agreement for the erection of a wall and payments for police protection; such arrangements eliminate the uniformity in zoning and violate rules condemning the bargaining away of the municipalities’ police power), and *Houston Petroleum Co. v. Automotive Prods. Credit Ass’n*, 87 A.2d 319, 322-23 (N.J. 1952) (invalidating a rezoning action subject to a covenant protecting the frontage area of the rezoned parcel; rezoning was clearly made in consideration of the

Sylvania, any concomitant agreement contained in a rezoning action that included a form of consideration lacking a demonstrated connection to the rezoned parcel could be assailed as impermissible contract zoning.²⁷⁹ Although the restrictive covenant created the appearance that the rezoning action was induced by the landowner's assent to these restrictions, the court in *Sylvania* was not compelled to overturn the rezoning action because the covenant was tied to impacts of the reclassification, namely providing the town with protection from the drastic effect of the zoning change.²⁸⁰

B. *Sylvania* Shines Its Light on *Durand*

The *Durand* rezoning action, however, involved neither a restrictive covenant nor an attempt by the town to ameliorate the effects of a drastic zoning change.²⁸¹ The thrust of the agreement in *Durand* concerned the town's receipt of an \$8 million dollar gift upon satisfaction of the conditions contained in the agreement between Bellingham and IDC.²⁸² Moreover, IDC's cash payment was not intended to lessen any deleterious effect arising from the rezoning or any subsequent development of the parcel.²⁸³ The cash was actually given for "any municipal purpose," but it was clear that \$8 million was intended to help finance construction of a new high school.²⁸⁴ Either way, the rezoning of the locus diminished the overall amount of residential land in Bellingham, thereby decreasing the potential number of school-age children in town.²⁸⁵ In light of this evidence, it is clear that the \$8 million gift in *Durand* approaches the type of "extraneous consideration" the court expressed its disapproval for in *Sylvania*.

contract and contracts have no place in the rezoning process on public policy grounds), *with Church v. Town of Islip*, 168 N.E.2d 680, 683 (N.Y. 1960) (upholding a rezoning action subject to a restrictive covenant while acknowledging that no New York law specifically addresses contract zoning) and *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 419-20 (Ct. App. 1969) (finding no legal significance in the term "contract zoning").

279. *See Sylvania*, 183 N.E.2d at 122.

280. *See id.* at 123-24.

281. *See Durand v. IDC Bellingham*, 793 N.E.2d 359, 361-62 (Mass. 2003). As stated above, *Durand* involved a developer's gift to the town of \$8 million which was officially granted for any municipal purpose; however, the circumstances surrounding the developer's generosity suggested that the gift was meant to gather public support for the development. *Id.*

282. *See Agreement for Water/Wastewater Services*, *supra* note 88.

283. *See supra* notes 59-72 and accompanying text.

284. *Durand*, 793 N.E.2d at 362.

285. *See supra* notes 70-73 and accompanying text.

C. *Rando*: Clarification Without Resolution

Rando applied *Sylvania*'s rationale to a rezoning action predicated on an agreement similar to the one presented in the latter case. *Rando* tested the limits of the *Sylvania* rationale because the agreement in *Rando* involved an additional wrinkle: a developer-established mitigation fund.²⁸⁶ Although this attendant agreement contained a monetary element in addition to other concessions, the court was not moved to find an instance of impermissible contract zoning, since the funds were given voluntarily and were intended to off-set potential costs arising from the development.²⁸⁷ The court refused to overturn the legislative decision of the municipality because there was no evidence that the rezoning action was influenced by factors beyond the merits of the action.²⁸⁸

The rezoning action in *Durand*, however, was replete with evidence that the amendment was influenced by extraneous considerations.²⁸⁹ Discussions between town officials and the developer indicate that IDC was made aware of the fact that Bellingham could use \$8 million to complete the financing of its new high school project.²⁹⁰ IDC's offer of \$8 million was a direct result of these discussions.²⁹¹ Furthermore, the discussions at the 1997 Town Meeting appeared to focus solely on whether IDC could be trusted to make good on its offer rather than on the merits of the actual rezoning action.²⁹² Even though IDC's offer was arguably made voluntarily, it is likely that the rezoning action was influenced by factors beyond its own merits.²⁹³ The lack of a transcription of the discussions at the 1997 Town Meeting, however, prevented both the Land Court and the

286. See *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 546 (Mass. App. Ct. 1998). The landowner agreement contained a provision for the establishment of a general mitigation fund of \$260,000, in addition to other funds provided by the developer to off-set costs for traffic improvements. *Id.*

287. *Id.* at 548.

288. *Id.* at 549. The establishment of a general mitigation fund serves the public interest because it can be drawn to cover unanticipated costs which arise from the new uses of the locus. *See id.*

289. See *Durand*, 793 N.E.2d at 361-62.

290. *Id.* at 361.

291. *Id.* at 361-62.

292. See *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 39 (Mass. 2002); see also Deposition of Stephen Roy, reprinted in Brief of Plaintiffs-Appellees app. vol. 2, at 662, *Durand* (No. 2002-P-940). The only thing Roy seemed to remember about the town meeting discussion was whether IDC could be trusted to make good on its offer of \$8 million. *Id.*

293. See *Durand*, 793 N.E.2d at 370-71 (Spina, J., concurring in part, dissenting in part). Justice Spina, as well as Justices Ireland and Cowin agreed with the result but disagreed with the majority's reasoning.

SJC from determining whether the Bellingham rezoning vote was triggered by factors apart from the promotion of the general welfare.²⁹⁴

D. *McLean* and *Durand*: More Money, More Problems

The SJC's ultimate holding in *Durand* is curious when examined in light of the rationale espoused in *McLean*. Although *McLean* rejected a per se invalidation of all rezoning actions taken pursuant to an agreement between the town and the landowner, the court reasoned, in the alternative, that invalidation would be proper if an agreement and the subsequent rezoning indicate some level of impropriety.²⁹⁵ Distilling the major points from both *Sylvania* and *Rando*, the court determined that the main point of inquiry should focus on whether the consideration given by the landowner "[bore] some identifiable relationship to the locus so that there can be assurance that the town's legislative body did not act for reasons irrelevant to the zoning of the site at issue."²⁹⁶

Conducting this inquiry in conjunction with the evidence and the lower court's decision,²⁹⁷ the *McLean* court was convinced that the lower court's rejection of the contract zoning claim upheld the spirit of prior precedent since there was proof that the town's interests were being served by the rezoning action.²⁹⁸ The extensive town meeting deliberations, as evidenced by numerous adjournments, satisfied the court that the town meeting did not act for reasons wholly irrelevant to the particular parcel.²⁹⁹ *McLean* appeared to soften the rigidity of *Sylvania*'s "extraneous consideration" analysis by rejecting a strict approach compelling invalidation upon a showing that the consideration was not directly tied to the impacts of the rezoning action.³⁰⁰ The court declined to characterize monetary payments for reimbursement and/or mitigation of expenses as consideration lacking an identifiable connection to the rezoned land.³⁰¹ With this ruling, the court recognized the usefulness of permitting flexible agreements between municipalities and developers in the rezoning process

294. *See id.* at 368-69; *Durand*, 10 Land Ct. Rep. at 44.

295. *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1020-23 (Mass. App. Ct. 2002).

296. *Id.* at 1022.

297. *See generally* *McLean Hosp. Corp. v. Town of Belmont*, 8 Land Ct. Rep. 155 (Mass. App. Ct. 2002).

298. *McLean*, 778 N.E.2d at 1021-22. The town would benefit because the agreement allowed it to recoup some of the town funds expended in conjunction with the development of the locus. *Id.* at 1022.

299. *See id.* at 1019, 1022.

300. *See id.* at 1022.

301. *Id.*

as a means of effectuating a sound land use planning scheme.³⁰²

In *Durand*, however, the SJC did not undertake *McLean*'s inquiry which focused on the motives of the town legislative body.³⁰³ This apparent oversight is understandable in light of the majority's heavy emphasis on the strong presumption of validity typically afforded to local legislative decisions.³⁰⁴ Recognizing that the times had changed since *Sylvania*, the majority was inclined to formulate a different analysis focusing on the connection between the rezoning action and constitutional requirements.³⁰⁵ As a result, the emphasis on the existence of extraneous consideration is apparently no longer an appropriate reason to overturn a rezoning amendment, especially in light of *McLean*'s recognition of the utility of such landowner agreements.³⁰⁶ This shift in reasoning was somewhat abrupt considering the fact that contract zoning and extraneous consideration had been extensively intertwined throughout previous decisions.³⁰⁷ In a result-oriented fashion, the SJC effectively avoided the cloudy issue of extraneous consideration by relying primarily on Bellingham's adherence to constitutional and state law principles.³⁰⁸

The SJC minority, however, was not so dismissive of the prior rulings concerning contract zoning and the limitations imposed on considerations provided by a landowner. Analogous to *McLean*, the *Durand* minority trained its focus on the conduct of the town meeting members in order to ascertain whether the rezoning action had been taken pursuant to considerations irrelevant to the site at issue.³⁰⁹ Focusing on the discussions between town and power plant officials along with the subsequent town meeting deliberations, it was clear that the rezoning action was taken in conjunction with factors outside its actual merits.³¹⁰ Troubled, in part, by IDC's admissions that the \$8 million was intended to gather support for an otherwise unpopular project, the minority was convinced that the rezoning agreement would not have passed absent IDC's large cash gift.³¹¹

302. *Id.* at 1023 (“[S]uch arrangements are consistent with good government in general and with effective land use planning in particular.”).

303. *See Durand*, 793 N.E.2d at 369.

304. *See id.* at 364-65.

305. *See id.* at 366-67.

306. *See McLean*, 778 N.E.2d at 1023; *see also* Wilson, *supra* note 19, at 11-12 (arguing that the SJC's ruling in *Durand* expanded the types of deals that are allowed between towns and developers during land development negotiations).

307. *See, e.g.*, *Sylvania Elec. Prods., Inc. v. City of Newton*, 183 N.E.2d 118 (Mass. 1962); *Rando v. Town of N. Attleborough*, 692 N.E.2d 544 (Mass. App. Ct. 1998).

308. *See Durand*, 793 N.E.2d at 369.

309. *See id.* at 370-71 (Spina, J., concurring in part, dissenting in part).

310. *See id.* at 371 (Spina, J., concurring in part, dissenting in part).

311. *See id.* (Spina, J., concurring in part, dissenting in part).

E. Post-*Durand*: Where Do We Go From Here?

After *Durand* it appears that the existence of “extraneous consideration” is no longer a dispositive issue in the context of contract zoning disputes.³¹² In declining to affirm the land court’s invalidation of the Bellingham rezoning action, the SJC missed a prime opportunity to bring clarity to the somewhat opaque doctrine of contract zoning. Instead of establishing a ceiling on the types of considerations allowed in the zoning process, the SJC dodged the possibility of infringing upon the autonomy of local governments in their land use planning capacity by couching this controversy in terms of the power delegated to municipalities under state law.³¹³ According to the course charted by prior precedent, IDC’s \$8 million “gift” would have invalidated the town meeting vote as an instance of contract zoning taken pursuant to the acceptance of an extraneous consideration. Following the progression of this doctrine since *Sylvania*, the SJC’s acceptance of the \$8 million as valid consideration marks a drastic broadening of the court’s approach to zoning and any concomitant agreements, since prior cases had only concerned restrictive covenants and modest mitigation payments.³¹⁴ If a municipality is allowed to affix a price tag (say, \$8 million) to its administration of the zoning process without exposing itself to a claim of contract zoning, it is questionable whether there exists any limit to the extent a town and a landowner can collude in the rezoning and bargaining process.

CONCLUSION

In the end, the plans to construct the power plant were deserted and the town never received its \$8 million windfall.³¹⁵ Responding to a shift in the energy market, the power company providing funding for the project decided to focus its resources on other business ventures.³¹⁶ Although the

312. See *id.* at 369; see also Wilson, *supra* note 19, at 11.

313. See *Durand*, 793 N.E.2d at 364-65.

314. See *Sylvania Elec. Prods., Inc. v. City of Newton*, 183 N.E.2d 118, 120-21 (Mass. 1962); *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1019-20 (Mass. App. Ct. 2002); *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 546-47 (Mass. App. Ct. 1998).

315. See Russell, *supra* note 3, at B1. Bellingham eventually completed the construction of its high school, but without the benefit of IDC’s gift; instead, the funding gap was bridged with tax revenue. *Id.* According to the chairman of Bellingham’s Board of Selectmen, the town collected an annual total of \$5 million in tax revenue from the other two power plants located there. Franco Ordonez, *Power Plant Foes Remain Cautious After Latest Victory*, BOSTON GLOBE, Jan. 23, 2003, at Globe West 4.

316. See Ordonez, *supra* note 315. A spokesman for FPL Energy, IDC’s corporate parent, stated that the company planned to focus its efforts on wind development citing “difficult market conditions.” *Id.*

plans for the power plant were eventually abandoned, the SJC's ruling allowed the locus to retain its industrial classification.³¹⁷ The dispute, however, was never really about a power plant. Although it began that way, the conflict seemed to evolve into a struggle to maintain the proper balance between government and private interests.³¹⁸ Indeed, the effect of *Durand* permits greater flexibility in land development negotiations, but its result should also raise caution because it failed to impose a limit on the types and amounts of benefits that either landowners can offer or municipalities can seek through such negotiations.³¹⁹ At the very least, any benefits sought or proffered during a land development negotiation should have a reasonable nexus to the project itself. Bringing a certain level of clarity and transparency to the land development decisions of local governments may work to prevent "back room" deals and other conduct that tends to erode the public's trust in the legitimacy of local legislative decisions. Toward that end, the proposed MLURA, in part, takes steps toward regulating some of the extra benefits that are often included in the development process.

Recognizing that Massachusetts was recently placed on a list of states with the most antiquated land use regulations, the ZRWG drafted the MLURA as an attempt to overhaul the existing legislation and replace it with a body of law more suitable to meet the present-day challenges faced by planners, developers and landowners alike.³²⁰ A portion of the proposed legislation covers the enactment of bylaws and ordinances to govern development agreements and impact fees.³²¹ Under this section, each city and town would be authorized to adopt legislation requiring the payment of a "development impact fee" before the approval and the subsequent permitting process can be completed.³²² This legislative framework would give all municipalities the power to extract from developers certain fees and apply those funds directly towards its efforts to mitigate the effects of the development.³²³ The language of this proposed legislation echoes the

317. See *Durand*, 793 N.E.2d at 369. Even without the power plant project, the landowners sought to preserve the increased value generated by the zoning change. See *Ordonez*, *supra* note 315.

318. See *Durand*, 793 N.E.2d at 371.

319. See *id.* at 369, 371.

320. THE ZONING REFORM WORKING GROUP, THE MASSACHUSETTS LAND USE REFORM ACT (AT A GLANCE), available at <http://www.massmunilaw.org/pdf/LURAatagance.pdf> (last visited Feb. 16, 2005). Drafting of the MLURA was aimed at updating statutes that are 30, and in some cases, 50 years old. *Id.*

321. *Id.* § 10.

322. *Id.* § 18(a)(1).

323. *Id.* More specifically, the fees are imposed "solely for the purposes of defraying the costs of capital facilities to be provided or paid for by the city or town and which are caused by and necessary to support or compensate for the proposed development." *Id.*

sentiment of both the land court and the SJC minority in *Durand*: any development fee or other consideration must have some logical connection to the impacts arising from the development itself.³²⁴ The rezoning in *Durand* would be subject to rigorous scrutiny in a system applying MLURA's approach to development fees because the \$8 million was not given to offset any impact of the proposed development; rather, it was portrayed as a gesture of goodwill.³²⁵ Apart from being mere benevolence, the fact that the town had no intention of expending the \$8 million to "reasonably benefit the proposed development" would further militate against the validity of such an arrangement in a legal and political environment concerned about the placement of large, unconnected cash inducements in the process of local governance.³²⁶

It has been argued that American land use and planning law is pervaded by a "leave it to the courts" attitude which results in a court-dominated system that is ill-equipped to meet the needs and challenges faced daily by local communities.³²⁷ In many instances, lawyers and

As an initial matter, however, municipalities must satisfy a number of requirements before imposing any type of development fee. *See id.* § 18(c)(1). Under the current wording of MLURA, a municipality must complete a study that:

(i) analyzes existing capital improvement plans or the facilities element of a plan adopted under section 81D of chapter 41; (ii) estimates future development based on the then current zoning ordinance or bylaw; (iii) assesses the impacts related to such development; (iv) determines the need for capital facilities required to address the impacts of the estimated development including excess facility capacity, if any, currently planned to accommodate future development; (v) develops cost projections for the needed capital facilities and documents costs of existing facilities with planned excess capacity; and (vi) establishes the amount of any development impact fee authorized under this section in accordance with a methodology determined pursuant to the study.

Id.

324. *See Durand v. IDC Bellingham*, 793 N.E.2d 359, 371 (Mass. 2003) (Spina, J., concurring in part, dissenting in part); *Durand v. Paturzo*, 10 Land Ct. Rep. 36, 44 (Mass. App. Ct. 2002). Under the language of the current proposal, any development fee levied by a municipality "shall have a rational nexus to, and shall be roughly proportionate to, the impacts created by the development...." MLURA, *supra* note 246, § 18(c)(2). Moreover, the subsequent expenditure of any such development fee by the municipality "shall reasonably benefit the proposed development." *Id.* § 18(c)(3).
325. *See Durand*, 793 N.E.2d at 371 (Spina, J., concurring in part, dissenting in part); *see also* MLURA, *supra* note 246, § 18.
326. *See* MLURA, *supra* note 246, § 18(c)(3).
327. J. Patrick Green, *Giger v. City of Omaha: Of Contracts, Comprehensive Plans, and Master Plans in Nebraska Zoning, Questions With and Without Answers*, 23 CREIGHTON L. REV. 289, 313 (1989).

judges—often those far removed from the affected community—have the final say on many land use decisions.³²⁸ Instead of a reactionary system, Massachusetts has the opportunity to establish an updated land use regime capable of discerning the validity of the “arrangements” often made between municipalities and developers during the development process. Such legislation could eliminate some of the uncertainty that currently clouds land use decisions throughout the state. Allowing this scheme of development fees should permit, and actually force, municipalities to gauge the financial impact of a particular project before any development fees can be imposed. Along with promoting thoughtful planning, these new guidelines should protect developers from being held captive to unreasonable financial demands by local governments. Most importantly, however, legislative guidelines on the types of deals permitted in the development process will instill confidence in the general public that their local officials are acting in the best interests of the community and not those of a private entity.

Going forward, lawmakers should work toward promulgating a system of governance to regulate such dealings, especially if this collaboration between governments and private entities is becoming “both legal and realpolitik,” as some commentators have argued.³²⁹ Certainly, central guidance from the state legislature—perhaps through its adoption of the MLURA—will help make strides toward creating harmony in the ever-present conflict between public and private interests that often permeates many land use decisions.

Michael Wainwright Whitcher

328. *See id.*

329. Bauer & Grill, *supra* note 22.