KP | LAW
The Leader in Public Sector Law

101 Arch Street, Boston, MA 02110
Tel: 617.556.0007 | Fax: 617.654.1735
www.k-plaw.com

September 22, 2023

Jeffrey T. Blake
jblake@k-plaw.com

CONFIDENTIAL - NOT A PUBLIC DOCUMENT

BY ELECTRONIC MAIL ONLY (StevenE@montague-ma.gov)

Mr. Steven F. Ellis
Town Administrator
Montague Town Hall
One Avenue A
Turners Falls, MA 01376

Re: Amendment to Town's Zoning Bylaws.

Dear Mr. Ellis:

You have requested an opinion regarding a proposed amendment to the Town's Zoning Bylaws. Specifically, the Planning Board has requested that an amendment to the Zoning Bylaw be made that would re-zone a Town owned += 15.6 acre area of land identified as Parcel #21-0-152 (Turnpike Road) and a 13.2+- acre area of land identified as Parcel #21-0-004 (Turnpike Road) not owned by the Town from Neighborhood Business (NB) Zoning District to General Business (GB) Zoning District. The re-zoning is based, in part, on inquiries from an area business looking to expand its operations into Town. The parcels to be re-zoned are surrounded by a Residential Zoning District, Industrial Zoning District and a General Business District. While the re-zoned parcels do not directly abut the existing General Business District they are only separated from that existing District by Turnpike Road. You have indicated to me that the re-zoning is also in part to provide for greater accessibility to businesses in that section of Town and to expand the already existing General Business District. You have asked whether the re-zoning of the two parcels is spot zoning or contract zoning and whether, if the Town wishes to sell the property it owns after rezoning, it can offer the parcel to the area business that originally provided the impetus, in part, to re-zone the parcels. In my opinion, the proposed re-zoning is not spot or contract zoning and the Town, through an RFP process, can sell its property to the area business. I reach this conclusion based on the following:

Spot zoning "violates the uniformity requirements of G.L. c. 40A, § 4", and "constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions." Rando v. North Attleborough, 44 Mass. App. Ct. 603, 606 (1998). The question of spot zoning raises "essentially a single issue, i.e., whether the [zoning] amendments were a legitimate exercise of the [Town's] authority under the Zoning Act." W.R. Grace & Co.-Conn. v. City Council of Cambridge, 56 Mass. App. Ct. 559, 567 (2002). A party challenging a zoning amendment as spot zoning bears the burden of proof that the zoning amendment conflicts with the Zoning Act, G.L. Chapter 40A. Id. In reviewing a spot zoning challenge, the Court will examine whether a zoning amendment "was an arbitrary or unreasonable exercise of police power having no substantial relationship to the public

health, safety, or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 52 (2003). As an action of the local legislative body (here, the representative Town Meeting), the zoning amendment is entitled to every presumption in its favor, and the reviewing court should not substitute its judgement for that of the local body. See Van Renselaar v. Springfield, 58 Mass. App. Ct. 104 (2003). Anytime an individual parcel is singled out for zoning treatment for the economic benefit of the owner, an argument could be made that the Town is engaging in spot zoning. The size of the parcel is not conclusive as to how a court would rule on the matter. See Town of Marblehead v. Rosenthal, 316 Mass. 124 (1944). The fact that the re-zoning may financially benefit the property owner is not conclusive as to spot zoning if the re-zoning also provides an economic benefit to the public generally. See Raymond v. Building Inspector of Brimfield, 3 Mass. App. Ct. 38 (1975). Rather, the court will look to the nature and character of surrounding properties in relation to the property being re-zoned, the location of the lot to be re-zoned in relation to differently treated lots (i.e. lots in adjoining zoning districts, such as this one), and whether the lot to be re-zoned is distinguishable from surrounding properties.

A case that is factually similar to the present situation is Martin v. Town of Rockland, 1 Mass. App. Ct. 167 (1973). In Martin, the town re-zoned a parcel of 1.5 acres from Residential to Limited Business. The parcel at issue was a corner lot located in a residential zoning district and improved with a two-family structure. The lot was bounded to the north by a residential zoning district, separated to the south by a state highway on the other side of which was a business/industrial zoning district, and to the west, across a street, was land zoned for limited business. The Court concluded "that the locus is at a borderline between a business and industry district and a residential district and that it could be properly zoned in either. We further conclude that the voters of the town could properly determine that the classification was reasonably related to public convenience and welfare and constituted an appropriate use of the land." Id. at 169. Accordingly, the Court found the zoning amendment did not constitute spot zoning.

In this case, the map that you have provided shows that the parcels to be re-zoned are across the road from the General Business zoning district where certain business uses are located and allowed. Further, re-zoning of the Property would allow for development opportunities that would benefit the Town as well as the owner. Considering the uses of surrounding parcels, it appears the Property could be located in either a residential or general business district or industrial district. Based on the uses of surrounding parcels, it is my opinion that the Town could re-zone the Property and withstand a spot zoning challenge.

Another potential challenge to a zoning amendment is that it constitutes illegal "contract zoning". Contract zoning may occur when a municipality makes a promise to rezone property either

before the vote to rezone is taken, or before the required process for zoning amendments under G.L. c. 40A, §5. See Sylvania Electrical Products, Inc. v. Newton, 344 Mass. 428 (1962). In a town where a representative town meeting acts as the legislative body, however, "it is difficult to imagine how there could be an agreement in advance of the vote to approve such an action." Durand v. IDC Bellingham, Inc., 440 Mass. 45, 53 n. 14 (2003). Contract zoning has also been described as where a municipality "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. North Attleborough, 44 Mass. App. Ct. 603, 607 (1998). Contract zoning is considered illegal because it constitutes a legislative body bargaining away its police powers. The authority of the local legislative body to approve or reject a proposed zoning amendment must be unencumbered by any binding agreement. Id. at n. 15. As with challenges based on allegations of spot zoning, every presumption is made in favor of the validity of a zoning by-law.

The Supreme Judicial Court (SJC) has said that "the 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 of the town meeting." Durand v. IDC Bellingham, Inc., 440 Mass. 45 (2003). In the Durand case, IDC, which owned a power plant in town, discussed with town officials a possible rezoning in order to construct a second plant. The discussion included what public benefits and financial inducements IDC might offer the town with regard to the proposed plant. The town administrator told IDC officials that the town was facing an $8 million shortfall for construction of a new high school. Shortly thereafter, IDC announced that it would make an $8 million gift to the town if it obtained the financing and permits necessary to build the plant and operated it for one year. The proposed gift to the town would be for any municipal purpose. At the town meeting, IDC reiterated its offer of an $8 million gift to the town if the plant was built and became operational. In 1997, town meeting approved the rezoning, and a few years later there was an agreement between IDC and the town for water and wastewater services that memorialized the $8 million commitment.

The SJC noted that zoning law and practice had changed considerably since the Sylvania case was decided.

> More importantly, the legal context in which zoning actions are evaluated has also changed. The *Sylvania* court was concerned with the use by municipalities of the device of contract to restrict or condition the use of land in a manner beyond the authority then delegated to them by the Legislature and embodied in zoning enabling laws. The municipal power of zoning is, however, no longer a matter of delegated State legislative power [due to enactment of Home Rule Amendment]. The practice of conditioning otherwise valid zoning enactments on

> agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development is a commonly accepted tool of modern land use planning,… constrained, of course, by constitutional limitations not at issue here.

Durand v. IDC Bellingham, Inc., 440 Mass. at 54-55. The SJC further noted that the determination as to the validity of a zoning amendment is whether it is consistent with state law and constitutional requirements, and meets the criteria for a valid exercise of the municipality's police power. It further stated that it deferred to the legislative body's choices without regard to motive, such as whether the IDC offer may have swayed voters, and concluded that an otherwise valid zoning enactment is not invalid because it is prompted or encouraged by a public benefit voluntarily offered.

Therefore, in my opinion, because there is a rational planning purpose for the re-zoning and there is no promise by the business to relocate or any specific financial benefits to the Town, the Town's proposed re-zoning is likely to withstand any challenge as contract zoning.

Lastly, you have asked whether NE-XT Technologies (NE-XT), a manufacturing company currently based in Greenfield, may submit a proposal in the event a Request for Proposals is issued by the Selectboard for the Turnpike Road property. Starting in or about April 2023, NE-XT and Town officials communicated regarding the possibility of relocating to the Montague property, including discussions regarding a possible purchase price and whether a TIF might be available, and possible terms therefor. The re-zoning petition, I understand, came about due to NE-XT's interest in the property.

As you are aware, when a town seeks to dispose of real property valued in excess of $35,000, the town must comply with Chapter 30B, Section 16. The town must issue a Request for Proposals seeking qualified proposers. The RFP may include a minimum price, and may also establish evaluative criteria to use to determine the bidder best qualified to develop the property and offer the town benefits it is looking to promote, such as jobs, economic growth.

In my opinion, the Town's preliminary communications with NE-XT do not preclude the company from participating in an RFP process for the Turnpike Road property. It is common, in my experience, for towns to engage in discussions with entities regarding the possibilities for development of a particular parcel prior to issuance for an RFP. Often, towns are not aware of what the market is looking for, and developers will actually approach a municipality relative to development of a property, or what might be available in a town. So long as the Town issues an RFP which allows all proposers to participate, on a level playing field, in my opinion, previous

KP | LAW

CONFIDENTIAL - NOT A PUBLIC DOCUMENT

communications between a town and a prospective proposer do not preclude that company from participating in the procurement process.

If you have any further questions regarding this matter or wish to discuss, please do not hesitate to contact me.

Very truly yours,

Jeffrey T. Blake

JTB/caa
#879391/MTGU/0001