

By Paul D. Wilson

Contract Zoning and Development Exactions:

IDC Bellingham and its Implications



Paul D. Wilson is a member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo in Boston, where much of his practice involves real estate development. Mr. Wilson heads Mintz Levin's real estate and land use litigation working group, and is vice-chair of the Land Use Committee of the Section of State and Local Government Law of the American Bar Association. This article is based on materials the author prepared for a seminar entitled *Land Use and Development Law*, sponsored by Continuing Legal Education International in January 2004. The author received assistance from his colleague Phil Catanzano, to whom he extends his thanks.

Developers and the towns in which they seek to build have long struggled over the impacts of proposed developments. A zoning tool called a "development exaction" has emerged as one way of dealing with such impacts. A few months ago, in *Durand v. IDC Bellingham, L.L.C.*, 440 Mass. 45 (2003), the Massachusetts Supreme Judicial Court considered exactions for the first time in four decades. In the process, the Court made strange bedfellows of developers and town governments.

Traditionally, an exaction imposes the municipal costs of a development directly on the developer in exchange for town permission to build. For example, the town may require the developer to upgrade the roads to be used by those who will live in a development. The rationale is that those who benefit from development should shoulder some of the burden that they impose on public services.

The cynical among us, however, might view development exactions as legalized bribery (developers, through winks and nods, purchasing from the town to the right to build) or extortion (towns demanding a payoff before they will issue permits). Because the developers do get to build, albeit for a price, the outcry against development exactions generally has come from neighbors claiming the town has sold out its zoning scheme through "contract zoning."

IDC Bellingham appears to change Massachusetts law by allowing developers to offer towns nearly anything they want in return for a rezoning. However, the *IDC Bellingham* Court was so sharply divided, and its opinion seems not to apply to so many types of permits, that the Court will likely have to visit this area again, and soon. Indeed, the Appeals Court has already

elaborated slightly on *IDC Bellingham*, in *Hanna v. Framingham*, 60 Mass. App. Ct. 420 (2004), discussed below.

This article first describes the three cases that led up to *IDC Bellingham*. Next, it examines the majority opinion in *IDC Bellingham*, as well as the biting, substantively dissenting opinion of three of the seven justices. Finally, it attempts to address a few of the remaining open questions about development exactions and contract zoning.

I. MASSACHUSETTS LAW BEFORE *IDC BELLINGHAM*

The law of contract zoning in Massachusetts begins with *Sylvania Elec. Prods. Inc. v. Newton*, 344 Mass. 428 (1962). A manufacturer, petitioning to rezone residential land, voluntarily offered to deed part of its acreage to the City of Newton, and to abide by certain restrictions as to the rest. The Supreme Judicial Court held the rezoning valid, finding no illegal "contract zoning" – the bargaining away of a legislative power – because Sylvania simply made a voluntary offer involving its locus. In *dicta*, the Sylvania Court distinguished a hypothetical municipal request that a developer donate land for a park elsewhere in the city as an example of "extraneous consideration" that would have rendered the rezoning illegal. And with that declaration, the Massachusetts appellate courts fell silent on the issue of contract zoning for more than 35 years.

The Appeals Court next visited the issue, in *Rando v. North Attleborough*, 44 Mass. App. Ct. 603 (1998). In seeking a rezoning to allow construction of a movie complex, a developer offered the town a \$260,000 project mitigation fund, but without tying that money to any development-related town costs. Despite this

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lack of a specific link to the project, the Appeals Court upheld the rezoning, because the payment was offered by the developer and reasonably intended to meet public needs arising out of the proposed development.

The last word on contract zoning before *IDC Bellingham* was *McLean Hospital Corp. v. Belmont*, 56 Mass. App. Ct. 540 (2002). Before seeking a rezoning to develop much of its campus in Belmont, McLean Hospital prepared a "Memorandum of Understanding" spelling out what it would give the town, regarding, among other things, traffic improvements and limits on the types and scope of development. McLean also agreed to transfer much of its acreage to the town – which, in an interesting reversal, would pay McLean \$1,500,000. Town Meeting approved the rezoning, and McLean and the Town then executed the Memorandum of Understanding. Again the Court found no fault.

After *McLean*, then, a written contract about a rezoning was not necessarily illegal contract zoning. And *Rando* had watered down the prohibition against extraneous consideration by holding that what the town received did not have to directly mitigate development impacts. This was a far cry from the Supreme Judicial Court's last words on the subject in *Sylvania*, but that Court was about to break its silence and widen the range of permissible development exactions further still.

II. THE SUPREME JUDICIAL COURT'S DECISION IN *DURAND V. IDC BELLINGHAM*

The *IDC Bellingham* facts were straightforward. In 1995, IDC asked town officials about rezoning land so IDC could build a power plant. During these discussions, town officials mentioned an \$8 million shortfall in the Town's high school construction fund. IDC soon publicly announced it would make an \$8 million gift to the Town, which the Town could use for any purpose, if IDC built and operated the plant. Town Meeting then approved the rezoning. After IDC obtained all its permits, eight nearby landowners filed suit.

By a 4-3 majority, the Court upheld the rezoning. The majority emphasized that, because decisions to rezone are legislative acts, if the reasonableness of a zoning bylaw is even "fairly debatable, the judgment of the local legislative body responsible for the enactment must be

sustained." 440 Mass. at 51. Applying this standard, the Court held that Town Meeting's actions were not unreasonable in relation to the public health, safety, or general welfare of the town. The Court then explicitly abandoned its own *Sylvania* notion of "extraneous consideration," stating that "the courts defer to legislative findings and choices without regard to motive." *Id.* at 57. And, indeed, in *Hanna*, where it blessed a Framingham rezoning, the Appeals Court has since confirmed that after *IDC Bellingham* "extraneous consideration" is no longer worth discussing in a contract zoning case.

In a heated opinion concurring in part and dissenting in part, three *IDC Bellingham* justices said that Town Meeting "improperly agreed to exercise its power to rezone land in exchange for a promise to pay money," *id.* at 58-59 (Spina, J., joined by Ireland and Cowin, JJ.), "because there was nothing in the record to legitimize the eight million dollar offer as 'intended to mitigate the impact of the development upon the town,' or as 'reasonably intended to meet public needs arising out of the proposed development.'" *Id.* at 59-60, quoting *Rando*, 44 Mass. App. Ct. at 609. The otherwise dissenting judges concurred in the result only because they believed the plaintiffs had no standing since they were not parties to the contract.

III. THE LEGAL LANDSCAPE AFTER *IDC BELLINGHAM*

Sylvania, *Rando*, and *McLean* had approved rezonings only after determining that what the developer offered was at least reasonably related to the locus being rezoned. *IDC Bellingham* abandons this test altogether, approving what it called a "voluntary offer of public benefits beyond what might be necessary to mitigate the development of a parcel of land." *IDC Bellingham*, 440 Mass. at 50. The question, though, is how big a change in the law *IDC Bellingham* makes.

A. Is Any Exaction Unlawful?

Are there any limits on what a developer may offer, or a town may exact? Recognizing the danger, pointed out so heatedly by the concurring/dissenting justices, that towns will view *IDC Bellingham* as an invitation to prepare municipal shopping lists for the next developer seeking a rezoning, the Court says public benefits must

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result from a voluntary offer by the developer. But in *IDC Bellingham* the town first mentioned the \$8 million shortfall in the high school construction fund, and the developer merely played along by offering what the town said it needed. So, on the surface, at least, *IDC Bellingham* seems to tell towns that anything goes, so long as it's "voluntary."

But *IDC Bellingham* does hint that a developer can dig in his heels. The first *IDC Bellingham* test of the legality of a rezoning deal is whether the rezoning violated any state law or constitutional limitation. There is one obvious constitutional claim that could provide the landowner a means of fending off the more outrageous municipal requests for handouts: a takings claim under the Fifth Amendment to the United States Constitution.

As *IDC Bellingham* points out in a footnote, the Takings Clause prevents a government body from taking private property for public use without paying just compensation to its owner. In *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), the Supreme Court held that the Takings Clause requires that any conditions imposed on the issuance of a permit must have a "nexus" to the government interests at stake in the decision to grant the permit. This "nexus" test sounds very much like the Massachusetts requirement, expressed in *dicta* in *Sylvania* and *Rando* and *McLean* but abandoned in *IDC Bellingham*, that anything the developer offers, or the town exacts, must be reasonably related to the locus being rezoned. But, expanding on *Nollan* in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court held that the Takings Clause requires "rough proportionality" between the requirements imposed on a developer and the interests threatened by the developer's permit. In other words, even if \$8 million is an appropriate exaction for a power plant, it would not be "roughly proportional" to the possible impact of a five-lot subdivision, and so a town approving that subdivision would be limited to a far smaller exaction.

We will never know whether the \$8 million *IDC Bellingham* exaction passed muster under *Nollan* and *Dolan*, because the party making that "contribution" did not object – or did not object so strongly as to make a *Nollan/Dolan* takings claim. And there lies the dilemma for the developer in a post-*IDC Bellingham* world: where

does he draw the line?

B. Does IDC Bellingham Forbid All Court Inquiry into Town Meeting Motives?

Anyone challenging a rezoning faces a serious obstacle: courts generally do not look behind a town meeting vote to consider motives, as the *IDC Bellingham* majority pointed out. But if *IDC Bellingham* entirely eliminates the relevance of municipal motive, then here, too, it departs from prior Massachusetts law.

In *Pheasant Ridge Assoc. Ltd. Partnership v. Burlington*, 399 Mass. 774 (1987), the Court invalidated a town meeting vote to take land by eminent domain, precisely because the landowner proved that the voters had an improper motive: stopping the construction of subsidized housing on the site.¹ *IDC Bellingham* dismisses *Pheasant Ridge* in a footnote as inapposite, but the concurring/dissenting justices made *Pheasant Ridge* the first case they cited, reading it to hold that "[t]he vote of a town meeting, valid on its face, may be invalid if it can be shown that the dominant motives or reasons for the action were unlawful." *IDC Bellingham*, 440 Mass. at 58.

If, as the *IDC Bellingham* majority suggests, courts hearing challenges to rezonings may never consider town meeting motives, it will be nearly impossible to challenge a rezoning deal. But the sharp split among the justices offers some hope that the *Pheasant Ridge* rule might survive in the right case.

C. Does IDC Bellingham Apply To Other Land Use Permits?

The fact that the *IDC Bellingham* land use approval was a Town Meeting vote to rezone – a legislative act – was critical to the Court's decision. But suppose IDC had instead sought a use variance. Or suppose a developer applies for one of the other municipal authorizations for land development issued by town boards, such as a special permit or site plan approval, which do not require a Town Meeting vote. In return for such permits, can the town exact, or can the developer "volunteer," payments unrelated to project impacts?

Because *IDC Bellingham* relies so heavily on the notion that courts should not look behind the "legislative" decisions of a town meeting, the logic of the opinion simply does not apply to decisions of Zoning Boards of Appeals or

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Planning Boards or other town bodies. So for the moment, anyway, cautious towns and developers who want to agree on contributions unrelated to project impacts should make a rezoning – or perhaps some other town meeting vote – part of the package.

D. Who Has Standing To Challenge a Rezoning?

In the prior development exaction cases, as in *IDC Bellingham*, the plaintiffs were citizens of the towns in which the rezonings occurred, whose standing was either not raised or assumed. In *IDC Bellingham*, however, the three otherwise dissenting judges believed that the citizen-plaintiffs had no standing to bring that challenge, because the plaintiffs “claim no injury peculiar to them,” *id.* at 61 — the standard under M.G.L. c. 40A, § 17 for qualifying as a “person aggrieved” who can appeal a board’s grant of a special permit or variance.

However, the courts have traditionally applied a looser test for standing to challenge a rezoning. In fact, just a few months before *IDC Bellingham*, in *Van Renselaar v. Springfield*, 58 Mass. App. Ct. 104 (2003), the Appeals Court specifically held that the rigorous “person aggrieved” standard does not apply to a challenge to a rezoning. Rather, plaintiffs need only allege an adverse impact without establishing, in addition, that their injury is different from the concerns of the rest of the community.

The *IDC Bellingham* suggestion about a more rigorous standing requirement arose solely in the concurring/dissenting opinion. Therefore, as the Appeals Court noted post-*IDC Bellingham* in *Hanna*, *Van Renselaar* remains the controlling precedent – at least until the three justices in the *IDC Bellingham* minority find a fourth vote for deciding standing in challenges to rezonings under the more rigorous “injury peculiar to them” standard.

IV. CONCLUSION

The practice of assessing development exactions is becoming more common as communities plan for growth and look for revenues. As *IDC Bellingham* demonstrates, developers are under increasing pressure to make “voluntary” contributions for items far removed from their proposed projects. The fact that the Supreme Judicial Court is not going to stand in the way should trouble developers. And the fact that developers can now buy their way around a town’s zoning laws should trouble citizens who thought the zoning laws would protect them.

But perhaps the most troubling aspect of this practice is its potential effect on the towns most in need of the money dangled by the developers. A disproportionate number of environmentally problematic businesses may end up in the towns with the worst budgetary problems, because those are the towns that need more financial help to, say, build a new high school. This 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. Perhaps the *cri de coeur* of the concurring/dissenting judges in the last line of their opinion best summarizes the post-*IDC Bellingham* landscape: “Sadly, these circumstances demonstrate government and private interests at their shameful worst, and are most likely to involve the most needy towns.” ■

Endnotes

¹ Along with his more senior colleague Michael Gardener, the author represented the developer in *Pheasant Ridge*.