ZONING ISSUES RELATED TO THE EXTENSION OF A 16 " WATER MAIN IN WILLIAMSTOWN ALONG THE ROUTE 7 CORRIDOR:

If town water and sewer in place, 2.5 acre zoning threatened

Submitted by Sherwood Guernsey

Brief Summary:

The Massachusetts Supreme Judicial Court has not upheld 2.5 acre zoning as constitutionally permissible if the large lot zoning requirement is in place only to preserve land in its natural state or maintain the town's bucolic character, especially if town water and sewer are in place. Williamstown places itself in great jeopardy of losing its 2.5 acre zoning if it installs the 16 " water main.

Background:

The Town of Williamstown is proposing to install a 16" water main along the Route 7 corridor from the Captain's Table restaurant to the Mt Greylock high school. A high-pressure sewer line (a gray water line) already exists along the same extent of Route 7. The issue for serious consideration by the town residents is whether or not the installation of such a water main will encourage and facilitate development.

Development Expansion with Existing Zoning.

Under the existing zoning by-laws, a majority of the planning board has already determined that substantial development can occur: according to their analysis, over 160 lots can be developed.

Development if 2.5 acre zoning is invalidated.

What is even more threatening, however, is if installation of a new 16" water main will invalidate the present 2.5 acre zoning, presently used by the town as a means to control overly dense development. If such large lot zoning were to be invalidated, then the town would be forced to rezone the route 7 corridor for, say, one acre zoning, allowing 2 and ½ times the number of developable lots available under present zoning: a house could be built on every one acre of land, instead of on every 2.5 acres, which would allow over 400 homes to be built, not the 160 set forth by the planning board.

In addition, once the water main is built out to Mt. Greylock Regional High School, it is simple for developers to pay for the extension of the water main to the rest of Williamstown's southern gateway. No town meeting would be required. Waubeeka golf course is then within eyeshot, where future development with hundreds of units is a real threat. Just to the south, at Brodie Mountain, several time-share companies are poised to build a huge time-share complex.

Constitutional Protection to Private Property

Zoning law is based on the Constitutional protection afforded to private landowners, guaranteeing that private property shall not be taken for public use without just compensation.[1] A zoning provision that requires too large a minimum lot size violates the Constitutional protection by depriving the property owner of the full value of his or her property, by preventing that owner from subdividing his land into more buildable lots.

Our zoning board cannot protect us against a Constitutional challenge. The challenge to our zoning by-law would come from a present owner or a developer who buys a parcel abutting the water main

[1] U.S. Constitution, Fifth Amendment: "…nor shall private property be taken for public use, without just compensation".

(or who proposes to extend it at his own expense), and then files a court action to challenge our town's by-law, to allow the owner to build more houses than presently allowed. If the court overturns the by-law, then the zoning board would be powerless to prevent a re-zoning, and the town would have to rezone the land into smaller lots in order to conform to the court's decision.

In upholding this Constitutional protection, the Massachusetts Appellate courts have been exceedingly diligent in respecting the rights of property owners. A review of our Massachusetts appellate court cases is clear: zoning must have a real and substantial relation to the public safety, public health or public welfare. Otherwise, it may well be deemed a deprivation of private property without compensation [2]. As Justice Oliver Wendell Holmes has said: "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking…It is question of degree". [3]

Importance of Water and Sewer in upholding large lot zoning

The importance of water and sewer to justify large lot zoning is crucial in determining the degree to which the courts will uphold large lot zoning: adverse topographic and soil conditions can necessitate having a sufficient land area with a soil type that allows the septic system and the well to operate without the possibility of eventual pollution of the water, and to provide for additional land in the event the septic system requires repair, relocation or expansion. South Williamstown's soils and topography presently meet this rationale, so that the existing zoning is justified based on the goal of protecting the public health and welfare. By installing a 16"water main, with a limited-capacity high pressure sewer line already in place, this rationale is undercut…and so would the 2.5 acre zoning which it justifies.

Zoning cases are exceedingly fact specific, but the Massachusetts appellate courts have applied this analysis consistently, and are very protective of the constitutional prohibition against the taking of private property without just compensation: absent some extremely special condition, large lot zoning (one, two or more acres) is upheld where there is NO public water and sewer in the zone affected; BUT, large lot zoning can be, and has been, invalidated when water and sewer is installed.

Case Law Analysis:

In early cases such as the Town of Needham[4] case, where there was no public water and sewer, the court set forth certain health and safety advantages resulting from one acre zoning, and upheld the one acre zoning, but intimated that even one acre zoning might not be upheld if the one acre zoning created "a barrier against the influx of thrifty and respectable citizens who desire to live there…"

In 1975, the Supreme Judicial Court upheld 2 acre zoning in the Town of Sherborn [5] because the town did not have public water and sewer facilities. The court reasoned that 2 acre lots were needed to accommodate the installation of wells and septic systems on the lots, in order to protect the public health, a valid use of the town's police power. In our Williamstown case, the installation of the 16" water main will actually reduce the need for large lot zoning, because the town will not need large lots in order to accommodate septic and well systems.

More recently, in the Town of Edgartown [6] case, the Supreme Judicial Court expressly rejected the notion that goals of preserving open space and protecting plant and animal life "would singly justify large lot zoning." In a case where there was no town water and sewer to the affected district, the Court upheld three–acre zoning, because of ecological conditions unique to the island of Martha's Vineyard. However, the Court warned that it's "opinion should not be read as an endorsement of three-acre zoning." Edgartown, at p.125.

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[2] Aaronson v. Sharon, 346 Mass. 598 (1964)
[3] Pennsylvania Coal Co. v. Mahon, 260 US 393
[4] Simon v. Needham, 311 Mass. 560 (1942)
[5] Wilson v. Town of Sherborn, 3 Mass. App. Ct. 237 (1975)
[6] Johnson v. Town of Edgartown, 425 Mass. 117 (1997)

A good example of a case where large lot zoning was invalidated when a water line was present, is the Town of Sharon[7] case. The Supreme Judicial Court struck down an approximately 2.5 acre lot size requirement as constitutionally invalid where the Town of Sharon, with water, but no sewerage to the lots in question, argued adamantly about the town's rural character, bucolic environment and conservation needs, and lost:

> 'The physical characteristics of the district, considered in conjunction with those of the town, a town of residences, large camps, a retreat house, fish and game clubs, a wildlife sanctuary, and large recreation and conservation areas, indicate that all that has made Sharon beautiful . . . will best be maintained by the lot size requirements of its zoning by-law. The zoning here in question will encourage leaving land in the natural state, which will provide the inhabitants, and those who come to Sharon, with a community which has the living and recreational amenities that are fundamental to mental and physical health…(but) "the attainment of such advantages does not reasonably require lots of 100,000 square feet. "[8] (emphasis added)

In a recently reported case from this year, involving the Town of Hadley[9], the Supreme Judicial Court, continued its characteristically careful protection of the constitutional rights of landowners. It struck down the Town's rate of development (ROD) by-law, which was unlimited in duration, restricting the number of building permits the Town could issue. While the Supreme Judicial Court makes a casual reference in a footnote to large lot zoning by-laws as a means to curtail development under special circumstances, the court remarked: "[d]espite the perceived benefits that enforced isolation may bring to a town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular town to deflect that wave onto its neighbors."[10] The Hadley case simply does not support a position in favor of large lot zoning. The Court's made passing references to the difference between rural and suburban settings as a factor that might be relevant to zoning cases, but such a difference was simply not germane to the Court's decision in the case ("dicta"). In any event, to have any meaning, a town would have to show that there was little regional demand for primary housing, which is simply not the case in Williamstown or throughout many towns in Berkshire County. Anyone who thinks that land in Williamstown is not in high demand by both Berkshire county residents and outside buyers alike is not involved in day to day real estate transactions.

Brief Summary:

In summary, the Supreme Judicial Court has not upheld 2.5 acre zoning as constitutionally permissible if the large lot zoning requirement is in place only to preserve land in its natural state or maintain the town's bucolic character, especially if town water and sewer are in place. Williamstown places itself in great jeopardy of losing its 2.5 acre zoning if it installs the 16 " water main.

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[7] Supra, Aaronson

[8] Aronson at p. 604

[9] Zuckerman v. Town of Hadley, 442 Mass. 511 (2004)

[10] Hadley at p. 850