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MEMORANDUM

TO: Municipal Clients

FROM: Murphy, Hesse, Toomey and Lehane, LLP  
Municipal Law Practice Group

DATE: January 7, 2003

RE: Advisory on Contract Zoning and Spot Zoning

A Summary Of The Decision Of The Massachusetts Appeals Court In  
*The McLean Hospital Corporation v. Town of Belmont*, 56 Mass. App. Ct. 540  
(2002) (Decided November 22, 2002)

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In a decision which has significant land use planning implications for Massachusetts municipalities, our Appeals Court has affirmed a judgment of the Land Court which declared that a zoning by-law amendment enacted by the Town of Belmont and affecting property owned by the McLean Hospital Corporation is a valid exercise of the Town's zoning authority and does not constitute illegal contract zoning. The Court found nothing to prohibit a municipality from negotiating with a private landowner to bring about the receipt of benefits for desirable public purposes once otherwise valid zoning has taken place, assuming that those benefits have some reasonable relationship to the site governed by the zoning. The Court held "Indeed, such arrangements are consistent with good government in general and with effective land use planning in particular".

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No application has been filed for leave to obtain further appellate review by the Supreme Judicial Court and no request has been filed for an extension of time to file such an application.

The background to the case is as follows: McLean Hospital is a teaching hospital which provides inpatient and outpatient psychiatric care and related services. Prior to the rezoning that is the subject matter of this case, the locus was situated in a single residence zoning district with McLean Hospital conducting its operations as a nonconforming use. Approximately forty-eight acres of the McLean Hospital property was available for development. A task force of municipal officials, appointed private citizens and McLean Hospital representatives was formed to review possible uses of the locus. The task force adopted a statement of principles which was approved by the Belmont Board of Selectmen.

McLean Hospital presented various development proposals that were rejected by the task force. McLean Hospital subsequently presented a revised proposal that was further revised after public hearings, meetings and comments. This resulted in a memorandum of understanding prepared by McLean Hospital and the town, which contemplated rezoning of the entire site, together with a number of commitments generally, but not exclusively of benefit to the town. These commitments included legal protection for significant historical features; acquisition by the town of interests in the locus, including title to a major portion thereof for open space and a cemetery; creation of a public-private partnership for management of the open space; obtaining a tax exemption for that portion of the locus devoted to hospital operations; a traffic management agreement; revenue sharing between McLean Hospital and the town in the event that McLean Hospital's net land sale revenues exceeded \$28 million; commitments with respect to affordable housing and additional recreational benefits; and reimbursement by McLean Hospital of the town's consultant fees.

This process resulted in a proposed amendment to the Belmont zoning by-law that, following revisions based on planning board proceedings and consultant recommendations, was substantially similar to the proposal contained in the memorandum of understanding, except that the proposed sharing of land sale proceeds was eliminated. The proposed amendment established a McLean Hospital zoning district containing six subdistricts: (i) residential; (ii) senior living; (iii) research and development; (iv) McLean Hospital institutional; (v) open space; and (vi) cemetery. Detailed provisions regarding permitted uses, dimensions, access and parking were included.

A special town meeting was held. Four articles in the warrant involved the locus. One warrant article contained the proposed zoning by-law amendment. One warrant article proposed authorizing the board of selectmen to enter into a memorandum of understanding with McLean Hospital involving a conveyance by McLean Hospital to the town of fourteen acres for a town

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cemetery, seventy eight and one half acres for public open space and public access rights in twenty-seven acres of privately owned open space. The memorandum of understanding also provided that McLean Hospital would pay to the town \$1,000,000 for traffic improvements related to the rezoning and future development and \$500,000 for reimbursement of the town's consultant fees. One warrant article proposed authorizing the board of selectmen to accept conveyance of the land and rights described above. One warrant article proposed authorizing the board of selectmen to petition the legislature to enact an exemption from real estate taxes of certain McLean Hospital property.

The Belmont special town meeting failed to approve any of the four articles. The town meeting was adjourned. During the adjournment the parties prepared a revised proposal that reflected concerns raised at town meeting. The revisions reduced the maximum square footage in the research and enrollment subdistrict; eliminated the \$500,000 reimbursement by McLean Hospital of the town's consultant expenses; reduced from \$1,000,000 to \$800,000 the amount McLean Hospital would pay to the town for traffic mitigation; and provided for a payment by the town to McLean Hospital of \$1,500,000. These changes resulted in a net cost to the town of \$2.2 million. The revised proposal also included an agreement by McLean Hospital to grant to the town an option to purchase up to sixteen lots contiguous to the open space subdistrict at a purchase price of \$200,000 each; provided for the timing of the \$1,500,000 payment by the town and the conveyances by McLean Hospital; provided for evidence of compliance by McLean Hospital with its ancillary agreements as part of a site plan review process; and included an agreement by McLean Hospital that any change from a psychiatric use at the locus to a nonpsychiatric use would require site plan approval.

At the adjourned town meeting, the members voted to reconsider the four articles which concerned the locus. The zoning by-law amendment was approved by town meeting with amendments which increased the maximum gross floor area within the senior living subdistrict, reduced the maximum gross floor area within the research and development subdistrict, and changed the limitation of nonpsychiatric medical uses in the McLean Hospital institutional subdistrict; and with four amendments regarding the cemetery subdistrict. The special town meeting passed the other three warrant articles. The vote of the special town meeting on these four articles was approved by the voters of the Town of Belmont in a special town election conducted pursuant to petition. The Attorney General approved the zoning by-law amendment with the exception of the amendments regarding the cemetery subdistrict. The disapproval of the amendments involving the cemetery subdistrict is not an issue in the Land Court decision or the Appeals Court decision. McLean Hospital and the town subsequently signed a memorandum of agreement incorporating the various commitments of the parties to each other.

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Several residents of the Town of Belmont as interveners challenged the zoning by-law amendment as a bargaining away of the town's police power, as a bilateral agreement that created a duty on the part of the town to rezone, and as an exercise of governmental authority in the interest of the private landowner, rather than in the interest of the town. The Appeals Court considered these theories as different expression of one argument, namely, that the rezoning was a product of so-called contract zoning and, therefore, unlawful.

The Appeals Court noted that illegal contract zoning has been defined as a "process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promises from the developer in exchange for its agreement to rezone the property". The Court indicated that the process is suspect because of the concern that a municipality will contract away its police power to regulate on behalf of the public in return for contractual benefits offered by a landowner whose interest is principally served by the zoning action.

The Appeals Court noted that attacks on zoning enactments as unlawful contract zoning have been considered twice to date by our appellate courts. Each case featured an agreement between the municipality and the developer. In neither case did the court invalidate the zoning action.

Among the many implications of this decision for municipal land use planning are:

(1) The fact that there is an agreement between a municipality and a landowner affected by related zoning action does not per se invalidate the zoning action. It is the nature of the agreement and the character of the zoning action that determines the outcome.

(2) Zoning action, if otherwise valid, stands by itself and its legitimacy is not lessened because it was accompanied, and even encouraged, by ancillary agreements not involving consideration extraneous to the property being rezoned.

An agreement by a developer that if a municipality rezoned land from single residence to limited manufacturing it would restrict its uses of the land in various ways and convey to the municipality an option to purchase a portion of the property has been held to satisfy this standard, notwithstanding the fact that local officials let it be known that favorable rezoning depended in great likelihood on the adoption of the option restrictions.

(3) A payment of money that is promised by the developer rather than required by the municipality and that is reasonably intended to meet public needs arising out of the proposed development cannot be viewed as an extraneous influence upon a zoning decision. In a case

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where a developer sought a rezoning of land from a residential district to a commercial district an offer by a developer as an inducement to the town to provide a no build buffer zone, traffic improvements, mitigation payments and a commitment not to seek tax abatements regarding the rezoned land for five years has been held to satisfy this standard.

(4) A challenge to a zoning enactment on the basis of contract zoning involves two questions:

(a) was the action contrary to the best interest of the municipality and therefore offensive to public policy?

In the McLean Hospital case this standard was satisfied by the fact that the hospital agreed to give up its right to develop land for single family residences on condition that the land be rezoned; to convey open space to the town; to convey land to the town for a cemetery; to protect significant historical features; to provide commitments regarding affordable housing and recreational benefits; and a traffic management agreement; that the town pay \$1,500,000 to McLean Hospital; and that the town cooperate in McLean Hospital's effort to seek tax relief for that portion of the locus devoted to hospital operations.

(b) did the action involve extraneous consideration which could impeach the enacting vote as a decision solely in respect of rezoning the locus?

It is not necessary that consideration directly mitigate some deleterious effect of the development authorized by the rezoning, although such consideration would obviously be permissible. It is adequate that the consideration bear some identifiable relationship to the locus so that there can be some assurance that the town's legislative body did not act for reasons irrelevant to the zoning of the site at issue. This requirement was satisfied in the McLean Hospital case.

(5) It is not necessary that the agreement which accompanies the zoning action must be executed and placed in escrow as a condition to the validity of a municipality's zoning vote. A rezoning cannot lawfully be conditioned on an agreement with a properly owner. Rezoning action stands in its own right and is not dependent upon performance of the agreement.

(6) The rights of a municipality if the landowner breaches such an agreement were not decided in the McLean Hospital case.

(7) A zoning by law amendment is not spot zoning if it is adopted for a public purpose in relation to an area that is discrete in its geography, contours, and size.

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(8) An agreement with a developer should not bind the municipality to rezone land solely in consideration of promises of a landowner. It is permissible if rezoning of land is a condition that must be fulfilled before a separate agreement becomes enforceable. In that event, the municipality makes no promise and there is no enforceable contract until the municipality acts to rezone the property.

(9) A municipality may negotiate with a private landowner to bring about the receipt of benefits for desirable public purposes once otherwise valid zoning has taken place, assuming that those benefits have some reasonable relationship to the site governed by the zoning. Such arrangements are consistent with good government in general and with effective land use planning in particular.

(10) A party attacking a zoning amendment has a heavy burden, one requiring that he 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. He must demonstrate that the validity of the enactment is not even fairly debatable. If the validity of the zoning action is fairly debatable, local judgment on the subject should be sustained.