

MAY 5 PM3:15

TOWN OF LEE, MASSACHUSETTS
PUBLIC MEETING NOTICE
Planning Board

Date of Meeting: May 10, 2021

Time of Meeting: 6pm

Per Governor Baker's order suspending certain provisions of the Open Meeting Law, G.L.c. 30A sec. 20, this meeting will take place virtually via ZOOM

Web Address to Join Zoom Meeting

<https://us02web.zoom.us/j/87354590257?pwd=SXpxQlhRNGxHOGhoWCtMNUIiRGhNdz09>

Join Zoom Meeting

Meeting ID: 873 5459 0257

Passcode: 289816

One tap mobile

+16465588656,,87354590257#,,,,*289816# US (New York)

+13017158592,,87354590257#,,,,*289816# US (Washington DC)

Dial by your location

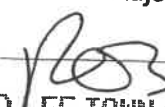
+1 646 558 8656 US (New York)

+1 301 715 8592 US (Washington DC)

AGENDA

1. Call to Order (Pursuant to MGL c 30A s20, I am hereby informing all attendees that a video and audio recording is being made of the meeting)
2. Approval of Minutes – April 26, 2021
3. Public Hearing – 525 Woodland Road
4. Discussion – 645 Pleasant Street, Public Hearing Request
5. Sign Permits
6. General Code Legal Analysis Chapter 199 and By-Law discussion
7. Any topic that the chair could not reasonably anticipate

Adjourn


REC'D LEE TOWN CLERK
MAY 5 '21 PM3:15

HUNTER, GRAZIANO & DiSANTIS, P.C.

Attorneys at Law

Ten Park Place, Post Office Box 337,
Lee, Massachusetts 01238

Don C. Hunter, Esq.*
John W. Graziano, Esq.*
Lindsay D. DiSantis, Esq.♦

Tel 413 243-0789
Fax 413 243-0213
www.berkshirelawyers.com

February 25, 2021

Lee Selectboard
Attn: Chairperson
32 Main Street
Lee, MA 01238

RE: 525 Woodlawn Road
Assessor's Map 2 Lot 5

Dear Chairperson:

Pursuant to Mass. Gen. L. ch. 40A, sec. 5, I am writing on behalf of Thomas M. and Steven A. Garrity, co-owners of the above referenced premises, to initiate the petition for a zoning amendment changing the district designation for the above referenced property from Conservation/Residential to Industrial.

Please submit this request to the Planning Board for its scheduling of a public hearing on the matter.

If you have any questions, please don't hesitate to contact me.

Respectfully submitted,
Hunter, Graziano & DiSantis, PC.

By: 
John W. Graziano, Esq.
Attorney for Petitioner
john@berkshirelawyers.com

cc: Barbara Garrity
Jeremia Pollard, Town Counsel
(both via e-mail only)

GARRITY ZONING MAP AMENDMENT REQUEST

THE REQUEST MEETS THE LEGAL REQUIREMENTS FOR A ZONING MAP AMENDMENT

THE LEGAL STANDARD FOR A MAP CHANGE ARE PRESENT IN THIS REQUEST

The primary legal criteria is that zoning may be amended "when the character and use of the district or the surrounding territory have become so changed since the original ordinance was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts."

In this case, the 2.6 acre Garrity property is surrounded by property owned by GE subject to a WMECO electric line transmission Right of Way (See, Survey, Exhibit "A"), and the Hells Angels MC clubhouse and another small GE property are just across the street. The Town of Lee itself classifies the WMECO Right of Way Use as Industrial. **On April 28, 2021, GE purchased the 75.009 acre property which completely boxes in the Garrity property for \$6,200,000.00** (See Deed Exhibit "B") That property is currently used very similarly to the Garrity property and is also part of the proposed site for the GE PCB dump. All of the other uses in this area are much more consistent with Industrial. *If the map were being drawn today, this parcel would certainly be included as part of the Industrial zone.*

The Town of Lee and Lenox and many construction projects and public works departments in the county and their taxpayers and citizens benefit greatly from this site. See emails from Lee and Lenox DPW Superintendents affirming the value of this site to municipal DPW operations - Exhibit "C." The site and amending the Zoning Map as requested benefits the public safety and welfare, saving significant large truck traffic, fuel, pollution, wear and tear on town vehicles and roads, and cost savings for the town and the public at large. Large trucks full of construction and road pavement debris which would normally have to go right through downtown Lee on Main Street to get to Turnpike to get to Chicopee (the next nearest facility which could handle disposal of these materials), need not do so. Trucking in of new

construction materials is also eliminated due to the material recycling that happens on this site. This site eliminates significant traffic, pollution and noise on Main Street in Lee and saves the Town, and its tax payers, a significant amount of money. There is also a clear environmental benefit from recycling and reusing these construction materials within our Town and Berkshire county.

THE PROPOSED CHANGE WOULD NOT CONSTITUTE "SPOT" ZONING

Inasmuch as a change will make the zoning in that area more uniform with the actual and current uses and makes perfect sense, the legal requirements for a change are met. In fact, amending the zoning as requested will be fixing a spot, not creating one. *See Exhibit "A."*

Any Challenger alleging spot zoning bears the "heavy burden" of proving spot zoning. In fact, "a spot zoning claim will fail unless the Plaintiff can show the rezoning is 'arbitrary and unreasonable or substantially unrelated to public health safety or general welfare' and bears no rational relation to the public good." *See Exhibit "D" for the Town Counsel Materials. The requested change clearly is not "arbitrary and unreasonable." Also, "[T]he odds are quite strong that a municipality's decision will not be invalidated." See. Zoning Handbook Exhibit "D, p. 94.*

Lots larger than 2.0 acres such as the Garrity lot are almost always deemed and found **not to be** "spot" zoning (17 of 19 cases where held for the municipality and upheld zoning changes for Lots larger than 2 acres). *See, Zoning Handbook Exhibit "D, p. 94-95.*

ADDITIONAL SAFEGUARDS EXIST

Beyond this zoning amendment, and well before any of the hypothetical concerns the parties raised, any change in use would still require a 2/3rds vote at town meeting, Attorney General review, and a Special Permit process where screening, drainage, noise, traffic and other safe guards could be made a condition of any Special Permit. Therefore, applicant believes that the Planning Board should favorably report out and pass along to the town meeting representatives this request knowing that the additional safety checks of a 2/3rds town meeting vote, approval of the attorney general and then the Special Permit permitting process will **all** be

required and will limit and give ample opportunity to raise and address concerns about any potential deleterious impacts of the zoning amendment. To not pass along would be to short circuit the statutory process.

THE SCENIC ROAD LAW IS SPECIFICALLY NOT APPLICABLE TO THIS MATTER

The Scenic Road Law, Wetlands, environmental and other concerns raised **are not** legally relevant to the requested change; they are stand alone, non-zoning land use safe guards **not effected by the proposed change**. In fact, the Scenic Road Act only applies to changes to "cutting of trees, or alterations to stone walls." Trees or stone walls "outside the limits of the road are beyond the reach of the statute." "The statute specifies that only changes 'done with respect to the scenic road is governed.'" See, Zoning Handbook, Exhibit "D" p. 613.

The change of zoning does nothing to effect, limit or obviate the need to comply with these or any other non-zoning land use laws. They are simply a red herring in this particular process and a fundamental misunderstanding of the law that applies for this specific matter.

For all the above reasons, the Planning Board should favorably report the requested zoning amendment out to the Town Meeting representatives for their vote at the upcoming Town Meeting.

EXHIBIT A

Page 8-15

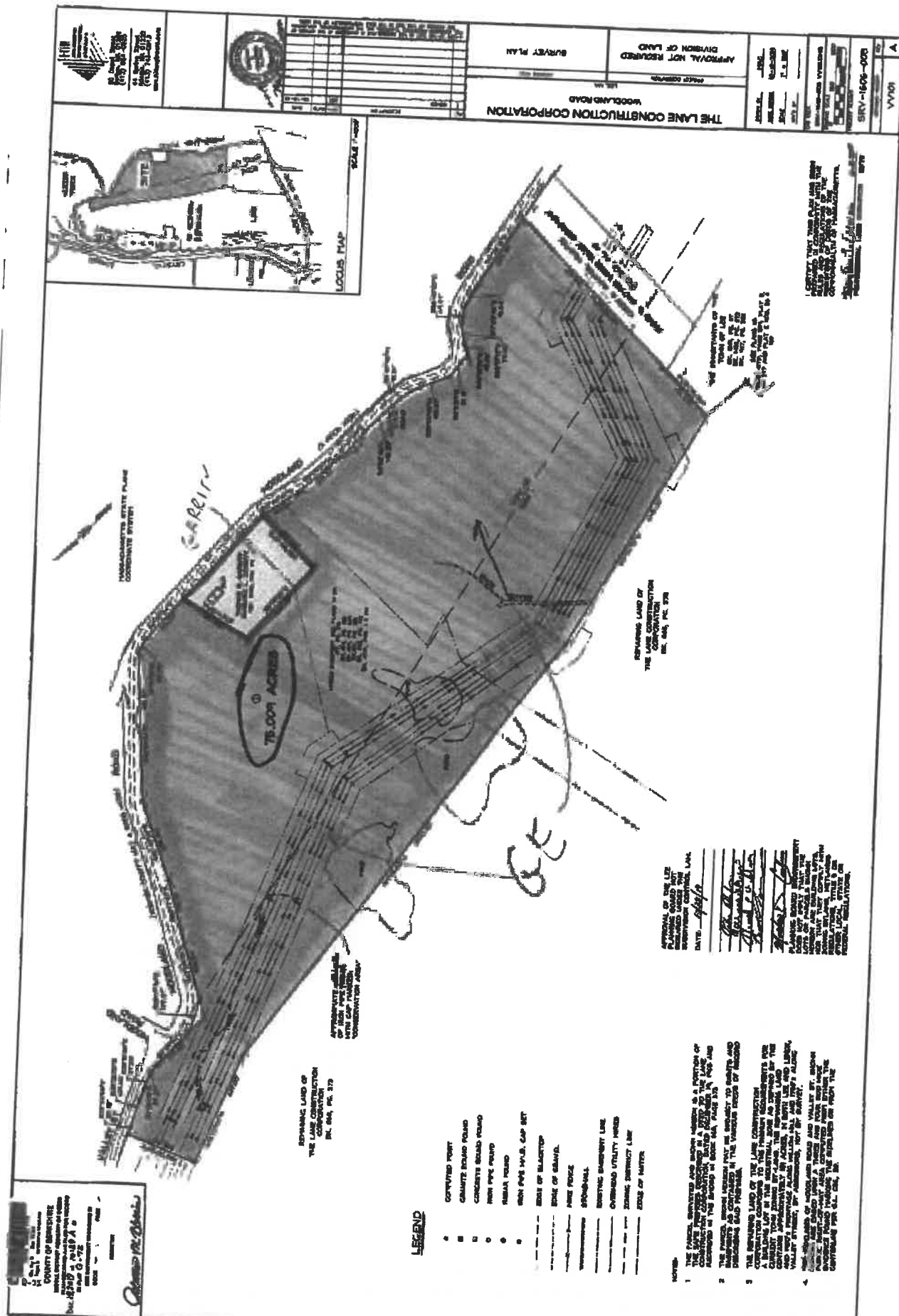


EXHIBIT B

Berkshire Middle District Registry of Deeds
Electronically Recorded Document

This is the first page of the document - Do not remove

Recording Information

Document Number	: 976528
Document Type	: DEED
Recorded Date	: April 28, 2021
Recorded Time	: 04:00:16 PM
Recorded Book and Page	: 06897 / 132
Number of Pages(including cover sheet)	: 5
Receipt Number	: 165489
Recording Fee (including excise)	: \$28,427.00

MASSACHUSETTS EXCISE TAX
Middle Berkshire ROD 001
Date: 04/28/2021 04:00 PM
Ctrl# 041012 28139 Doc# 00976528
Fee: \$28,272.00 Cons: \$6,200,000.00

Berkshire Middle District Registry of Deeds
Patricia M. Harris, Register
44 Bank Row
Pittsfield, MA 01201
413-443-7438
berkshiremiddlededeeds.com

QUITCLAIM DEED

THE LANE CONSTRUCTION CORPORATION, a Connecticut corporation registered to conduct business in Massachusetts, with a principal place of business at 90 Fieldstone Court, Cheshire, Connecticut 06410 ("Grantor"), for consideration paid in the amount of **Six Million, Two Hundred Thousand and No/100 Dollars (\$6,200,000.00)** grants to **GENERAL ELECTRIC COMPANY**, a New York corporation registered to conduct business in Massachusetts, having an office and place of business at 5 Necco Street, Boston, Massachusetts 02201 ("Grantee"), with **QUITCLAIM COVENANTS**, the land with improvements thereon, situated in the Town of Lee, Berkshire County, Commonwealth of Massachusetts, as described in **Exhibit A**, attached hereto and made a part hereof.

This conveyance does not constitute a sale of all, or substantially all, of the Grantor's assets located in the Commonwealth of Massachusetts.

Locus: off Willow Hill Road and Woodland Road, Lee, Massachusetts

EXHIBIT A

A certain parcel of land, situated westerly of Woodland Road and northerly of Willow Hill Road in the Town of Lee, Berkshire County, Massachusetts, being that lot numbered 1, containing 75.009 acres (the "Premises"), shown on a plan prepared for The Lane Construction Corporation by Hill Engineers, recorded on December 19, 2019 with the Berkshire Middle District Registry of Deeds at Plat File Q-72.

Together with an easement, running with the land, thirty (30) feet in width, for vehicular access over, upon and across land of Eurovia Atlantic Coast, LLC, extending from Willow Hill Road to the Premises, as referenced in the deed from the Grantor herein, recorded in Book 6567, Page 281, and as amended by a First Amended Easement recorded herewith.

Subject to the rights, easements and interests described in the deed from Berkshire Blacktop, Inc, recorded December 19, 1968 with the Berkshire Middle District Registry of Deeds in Book 868, Page 373.

Being a portion of the premises conveyed by deed from Berkshire Blacktop, Inc. to the Grantor herein, recorded December 19, 1968 with the Berkshire Middle District Registry of Deeds in Book 868, Page 373.

[Signature Pages Follow]

Executed as a sealed instrument this 22 day of April, 2021.

The Lane Construction Corporation,
A Connecticut Corporation

By: [Signature]

Mark A. Schiller

Its: President

Witness: [Signature]

Printed Name: Patricia A. Deleka

Witness: [Signature]

Printed Name: Maryanne Miranda

STATE OF CONNECTICUT

COUNTY OF New Haven ss. Cheshire

On this 22 day of April, 2021, before me, the undersigned notary public, personally appeared Mark A. Schiller, President of The Lane Construction Corporation, and proved to me through satisfactory evidence of identification, being:

☐ driver's license or other state or federal government document bearing a photographic image, or

☒ my own personal knowledge of the identity of the signatory

to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purposes as President of The Lane Construction Corporation.

[Signature]
Notary Public: **LORI A. WASILESKY**
NOTARY PUBLIC
STATE OF CONNECTICUT
My Commission Expires: My Commission Expires October 31, 2023

Executed as a sealed instrument this 22 day of April, 2021.

The Lane Construction Corporation,
A Connecticut Corporation

By: Chelsea C. Abbott

Chelsea C. Abbott
Its: Treasurer

Witness: Patricia A. Deleka

Printed Name: Patricia A. Deleka

Witness: Mayanne Miranda

Printed Name: Mayanne Miranda

STATE OF CONNECTICUT

COUNTY OF New Haven ss. Cheshire

On this 22 day of April, 2021, before me, the undersigned notary public, personally appeared Chelsea C. Abbott Treasurer of The Lane Construction Corporation, and proved to me through satisfactory evidence of identification, being:

☐ driver's license or other state or federal government document bearing a photographic image, or

☒ my own personal knowledge of the identity of the signatory

to be the person whose name is signed on the preceding or attached document, and acknowledged to me that she signed it voluntarily for its stated purposes as Treasurer of The Lane Construction Corporation.

Lori A. Wasilesky

Notary Public:

My Commission Expires:

LORI A. WASILESKY
NOTARY PUBLIC
STATE OF CONNECTICUT
My Commission Expires October 31, 2023

WMECO RIGHT OF WAY DESIGNATION

<http://mapublicaccess.tylerhost.net/Datalets/PrintDatalet.aspx?pi>

Page datalets/datalet.aspx?mode=agriculture not registered
 PARID: 150002000000120
 WESTERN MASS ELECTRIC CO

12 is a RIGHT of WAY (only)

Property Information

722 WOODLAND RD

Property Location: 722 WOODLAND RD
 Class: I-INDUSTRIAL
 Use Code (LUC): 423-ELECTRIC TRANSMISSION RIGHT-OF-WAY
 District: MA150 - GOOSE POND
 Deeded Acres: 19.0000
 Square Feet: 827,640

Owner

Owner	Co-Owner	City	Address	State	Zip Code	Deed Book/Page
WESTERN MASS ELECTRIC CO	PROPERTY TAX DEPT	HARTFORD	P O BOX 270	CT	06141	/

Owner History

1 of 20

Tax Year: 2021
 Owner: WESTERN MASS ELECTRIC CO
 Co-Owner: PROPERTY TAX DEPT
 City: HARTFORD
 Address: P O BOX 270
 State: CT
 Zip Code: 06141
 Deed Book/Page: /

Land

Land Line #	Land Type	Land Code	Class	Square Feet	Acres	Suppressed	Ch4618 %	Infl %	Infl Reason	Infl 2 %	Infl 2 Reason	Base Rate	Chap Market Value	Assessed Value
1	A-ACREAGE P-PRIMARY		423-ELECTRIC TRANSMISSION RIGHT-OF-WAY	43,560	1.00	N		50	RS			144,600	72,300	
2	A-ACREAGE R-RESIDUAL		423-ELECTRIC TRANSMISSION RIGHT-OF-WAY	217,800	5.00	N		50	RS			2,200	5,500	
3	A-ACREAGE U-UNDEVELOPED		423-ELECTRIC TRANSMISSION RIGHT-OF-WAY	566,280	13.00	N		50	RS			1,300	8,450	
Total:														0 86,250

Printed on Tuesday, May 4, 2021, at 2:04:17 PM EST

EXHIBIT C

Don Hunter

From: Tracy Garrity <_____
Sent: Thursday, June 25, 2020 12:38 PM
To: Don Hunter
Subject: FW: LB Corporation Steve Garrity

From: Alan Zerbato [mailto:AZerbato@town.lee.ma.us]
Sent: Tuesday, June 23, 2020 7:44 AM
To: TAGarrity@verizon.net
Subject: RE: LB Corporation Steve Garrity

LEE DPW

Steve/Tom Garrity,
I want to thank you for letting us dispose of recyclable material at this site when doing past projects, This will deficiently add time and cost for when doing future projects .
Thanks again,
Alan Zerbato
Lee DPW

From: Tracy Garrity <_____
Sent: Monday, June 22, 2020 4:00 PM
To: 'William J. Gop' <lenoxdpw@townoflenox.com>; Alan Zerbato <AZerbato@town.lee.ma.us>; 'Highway' <highway@townofstockbridge.com>
Cc: Steve Garrity <_____
Subject: LB Corporation Steve Garrity

Thomas M. Garrity <_____
U

To: Al Zerbato, Len Tisdale, Bill Gop,
Due to a ceased and desist order from the Town of Lee Building Inspector stating there is a complaint issued by Peter Bloom stating the misuse of property on 525 Woodland Road Lee,
The Town of Lee, Lenox, Stockbridge DPW will have to reframe from bringing material to the site effective immediately. We know this will bring extra cost of disposal to the town. Our hand are tied on this issue.

Thank you
Steve Garrity
Tom Garrity

Tracy A. Garrity
LB Corporation
General Contractor

When writing or responding, please remember that the secretary of State's Office has determined that email is a public record. This communication may contain privileged information. If you are not the intended recipient, or

Don Hunter

From: Tracy Garrity
Sent: Thursday, June 25, 2020 12:38 PM
To: Don Hunter
Subject: FW: LB Corporation Steve Garrity

Steve asked me to forward the Bill Gop and Al Zerbato emails

Thanks Tracy

Tracy A. Garrity
LB Corporation
General Contractor

From: William J. Gop [mailto:lenoxdpw@townoflenox.com]
Sent: Wednesday, June 24, 2020 12:51 PM
To:
Cc:
Subject: Re: LB Corporation Steve Garrity

LENOX DPW

Good Afternoon,

I'm sorry to hear that. Hopefully it can be resolved quickly for all of our sakes. It is very convenient with cost savings for us.

Thank you for letting us know,

William J. Gop,
Superintendent
Lenox Department of Public Works
275 Main Street
Lenox, MA 01240
(413) 637-5525
fax (413) 637-5529
www.townoflenox.com

EXHIBIT D

HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW

**Zoning, Subdivision Control,
and Nonzoning Alternatives**

Second Edition

Mark Bobrowski



ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
New York Gaithersburg

SPOT ZONING

PLANNING LAW

ZONING AMENDMENTS

§ 3.04[C]

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are."¹¹³ Spot zoning exercise of the zoning protection under the has been repeatedly

ss. 339, 362 (1973). On increase the town's tax opportunities," no spot p. Ct. 603, 606 (1998). v. Board of Selectmen

held to violate the "uniformity" requirement contained in Mass. Gen. L. ch. 40A, § 4.¹¹⁵

The test for spot zoning was succinctly stated in *Leahy v. Inspector of Buildings of New Bedford*,¹¹⁶ one of the earliest decisions in this genre:

A city council is empowered to amend a zoning ordinance when the character and use of a district or the surrounding territory have become so changed since the original ordinance was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts; but mere economic gain to the owner of a comparatively small area is not sufficient cause to involve an exercise of this amending power for the benefit of such owner.

SPOT ZONING

In effect, spot zoning occurs where one lot or a small area has been singled out for treatment less onerous than that imposed upon nearby, indistinguishable properties.¹¹⁷

The court now favors a balancing test to assess a spot zoning challenge. Changes to the neighborhood or area are certainly relevant and important facts, but they are not controlling.¹¹⁸ "It is not [even] necessary to find a substantial change in the locus to support a change in its zoning classification."¹¹⁹ Similarly, economic benefits accruing to a singled-out parcel do not require a finding of spot zoning, where there are also benefits to the general public.¹²⁰ This is the logical, if incidental, result of virtually every zoning change.¹²¹ Nor is the size of the parcel controlling.¹²¹

Town + General Public get a huge benefit from this change.

Several new factors have been added to the mix. In assessing spot zoning challenges, it is quite proper to consider the effect of the zoning change on the municipality as a whole.¹²² This is especially important where the growth of the

¹¹⁵ "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." Mass. Gen. L. ch. 40A, § 4 (1990). See *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 293 (1976). *Canteen* cites the uniformity provision of the old Zoning Enabling Act, formerly in Mass. Gen. L. ch. 40A, § 2, as does *Schertzer v. City of Somerville*, 345 Mass. 747, 751 (1963), and *Shapiro v. City of Cambridge*, 340 Mass. 652, 658 (1960). Despite minor changes in language, there is little doubt that a similar result is required under the current law.

¹¹⁶ 308 Mass. 128, 132-133 (1941).

¹¹⁷ *Id.* at 134.

¹¹⁸ *Raymond v. Commissioner of Pub. Works of Lowell*, 333 Mass. 410, 413 (1956).

¹¹⁹ *Cohen v. City of Lynn*, 333 Mass. 699, 704 (1956).

¹²⁰ *Raymond v. Building Inspector of Brimfield*, 3 Mass. App. Ct. 38, 42 nn.3 & 4 (1975). See also *Fabiano v. City of Boston*, 49 Mass. App. Ct. 281 (2000).

¹²¹ *Town of Marlborough v. Rosenthal*, 316 Mass. 124, 126 (1944). "The invalidity of 'spot zoning' depends upon more than the size of the 'spot.'" See also *Raymond v. Building Inspector of Brimfield*, 3 Mass. App. Ct. 38, 42 (1975); *Lanner v. Board of Appeal of Tewksbury*, 348 Mass. 220, 229 (1964).

¹²² *Lanner v. Board of Appeal of Tewksbury*, 348 Mass. 220, 228-229 (1964); *Cohen v. City of Lynn*, 333 Mass. 699, 704 (1956); *Rando v. Town of North Attleborough*, 44 Mass. App. Ct. 603, 606 (1998).

municipality has been addressed by a plan.¹²³ In fact, the failure to study the effect of a zoning change using conventional planning techniques may result in invalidation of the amendment.¹²⁴ On the other hand, it is now well established that the motive for the zoning change is not an important factor, whether the sponsors are beneficiaries of the amendment¹²⁵ or opponents to a development proposal.¹²⁶

The court has also characterized amendments that single out a parcel of land for more restrictive treatment than other parcels in the same zoning district as spot zoning. In effect, this is "reverse spot zoning" because the singling out of the parcel does not result in any benefit to its owner.¹²⁷ The amendment actually causes an economic loss, since the land uses available on the site are restricted in comparison to neighboring properties. For example, in *Schertzer v. City of Somerville*,¹²⁸ an amendment reclassifying three small lots on the edge of a business district from business to residential was invalidated. In terming this practice analogous to spot zoning, the appeals court has noted that it is "equally violative of the principal of uniformity."¹²⁹ The same balancing test is used in assessing such challenges.

Taken together, these types of disputes have the appearance of a "seemingly unending line of cases" whose number is "disproportionately large in relation to the very narrow scope of the review available before [the] court."¹³⁰ There are approximately four-dozen spot and reverse spot zoning decisions; most are summarized in Table 3-2. While the sheer number of such decisions is indeed daunting, a careful review yields some useful conclusions.

First, the odds are quite strong that the municipality's decision will not be invalidated. Of the 49 cases summarized in Table 3-2, only 15 resulted in invalidation of the amendment. Breaking this down by type, of those characterized as typical spot zoning cases, only 10 of 41 decisions resulted in invalidation; of the nine decisions characterized as reverse spot zoning, five resulted in invalidation.

Second, while case law holds that the size of the rezoned parcel is not con-

¹²³ *Rosko v. City of Marlborough*, 355 Mass. 51, 53 (1968); *Durand v. Superintendent of Pub. Bldgs. of Fall River*, 354 Mass. 74, 77 (1968).

¹²⁴ *National Amusements v. City of Boston*, 29 Mass. App. Ct. 305, 310-311 (1990).

¹²⁵ See, e.g., *Raymond v. Commissioner of Pub. Works of Lowell*, 333 Mass. 410, 412 (1956).

¹²⁶ See, e.g., *Schertzer v. City of Somerville*, 345 Mass. 747, 748-749 (1963); *Shapiro v. City of Cambridge*, 340 Mass. 652, 658-659 (1960).

¹²⁷ The court uses this term in another context in *Van Sant v. Building Inspector of Dennis*, 352 Mass. 289, 292 (1967). There, a single parcel was left unrestricted while all surrounding properties were placed in a residential district. The court noted that the opposite facts were more commonly in dispute and called this "spot zoning in reverse." For purposes of this discussion, however, "reverse spot zoning" means those situations where a zoning amendment has singled out a parcel for treatment more restrictive than others in the same area.

¹²⁸ 345 Mass. 747 (1963).

¹²⁹ *Canteen Corp. v. City of Pittsfield*, 4 Mass. App. Ct. 289, 293 (1976). See also *Nectow v. City of Cambridge*, 260 Mass. 441 (1927), *rev'd*, 277 U.S. 183 (1928). The facts of *Nectow* place that landmark decision in this category of rezonings.

¹³⁰ *Crall v. City of Leominster*, 362 Mass. 95, 100 (1972).

ZONING AMENDME

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ND PLANNING LAW

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ZONING AMENDMENTS

this lot is > 2 acres § 3.04(C)

trolling, the court clearly prefers bigger "spots." Where the size of the rezoned parcel was more than two acres, 17 of 19 spot zoning decisions and three of six reverse spot zoning decisions held for the municipality.¹³¹ On the other hand, where the size of the parcel was less than two acres (or the amendment involved reclassification of a small area consisting of one to three lots), only 10 of 17 spot-zoning decisions and one of two reverse spot zoning decisions were upheld by the court. These considerations as to size apply even when more than one lot is rezoned.¹³²

Third, the location of the lot relative to differently treated properties is crucial. Rezoned lots located on the border of districts are probably properly located in either and are therefore difficult to successfully challenge.¹³³ While the court has warned against "[n]ibbling at the edges of established districts,"¹³⁴ Table 3-2 reveals that, of the eight challenges involving border lots, seven resulted in decisions favoring the municipality. On the other hand, where the lot is surrounded by differently treated properties, the amendment is less likely to survive review.¹³⁵ The fact that the land is undeveloped is also a relevant factor.¹³⁶

Fourth, the recommendation of the planning board¹³⁷ carries some persuasive weight, at least where the board recommended approval of the amendment. Of the 17 decisions where a favorable planning board recommendation could be discerned, only three held that the ordinance or by-law was invalid. On the other hand, where the planning board did not endorse the change, the court apparently disregarded this as a factor; of the seven decisions involving an unfavorable recommendation, only three resulted in invalidation.

Finally, and quite predictably, zoning amendments enacted to benefit a governmental entity are generally left undisturbed by the court.¹³⁸

Where spot zoning is alleged, the challenger has the burden of proof. "To sustain that burden they must prove facts which compel a conclusion that the question whether the amendment falls within the enabling statute is not even fairly debatable."¹³⁹ The court has characterized this burden as "heavy."¹⁴⁰

¹³¹ There are two spot zoning decisions in which the total size of the area rezoned is indeterminable from the reported facts, and they are not included in this analysis.

¹³² Sullivan v. Town of Acton, 38 Mass. App. Ct. 113, 115 (1995).

¹³³ Martin v. Town of Rockland, 1 Mass. App. Ct. 167, 169 (1973).

¹³⁴ Peters v. City of Westfield, 353 Mass. 635, 639 (1968).

¹³⁵ Caputo v. Board of Appeals of Somerville, 331 Mass. 547, 549 (1954); Whittemore v. Building Inspector of Falmouth, 313 Mass. 248, 249 (1943).

¹³⁶ Sullivan v. Town of Acton, 38 Mass. App. Ct. 113, 116 (1995).

¹³⁷ See § 3.02[D] for a discussion of this statutory requirement in zoning amendments.

¹³⁸ See, e.g., Gilmore v. City of Quincy, 346 Mass. 22, 25 (1963) (rezoning to locate municipal incinerator); Lamarre v. Commissioner of Pub. Works of Fall River, 324 Mass. 542, 545 (1949) (rezoning to benefit Fall River Housing Authority).

¹³⁹ Crall v. City of Leominster, 362 Mass. 95, 103 (1972). Spot-zoning challenges are not appropriately brought before the board of appeals, which has no power to "nullify acts of the local legislative body." Bearce v. Zoning Bd. of Appeals of Brockton, 351 Mass. 316, 319 (1966). See § 3.05 for the usual procedural route in a spot zoning suit.

¹⁴⁰ Crall, 362 Mass. at 103.

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SCENIC ROAD LAW

§ 19.05

MASSACHUSETTS LAND USE AND PLANNING LAW

§ 19.05 SCENIC ROADS

Mass. Gen. L. ch. 40, § 15C authorizes a municipality, upon recommendation of its planning board, conservation commission, or historical commission, to designate "scenic roads."¹²⁹ Any road in the city or town, other than a state numbered route or highway,¹³⁰ is eligible for such designation.¹³¹ The purpose of the statute is to provide for planning board review of the cutting or removal of trees or the alteration of stone walls incidental to work on the scenic road.

[A] Legislative History

By 1973 Mass. Acts 67, the Legislature first enacted Mass. Gen. L. ch. 40 § 15C. Then 1979 Mass. Acts 552 added the provision in paragraph two requiring consolidation of hearings with the tree warden where public shade trees regulated by Mass. Gen. L. ch. 87 are also involved.¹³² Next, 1985 Mass. Acts 384 added the proviso to the end of the first paragraph regarding numbered routes entirely contained in one municipality. Finally, 1989 Mass. Acts 360 added the penalty clause to the end of the second paragraph.

[B] Municipal Powers

After a road has been designated as scenic,¹³³ the planning board is delegated certain limited powers by the statute. Any "repair, maintenance, reconstruction or paving work" done with respect to the scenic road that entails cutting or removal of trees,¹³⁴ or tearing down or destruction of stone walls is subject to planning board review. A public hearing must be held on the application to cut trees or alter walls, after strict notice requirements have been met.¹³⁵

Although the statute is silent on point, the planning board presumably has the power to condition or deny an application to cut or remove trees or alter stone walls along a scenic road.

The relative obscurity of the statute often results in a failure to comply with

¹²⁹ The statute is silent as to a definition of the term "scenic road."

¹³⁰ In the rare case of a numbered route entirely within one municipality, even that road may be designated scenic, as long as no part of the route is owned or maintained by the Commonwealth. Mass. Gen. L. ch. 40, § 15C, ¶ 1.

¹³¹ Several towns have designated *all* roads as scenic. Leverett is an example.

¹³² See § 19.06.

¹³³ The statute does not indicate any procedures for such designation. Presumably, a town meeting or city council vote is required, with a simple majority sufficient for designation.

¹³⁴ The statute does not detail those trees worthy of protection. Some municipalities have specified that only trees of a certain caliper, at a specified height above ground level, are protected. Municipalities are advised to establish a policy as to those trees covered by the statute.

¹³⁵ The notice requirements are consistent with the requirement for a zoning hearing. See § 10 for a discussion of notice in this context.

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NONZONING LAND USE CONTROLS

§ 19.05[D]

its terms. Municipalities are advised to refer to Mass. Gen. L. ch. 40, § 15C in zoning and subdivision regulations to inform landowners of its jurisdiction.

In *Young v. Town of Royalston*,¹³⁶ the trial court ruled that the power of the selectmen to order the removal of trees pursuant to Mass. Gen. L. ch. 87, § 5 does not trump the planning board's authority to regulate scenic roads pursuant to Mass. Gen. L. ch. 40, § 15C. Both approvals are required where applicable.

[C] Exemptions

The statute regulates only "repair, maintenance, reconstruction, or paving work" that involves or includes the cutting of trees or alteration of stone walls. If the changes to the roadway do not implicate trees or stone walls, the statute is inapplicable.¹³⁷

Second, if the cutting of trees or alteration of stone walls does not involve changes to the road, the statute is not applicable. For example, the trimming of roadside trees for utility maintenance purposes is not within Mass. Gen. L. ch. 40, § 15C. However, such trimming might be covered by Shade Tree Act, Mass. Gen. L. ch. 87.

Third, trees or stone walls outside the limits of the road and its right of way are beyond the reach of the statute. The statute specifies that only changes "done with respect to" the scenic road is governed.

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[D] Judicial Review

The statute is silent on judicial review of a planning board decision to condition or deny an application to cut or remove trees, or to alter a stone wall, along a scenic road. Similarly, no provision of Mass. Gen. L. ch. 40, § 15C grants standing to nearby owners or property on the scenic road to contest the written consent of the planning board to alter such features.

In the absence of statutory guidance, judicial review of planning board decisions should be available pursuant to Mass. Gen. L. ch. 249, § 4, establishing an action in the nature of certiorari.¹³⁹ In the closely analogous realm of Mass. Gen. L.

¹³⁶ Super. Ct. 1999.

¹³⁷ Public safety, for example, is not matter for proper consideration. See *South Street Neighbors and Abutters Ass'n v. Ensminger*, 2 Mass. L. Rptr. 71 n.6 (Mass. Super. 1996). Accordingly, municipalities have adopted local curb cut ordinances or by-laws that require a permit for a street opening to create a driveway or subdivision road. Such regulations may also address the changes to the roadway itself by setting local standards. Typically, curb cut by-laws are adopted pursuant to Mass. Gen. L. ch. 40, § 21(1). See § 19.02.

¹³⁸ Trees or walls adjacent to the road or its right of way, but outside the fee or easement interest of the municipality, may nonetheless be addressed by zoning ordinance or by-law. Some towns (for example, Lincoln) have extended the reach of the statute in this manner.

¹³⁹ A planning board decision pursuant to Mass. Gen. L. ch. 40, § 15C is not properly reviewed under Mass. Gen. L. ch. 40A, § 17. See *South Street Neighbors & Abutters Ass'n v. Ensminger*, 2 Mass. L. Rptr. 71 (Mass. Super. 1996).

MASSACHUSETTS Land Use Monitor

REAL-TIME NEWS & COMMENTARY ON LAND USE & REAL ESTATE LAW

Cambridge Rezoning Survives Spot Zoning Challenge

By Richard Gallogly on July 5, 2012

In Farrington v. City of Cambridge (pdf), an “unpublished decision” issued under the court’s Rule 1:28, an Appeals Court panel recently affirmed a Land Court decision upholding a rezoning by the City of Cambridge. The rezoning included a zoning map revision and changes to

various dimensional requirements, all intended to enable Lesley University to move the newly-acquired Art Institute of Boston (AIB) to a Lesley-owned site in Cambridge. In connection with the rezoning, Lesley agreed to contribute \$500,000 towards streetscape improvements and other mitigation. Several abutters challenged the rezoning, arguing that it amounted to illegal “spot zoning.”

Spot zoning occurs when a municipality singles out a parcel of land for different zoning treatment than neighboring parcels (all) for the economic benefit of the landowner. However, just because the landowner realizes an economic benefit doesn't mean the rezoning is invalid. As the panel in Farrington notes, a spot zoning claim will fail unless the plaintiff can show that the rezoning is “arbitrary and unreasonable, or substantially

unrelated to public health, safety . . . or general welfare,” and bears no rational relation to the public good.

The evidence showed that, prior to the rezoning, Cambridge conducted a three-year planning process that identified numerous public benefits to moving the AIB to Cambridge. In light of this evidence, the panel affirmed the Land Court’s judgment that the rezoning was valid. The panel also rejected the plaintiffs’ claim that Lesley’s \$500,000 mitigation commitment turned the rezoning

TOWNS OF LEE-LENOX

MASSACHUSETTS

Office of the Building Commissioner

32 Main St, Lee, MA 01238

6 Walker St, Lenox, MA 01240

July 27th, 2020

Steven Garrity
Tom Garrity
LB Corporation
525 Woodlawn
Lee, MA 01238

RE: Rescinding violation of Town of Lee Zoning Bylaws (Chapter 199) at 525 WOODLAWN RD, Lee, MA 01238.

Review of the Town of Lee's assessors' database shows that you, as Steven Garrity, Tom Garrity and LB Corporation are the owner of the property at 525 Woodlawn Rd, Lee, MA, which is designated PARCEL 002.0/002.0 0000-0005.0. The 525 Woodlawn Road property is listed as a single-family dwelling located in the Conservation-Residential (CR) zoning district.

I am rescinding violation notice of June 17th, 2020 after consideration of Subchapter 9.1 Removal of Earth Materials, subparagraph (2).

Removal of earth materials in connection with municipal road construction is allowed by right pursuant to Subchapter 9.1(2) to the extent that earth is being removed to provide for the repurposing of road materials for town projects, including all municipal projects involving the Town of Lee or any other municipalities.

Respectfully,

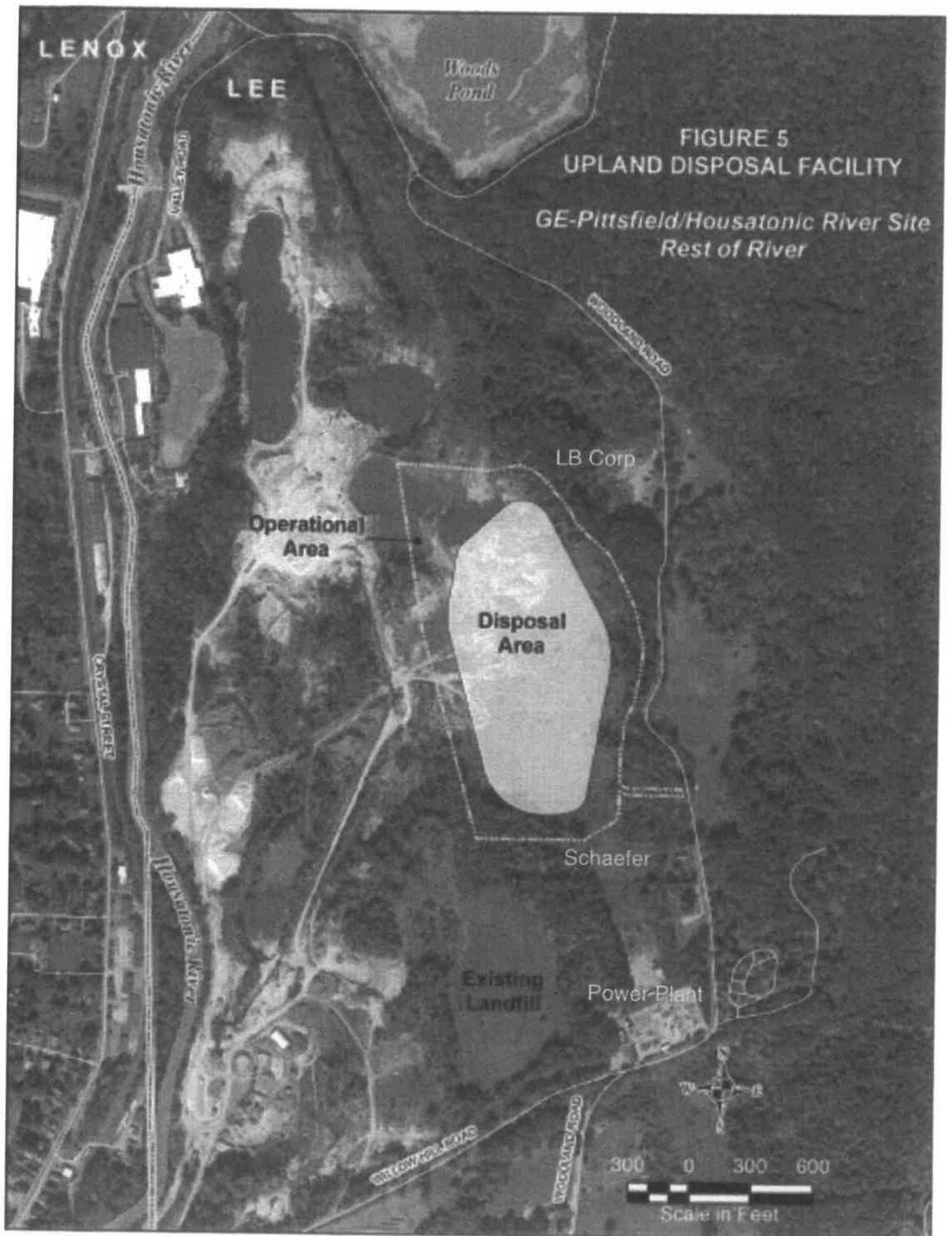


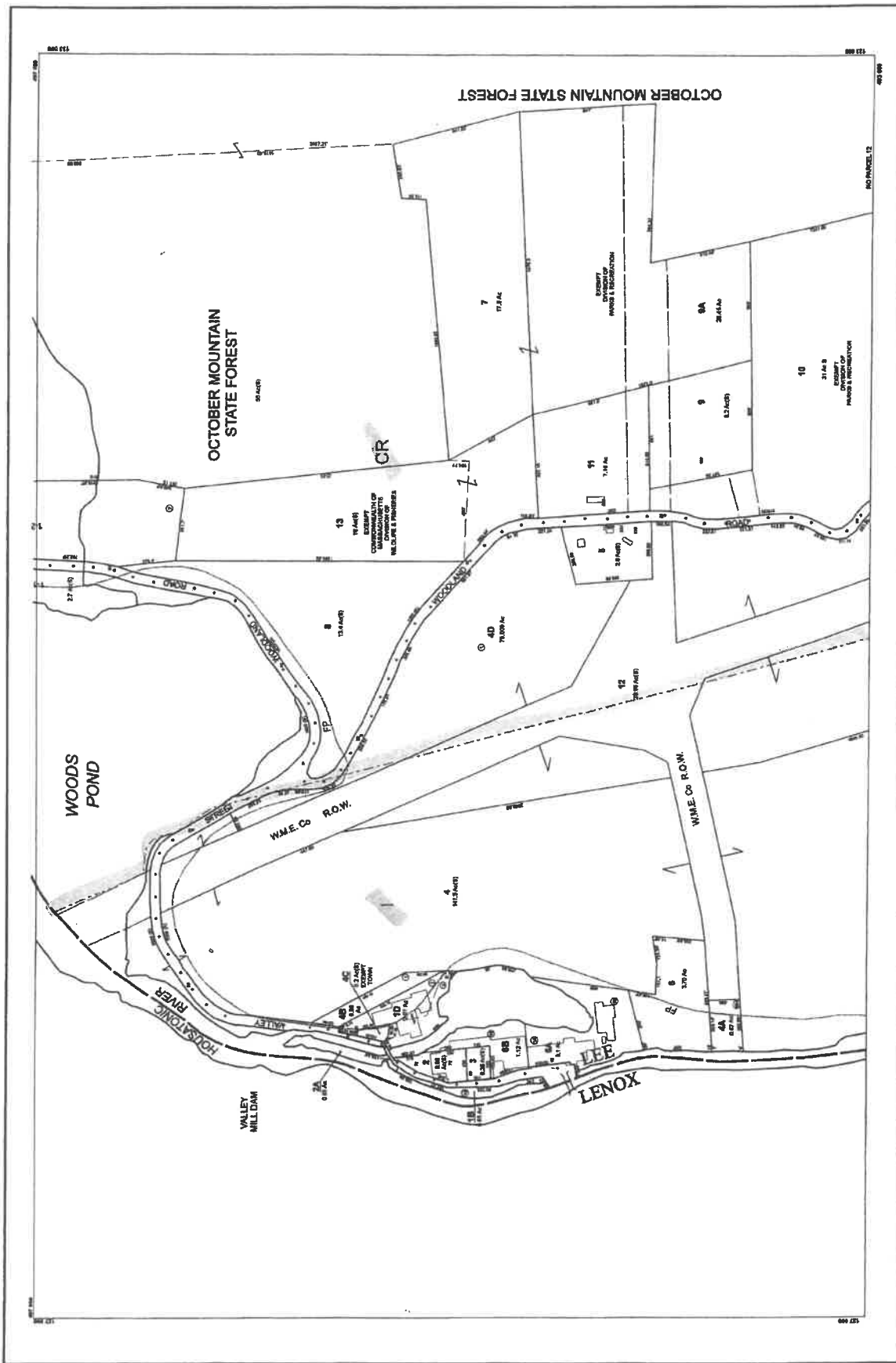
BJ Church
Building Commissioner
Zoning Enforcement Officer
Towns of Lee/Lenox

SAMPLE AG Response to Spot Zoning

Attorney General's Standard of Review. Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." *Amherst v. Attorney General*, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. *Id.* at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's bylaw.") Rather, in order to disapprove a by-law, the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws (emphasis added). *Id.* at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." *Bloom v. Worcester*, 363 Mass 136, 154 (1973) (emphasis added). "The legislative intent to preclude local action must be clear." *Id.* at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." *Connors v. City of Boston*, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted). The Attorney General also does not review by-laws for consistency with local law. See G.L. c. 40, § 32. When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he 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." *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." *Id.* at 51. "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.'" *Id.* at 51 (quoting *Crall v. City of Leominster*, 362 Mass. 95, 101 (1972)). A zoning by-law must be approved unless "the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." *Johnson v. Town of Edgartown*, 425 Mass. 117, 121 (1997). 3 C. Article 30 Does Not Clearly Violate the Uniformity Principle of G.L. c. 40A, §4. General Laws Chapter 40A, Section 4, embodies a "uniformity principle" for all zoning regulations: "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." Courts have interpreted this section to require that zoning regulations apply equally within a district: "The uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike . . ." *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 107 (1984) citing *Everpure Ice Mfg. Co. v. Bd. of Appeals of Lawrence*, 324 Mass. 433, 439 (1949), ("A zoning ordinance is intended to apply uniformly to all property located in a particular district ... and the properties of all the owners in that district [must be] subjected to the same restrictions for the common benefit of all.")). In evaluating whether different treatment violates the uniformity principle, "[p]rimary attention is . . . focused on the reasonableness of such classification." Williams, *American Land Planning Law* 32:1 (Rev. ed. 2003). "[A] classification as the means for attaining a permissible end is not to be declared invalid 'if any state of facts reasonably can be conceived that would sustain it.'" *Caires v. Building Comm'r of Hingham*, 323 Mass. 589, 596-97 (1949) (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)). Spot zoning only exists when there is a "singling out of a particular parcel for different treatment from that of the surrounding area, producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner." *National Amusements, Inc. v. Boston*, 29 Mass. App. Ct. 305, 312 (1990), citing *Shapiro v. Cambridge*, 340 Mass. 652, 659 (1960). Based upon the documents submitted to us by the Town Clerk, pursuant to G.L. c. 40, § 32, we cannot

conclude that the Town's vote under Article 30 lacks a legitimate planning purpose, or is "arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." *Johnson v. Town of Edgartown*, 425 Mass. 117, 121 (1997). On the contrary, the documents submitted by the Town reflect that the vote under Article 30 does not change the uses that are allowed by right or by special permit in the District. Rather, Article 30 extends the boundaries of the District and establishes a new method for regulating dwelling height. After the public hearing required by G.L. c. 40A, § 5, the Planning Board voted unanimously to support the amendments in order "to allow reasonable and equitable flood hazard mitigation for properties in the flood plain." (Report of Planning Board to Board of Selectmen dated March 10, 2016). The stated purposes of the Conservancy District are to preserve and maintain the ground water supply on which the inhabitants depend; to protect the purity of coastal and inland waters; to protect the public health and safety; to protect persons and property from the hazards of flood and tidal waters; and to preserve the Town's natural resources. (Section IV.A.1). The amendments to the Conservancy District adopted under both Article 29 and Article 30 appear to be reasonably related to these legitimate planning purposes. Thus, it appears on this record that the amendments adopted under Article 30 can be viewed as furthering the public welfare as part of a legitimate planning process. For this reason, we cannot conclude that Article 30 constitute "spot zoning" in violation of G.L. c. 40A, § 4. 3





THIS MAP IS FOR ASSESSMENT PURPOSES. IT IS NOT VALID FOR LEGAL DESCRIPTION OR CONVEYANCE.

THE HORIZONTAL DATUM IS THE MASSACHUSETTS STATE PLANE.

VERTICAL DATUM IS THE MEAN SEA LEVEL.

ACCURACY: ± 0.10' HORIZONTAL AND ± 0.10' VERTICAL.

COMPILED BY: CAI Technologies

COMPILED DATE: APRIL 1, 2020

REVIEWED & REPRINTED BY:

CAI Technologies

11 Pioneer Road, Suite 100, Needham Heights, MA 02459

TEL: 781.435.1234 FAX: 781.435.1235

WWW.CAI-TECH.COM

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SCALE: 1" = 200'

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METERS

REVIEWED TO: JANUARY 1, 2020

INDEX DIAGRAM

PROPERTY MAPS

LEE

MASSACHUSETTS

MAP NO. **2**

