

MEMORANDUM

TO: Andrew Scribner-MacLean, Assistant Town Administrator

FROM: Jonathan Witten, Huggins and Witten, LLC, acting as special counsel

DATE: February 17, 2015

RE: 129 Parker Street

COPY: Kevin Sweet, Town Administrator
William Nemser, AICP, Town Planner

You have asked for my opinion as to the relationship between the NBOD provisions of the Maynard Zoning Bylaw (Section 9.3 et seq.) and the Memorandum of Agreement executed by and between the Town of Maynard and 129 Parker Street, LLC.

Questions Presented

1. What is the relationship between the NBOD provisions of the Maynard Zoning Bylaw (§9.3 et seq.) and the Memorandum of Agreement executed by and between the Town of Maynard and 129 Parker Street, LLC?
2. Which document controls in the event of a conflict between the NBOD provisions of the Maynard Zoning Bylaw and the Memorandum of Agreement?

Relevant Facts

1. On June 12, 2006, Special Town Meeting voted to adopt Section 6E, et al. of the Zoning Bylaw, the same entitled “Neighborhood Business Overlay District (NBOD)”. (The NBOD was subsequently recodified and is currently found at Section 9.3 et seq. of the Zoning Bylaw).
2. Section 9.3.2 of the Zoning Bylaw states in relevant part, “The NBOD is an overlay district superimposed over rather than replacing, the applicable underlying zoning districts...Except as provided in Section 9.3, the NBOD does not in any manner alter or remove the zoning rights permitted in the underlying base zoning district(s). Nothing contained in Section 9.3 shall prohibit or limit uses otherwise permitted by right or Special Permit in the base zoning district(s)”.
3. On June 12, 2006, Special Town Meeting adopted Section 10.4 of the Zoning Bylaw and amended the Zoning Map to designate 58 acres of land off Parker Street as NBOD.

4. The 58 acres of land off Parker Street, zoned as NBOD by Special Town Meeting (June 12, 2006), included all of the land identified on the Maynard Assessor's Maps as Map 25, Parcel 152, the same included on Maps 24, 25, 28 and 29.
5. On or about December 20, 2006, the Maynard Board of Selectmen and 129 Parker Street, LLC executed the "129 Parker Street Memorandum of Agreement" ("MOA").
6. The MOA contains a "Description of Project and Concept Plan" and incorporates a "Proposed Concept Plan" dated December 12, 2006, revised through December 20, 2006 (Page 2, ¶1).
7. The land identified and specified in the MOA includes the entirety of the 58 acres zoned by Special Town Meeting (June 12, 2006) as NBOD.
8. On February 5, 2007, Special Town Meeting voted to approve the above noted December 12, 2006 Concept Plan, as revised.
9. On September 8, 2009, the Maynard Planning Board approved the Site Plan and Special Permit for the development of 58 acres off of Parker Street consistent with the 2006 MOA and the Concept Plan as approved by Town Meeting in February 2007. (See Page 2, ¶I of the Planning Board's Site Plan and Special Permit decision).
10. The MOA "runs with the Property and shall be binding upon and inure to the benefit and burden of the Town and the Owner and its successors in interest and assigns and all persons claiming any rights under the Owner" (Page 10, ¶F).
11. The MOA contains an acknowledgement that "The Parties agree that any dispute that may arise regarding the MOA shall be resolved under the laws of the Commonwealth of Massachusetts in a Massachusetts Court" (Page 11, ¶I(i)).
12. Counsel for the present applicant has represented on no less than two occasions that he acknowledges that the MOA "is in full force and effect".

Discussion

1. What is the relationship between the NBOD provisions of the Maynard Zoning Bylaw (Section 9.3 et seq.) and the Memorandum of Agreement executed by and between the Town of Maynard and 129 Parker Street, LLC?

The 2006 MOA is a legally binding contract unless and until revised or repealed (see MOA, Page 11, ¶I(ii)). At issue is the interaction between the MOA—which identifies a

specific project by density and design—and Section 9.3 of the Zoning Bylaw that establishes the NBOD as a development option and not a requirement.

The legislative history of the NBOD and Maynard Town Meeting’s approval of the Memorandum of Agreement is well documented.

Town Meeting adopted the NBOD Zoning District in 2006 and the Attorney General subsequently approved the same. Thereafter, in 2007, Town Meeting approved, in accordance with the NBOD Zoning District and the Memorandum of Agreement executed by the parties (December 20, 2006), the development plan referenced and incorporated into the Memorandum of Agreement.

The NBOD authorized the execution of the MOA and unless modified or rescinded, the MOA binds the developer, now and in the future, to the terms and conditions of the MOA.¹

The Memorandum of Agreement memorializes the contractual commitment of the parties for the development of the 58 acres off Parker Street. Payments required by the MOA have been made (see MOA, Page 2, ¶2 and Page 3 ¶3) and the Town has cooperated in the various attempts to implement the project (see MOA, Page 9, ¶6(A)).

2. Which document controls in the event of a conflict between the NBOD provisions of the Maynard Zoning Bylaw and the Memorandum of Agreement?

But for the execution of the MOA, it could be correctly argued that the NBOD serves as an option for a developer seeking to benefit from the overlay’s allowance of certain uses and development densities. However, in this instance and based upon the facts presented above and the clear language of the MOA—a legally binding contract—it is the terms of the MOA that control.

As an option, and not a requirement, a property owner within the NBOD could opt to avail itself of the Zoning Bylaw’s underlying uses, including those “by right” and those pursuant to receipt of a special permit. Moreover, the NBOD allows for a developer to enter into an Agreement with the Town (followed by the approval of a “Concept Plan” by Town

¹ Page 10, ¶E of the MOA, entitled “No Obligation to Build”, states, “Neither the execution of this MOA, a development agreement, nor the approval of the Concept Plan shall create any obligation of the Owner to construct all or any portion of the Project.” Thus while the developer of the 58 acres cannot be forced to construct the approved project, it does not follow that the developer can choose, without the Town’s consent, to build a portion of the project consistent with the MOA and another portion of the project inconsistent with the MOA. The same would result in a breach of the clear terms of the MOA.

Meeting”, see §9.3.3 of the Zoning Bylaw), which preserves some underlying uses and contracts (through an MOA) for permission to develop others.

In the present matter however, there is no indication that the parties intended on preserving any of the underlying uses or structures found in §9.3.3. of the Zoning Bylaw. Rather, and quite clearly, the parties memorialized and Town Meeting approved, the project to be developed on the 58 acres, without reservation of other uses or structures and without preservation of the underlying zoning then, or in the future.

The MOA is replete with acknowledgements that it—the MOA—controls the development of the 58 acres off of Parker Street with no reservation of rights to develop the property pursuant to the underlying uses allowed “by right” or by special permit. The parties could have, but did not, preserve development options of the 58 acres to include permitted underlying uses. Rather, the parties reached an agreement on the MOA that is unambiguous: the 58 acres will be developed according the terms of the MOA. Moreover, the parties have ratified the MOA through past actions and counsel for the applicant has stated his belief that the MOA is in “full force and effect”. As written, and unless and until modified or dissolved, the MOA governs the development of these 58 acres.

While the MOA contains a clause entitled “No Obligation to Build”, this is distinguished from a provision allowing the developer to pick and choose what zoning applies to the 58 acres in question.

“No Obligation to Build” is a standard contractual provision of a development agreement that, logically, does not force a developer to build a particular project and reflects the realities of the marketplace. But removal of a mandatory obligation to construct the project anticipated by a contract, or in this case, the MOA, does not include the authority to simply ignore the provisions of the ratified contract without breaching the same.

Whereas in this case, counsel for the developer has acknowledged the validity of the MOA and the parties have performed accordingly, the MOA remains in full force and effect and controls the development of the 58 acres off Parker Street.

Conclusion

The parties to the 2006 MOA agree that the MOA is in full force and effect. Absent a modification or rescission of the MOA, the MOA controls the development of the relevant 58 acres off of Parker Street.