

# Exaction, Extortion or Illegal? Mandatory Dedication of Open Space Parcel Held Unlawful

by Richard D. Vetstein, Esq. of the [Vetstein Law Group, P.C.](#), Framingham, MA

## Score One For Property Rights Advocates

Massachusetts has the well-deserved reputation of being one of the most challenging states to permit a new housing development due to its myriad of rules, regulations and zoning by-laws. Real estate developers seeking to build a new subdivision typically go through an arduous permitting process before the local Planning Board, Board of Selectmen, Board of Health, Conservation Commission, Zoning Board of Appeals and other town boards.

### Open Space Set-Asides

In what has become very much *en vogue* and required in the last decade are towns requiring that the developer dedicate or deed some of its developable land for open space and recreational purposes. In the recent case of *Collings v. Stow Planning Board* (link below), the Appeals Court ruled that the planning board went too far in requiring that the developer set aside almost 6 acres of a 5 lot subdivision for open space and “environmentally significant areas with views.”



Now usually, the developers don't like to sue town planning boards over these type of exactions or “give and takes” as they want to get their projects approved and “play ball” with the towns. Apparently, the Collings family stood their ground in this case and won a decent victory for other developers who are less inclined to sue town boards.

### Ruling: Open Space Requirements Must Be Tied to Legitimate Subdivision Concerns

Generally, a planning board condition requiring the dedication of open space which in effect reasonably limits the number of buildable lots, imposed out of safety concerns arising from the length of the street, would not be illegal. The Appeals Court found that the Stow planning board did not limit itself to a reasonable open space requirement but went much farther and required dedication of open space for public use, including the actual transfer of that open space to the

town or a land trust. The court ruled that the exactions also provided no additional benefit above and beyond the open space requirement that relate to the safety concerns that are the subject of the subdivision law and the street length requirements. “Although a planning board’s authority under the subdivision control law certainly encompasses, in appropriate circumstances, requiring open space, it does not extend to requiring the transfer of that open space to the public for reasons unrelated to adequate access and safety of the subdivision without providing just compensation,” the Court held.

This case is a wake-up call to town planning boards who may be a bit power-hungry.

[Collings v. Planning Board of Stow](#)