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# Challenges to Off-Site Condition Requirements

By **Anthony S. Guardino**

Local governments typically impose conditions on developers and property owners before they are willing to approve a development project. When those conditions relate to the specific property that is the subject of an application for a permit or zoning change, municipalities have a great deal of room to act. However, when those conditions relate to property other than the particular property that is the subject of an application, their authority is significantly reduced. Consider a decision issued in late January by the Supreme Court, Orange County, in *Matter of Application of Enlarged City School District of Middletown v. City of Middletown*.[1]

The case arose after the Enlarged City School District of Middletown decided it had to construct a new elementary school building to accommodate an expected surge in elementary school enrollment within the district. The district planned to construct the new school on a site adjacent to another of its buildings, which it proposed to demolish. Given the proximity of the proposed building to the building it intended to demolish, the district's plans provided that the proposed building would be connected to the existing sewer pipeline that served the other building.

As a precondition to the city's consideration of the district's application for a city permit to connect the proposed building to the city's sewage collection system, the city demanded that the district reconstruct, repair and/or replace approximately 3,300 feet of sewer pipeline that extended well beyond the district's property and that serviced both private individuals and developments.

ANTHONY S. GUARDINO *is a partner with Farrell Fritz in Uniondale, Long Island. He can be reached at aguardino@farrellfritz.com.*

Asserting that the city lacked the authority under state or local law to require the district to reconstruct, repair or replace the pre-existing sewer line that serviced not only the district, but numerous private city residents as well, the district brought an action against the city seeking a declaration that the city's refusal to consider the district's application unless the district agreed to fund the improvements to the sewer line was unlawful, arbitrary and capricious, and an abuse of discretion.

The court agreed with the district. In the court's view, it was not a "reasonable condition" upon the district's "development of land" for the city to impose a sewer pipeline obligation on the district, given that the pipeline extended "well beyond" the district's property and serviced "both private individuals and developments." The court explained that the city could impose certain conditions before granting approval of a development project, but that it could not require the district to make "off-site improvements to public infrastructure."

Although a town planning board may attach conditions to its approval of a site plan, its power to do so was limited in that any condition must be reasonable and must relate only to the proposed use of the property.

In this case, the court ruled, the city's authority was limited to imposing a "hookup fee" based upon the cost of repairing, reconstructing or replacing the sewer line, provided that these improvements were necessitated by the proposed building, as opposed to future growth and development in the city generally. Moreover, any such costs would have to be proportionate to the district's usage of the sewer line.

### Established Law

To a large extent, the court's decision in the *Middletown* case is not surprising. Other courts over the years have invalidated conditions requiring off-site improvements,[2] and an informal opinion of the New York State Attorney General in 1998 explained the general rule.[3] As the opinion explained, the Long Island Town of Brookhaven inquired as to whether it could require a developer of a planned retirement community (PRC) to include transportation for PRC residents to off-site shopping and/or medical facilities in its site plan for the development.

The town explained that it operated a jitney service to provide transportation for the elderly to medical appointments within the town limits. However, the town indicated that it was concerned that an influx of PRCs within the town might put a strain on that service and prevent the town from providing all of the needed transportation. Accordingly, it inquired whether it could amend its zoning law to include transportation for PRC residents to off-site shopping and/or medical facilities as one of the "required site plan elements" for site plan approval or whether site plan approval might be conditioned upon the provision of such transportation.

The Attorney General explained that although a town planning board may attach conditions to its approval of a site plan, its power to do so was limited in that any condition must be reasonable and must relate only to the proposed use of the property. According to the Attorney General, those conditions might properly relate to fences, safety devices, landscaping, screening and access roads relating to period of use,

screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area. The Attorney General was quite clear, though, that a town planning board "may not require an off-site improvement as a condition of approval."

The Attorney General therefore concluded by declaring that the provision of transportation for PRC residents to off-site shopping and/or medical facilities was an off-site condition unrelated to the proposed use of the property, and the town could not condition site plan approval upon the provision of such transportation.

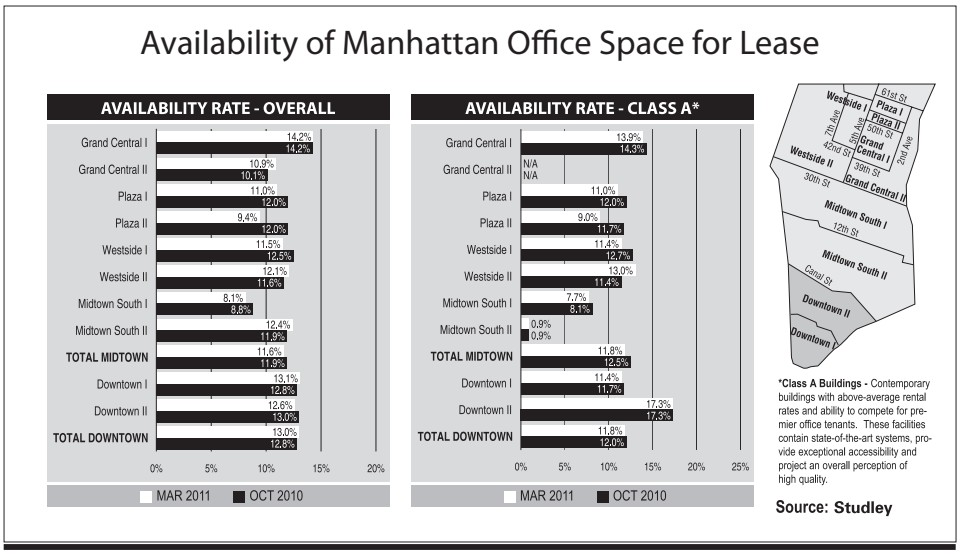
### Safety Concerns

A 1977 decision by a Suffolk County trial court illustrates that even safety concerns are insufficient to alter the general rule.[4] The case was brought by the owner of real property in the Town of Huntington after the Huntington Town Planning Board approved the requested subdivision but conditioned its approval upon the developer agreeing to construct approximately 1,150 linear feet of curb and sidewalk along the southerly side of a state road. The planning board said that it added this requirement to ensure the "safety" of the children living in the subdivision who would walk to the local public school.

The developer challenged the condition in court. Its safety expert testified that the sidewalk, rather than serving as a safety factor, might create an "attractive hazard" for the school children. The developer also argued that even if it agreed to install the sidewalks, it was unable to comply with the planning board's requirements because of the refusal of the State Transportation Department to issue a permit. The court recognized these concerns but then declared that in any event the authority of a town planning board to require the construction of curbs and sidewalks as a condition precedent to approving a subdivision was limited to improvements of streets "actually in the subdivision" and did not extend to state highways that might be referred to but that were not part of the filed map.

### Annulments

Notwithstanding this case law, local governments still frequently require off-site improvements. Developers may accept these conditions rather than challenge them in order to move their projects forward. But, as illustrated in another recent case, *Johnston v. Town Board of Brookhaven*,[5] a challenge by another party—such as a neighboring property owner—to the decision of a local government to approve a property owner's application conditioned on an off-site improvement can lead to the entire approval being annulled and the property owner being pushed back to step one of the development process.




The case arose when a neighboring property owner brought an action seeking to overturn a town board's conditional approval of a developer's application to rezone certain property. The court rejected a number of grounds asserted by the neighboring property owner, including denial of due process based on failure to receive notice of the zone change applications and conflict of interest claims with respect to the then-town clerk, but it upheld a claim by the property owner that the planning board had acted improperly under the State Environmental Quality Review Act, or SEQRA. Moreover, the court decided that the town board's imposition of a condition requiring that the developer establish a temporary septic system off-site, on town-owned property, could not stand because it was "outside the proposed site." The court therefore vacated the site plan approval.

### Impact Fees and Exactions

Off-site conditions come in other names, such as "impact fees" or "exactions," but courts typically handle them in the same way. A decade ago, for example, the Appellate Division, Third Department,[6] rejected efforts by the Town of Clifton Park Water Authority to impose "source" and "storage" fees on two newly constructed office buildings. The buildings' owners had argued that the fees actually were an invalid tax, and the Appellate Division agreed. It added that the law did not permit a municipality to charge "newcomers" an impact fee to cover expansion costs of an existing water facility absent a demonstration that such a fee was necessitated by the particular project (as opposed to future growth and development in that municipality generally) or a demonstration that the newcomer would be primarily or proportionately benefitted by the expansion. However "unfair" to existing residents, the Third Department concluded, the law did not permit "charging a fee only to newcomers to equalize the financial burden between them and long-time residents who have paid for an existing infrastructure."[7]

In practice, local governments in many cases will continue to attempt to impose off-site conditions on developers before approving their land use proposals and these improper conditions often will go unchallenged. Instead, developers generally will absorb the costs of the off-site improvements in the interest of moving their projects forward. However, in cases where these conditions are challenged, courts are quite willing to strike them down.

1. 2011 N.Y. Misc. Lexis 587 (Sup. Ct. Orange Co. 2011).
2. See, e.g., *Matter of Sepco Ventures, Ltd. v. Planning Board of the Town of Woodbury*, 230 A.D.2d 913 (App. Div. 2d Dept. 1996) (planning board without authority to require improvements to roads off-site); *Matter of Peckham Industries Inc. v. Ross*, 61 Misc. 2d 616 (Sup. Ct. Orange Co. 1970) (planning board may not require that petitioner improve an existing road that was outside the proposed site).
3. Informal Opinion No. 98-15, 1998 N.Y. Op. (Inf.) Att'y Gen. 1041.
4. *Valmont Homes Inc. v. Town of Huntington*, 89 Misc. 2d 702 (Sup. Ct. Suffolk Co. 1977).
5. 11 Misc. 3d 1092A (Sup. Ct. Suffolk Co. 2006).
6. *Matter of Phillips v. Town of Clifton Park Water Authority*, 286 A.D.2d 834 (3rd Dept. 2001).
7. The Court of Appeals, in *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372 (1989), had the opportunity to decide whether local impact fees were per se invalid. Instead the Court ruled narrowly that a transportation impact fee enacted by the Town Board of the Town of Guilderland was preempted by the general state laws regulating the funding of roadway improvements, and it declined to resolve the broader question. Accord, *Home Builders Ass'n of Central New York v. County of Onondaga*, 151 Misc. 2d 886 (Sup. Ct. Onondaga Co. 1991) (comprehensive scheme regulating sewer districts preempts local law imposing impact fees for new sewer connections).