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Parkland Reservation: The 'Findings' Requirement

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New York law allows local governments to require that an applicant for a residential subdivision or site plan approval set aside land for park and recreation purposes or pay a fee in lieu thereof to be used for park and recreation purposes, as a condition of approval.[1] The statutes, however, specifically require that before the requirement for land or fees can be imposed, the municipality first must find that (1) the new development creates the need for additional recreational facilities, and (2) the existing recreational facilities in the municipality are not sufficient to accommodate the additional demand.

Municipalities frequently impose such fees without making the required findings, which have led a number of courts over the years to invalidate their decisions. Moreover, because the fees are a form of an "exaction," a local government's failure to make the required findings very well may violate the "takings" rule announced by the U.S. Supreme Court in its *Nollan* and *Dolan* cases,[2] as amplified by its recent ruling in *Koontz v. St. Johns River Water Management District*.[3]

This column reviews the New York statutes—in particular, the Town Law and Village Law—allowing for the imposition of these fees, recent court rulings on the subject, and the implications of the U.S. Supreme Court "takings" decisions on this area.

The Law

Town Law §277(4) and Village Law §7-730(4), titled, "Reservation of parkland on subdivision plats containing residential units," provide in subsection (a) that before a town planning board may approve a subdivision containing residential units, the subdivision must show, when required by the board, a park or parks suitably located for playground or other recreational purposes. Subsection (b) adds, however, that land for park, playground, or other recreational purposes may not be required until the planning board has made a finding that a proper case exists for requiring that a park or parks be suitably located for playgrounds or other recreational purposes within the town. This subsection also provides that these findings "shall include an evaluation of the present and anticipated future needs for park and recreational facilities in the town based on projected population growth" to which the particular subdivision will contribute.

Then, subsection (c) provides that if a planning board makes a finding that the proposed subdivision presents a proper case for requiring a park or parks suitably located for playgrounds or other recreational purposes, but that a suitable park or parks of adequate size to meet the requirement cannot be properly located in the subdivision, then the planning board may require a sum of money in lieu thereof, in an amount to be established by the town board. In making this suitability determination, the planning board is obligated to assess the size and suitability of lands in the subdivision that could be possible locations for park or recreational facilities, as well as practical factors including whether there is a need for additional facilities in the immediate neighborhood. Moreover, any monies required by the planning board in lieu of land for park, playground, or other recreational purposes must be deposited into a trust fund to be used by the town exclusively for park, playground, or other recreational purposes, including the acquisition of property.

Town Law §274-a(6) and Village Law §7-725-a(6), which govern site plans, contain similar language that permits boards to require a parkland set aside or payment in lieu in connection with residential site plans, provided that the proposed development is not located within an approved subdivision for which a set aside or payment for park and recreation purposes was previously made.

As the New York Court of Appeals explained nearly 25 years ago in *Matter of Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*,[4] the law gives a planning board a "planning control device to be used as a means of reserving lands needed by the broader community for park and recreational purposes." The court added that the law was a "legislative reaction" to the threatened loss of open land available for park and recreational purposes resulting from the process of development in suburban areas and the continuing demands of the growing populations in such areas for additional park and recreational facilities. The park and recreational needs that it was designed to meet were those of the town or the community at large, not simply the isolated needs within the subdivision itself, the court stated.

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Court Decisions

Courts in New York take the "findings" requirement seriously. For example, in *Matter of Sunken Pond Estates v. O'Dea*,[5] the planning board in the Long Island town of Riverhead conditioned approval of a condominium map on the payment of $228,000 to the town for park, playground, and other recreational purposes, and the applicant challenged it in court.

The Appellate Division, Second Department, ruled that the town was not entitled to have the petition dismissed because the record was insufficient to determine whether it had made the specific findings required by the Town Law prior to conditioning approval of the condominium

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map on the payment of the money. As such, the Second Department explained, it could not be determined whether the town's decision had a rational basis, or was arbitrary and capricious. It then remitted the case to the Supreme Court, Suffolk County.

More recently, in *Matter of Pulte Homes of New York v. Town of Carmel Planning Board*,[6] the planning board for the town of Carmel directed an applicant to pay a recreation fee as a condition of site plan approvals for a senior citizen housing development. The applicant went to court but the Supreme Court, Putnam County, denied the petition and dismissed the proceeding. The applicant appealed to the Second Department.

The appellate court reversed the lower court's judgment—and annulled the planning board's imposition of the recreation fee. In its decision, the court explained that the planning board had the authority to impose a recreation fee as a condition to site plan approval—but only as long as certain findings had been made prior to the imposition of the fee. It then found that the planning board had made no "individualized consideration" prior to imposing the recreation fee and had made no specific findings as to the recreational needs created by the applicant's proposed improvements.

Accordingly, it concluded, the Supreme Court should have determined that the contested recreation fee was invalid, and should have remitted the matter to the planning board for further consideration as to whether a recreation fee was appropriate, the amount of the fee, if any, and to make the specific findings that would support such a fee.

Even the New York Court of Appeals has opined on this. In *Matter of Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*,[7] the owner of a 227-acre parcel in the upstate town of Lewisboro sought approval from the town planning board of a proposed conventional subdivision. Neither the owner's original proposal nor any of the subsequent revisions made provision for land to be reserved for park, playground, or other recreational use.

The planning board conditioned its approval on the owner providing for the perpetual reservation of 60.2 acres of open space and paying a "recreation fee" in accordance with the town's land development regulations. The owner challenged the recreation fee in court, and the dispute reached the Court of Appeals.

The court ruled that the condition imposing the recreation fee had to be annulled because the planning board had not made the findings necessary to trigger its authority to require a payment in lieu of setting aside park or recreation lands under the Town Law. The court specifically rejected the argument that the planning board's action imposing the payment requirement signified "its intent to so find," thereby making findings unnecessary. The court declared that the obligation to make findings was "mandatory," explaining that the Legislature could not have intended to give planning boards "unrestricted power to impose at whim on developers the requirement that they set aside lands or pay money in lieu thereof."

The court then explained that before a planning board may exercise its authority to impose a payment requirement in lieu of setting aside lands under the Town Law, it must first determine whether there was a "proper case" for requiring the developer to show parklands "suitably located for playground or other recreational purposes" within the boundaries of the subdivision. The court noted that this determination required an evaluation of the present and anticipated future needs for park and recreational facilities in the town based on projected population growth "to which, of course, the particular subdivision development will contribute."

Local governments that seek to shift the costs of providing park and recreational facilities from taxpayers to residential developers by conditioning subdivision and site plan approvals on payments in lieu of parkland should be able to steer clear of a judicial challenge by carefully adhering to the requirements of the New York statutes.

Once a planning board determined that the town needed additional park and recreation space, it had to decide whether to make the developer provide such space within the proposed development (thus reducing the number of permitted lots in the subdivision) or pay money as a substitute. This determination, the court pointed out, entailed an assessment of the size and suitability of any areas within the subdivision that could be possible locations for park and recreation facilities as well as the consideration of practical factors including whether there was a need for additional facilities in the immediate neighborhood.

The court then ordered the case remanded to the planning board.

The Fifth Amendment

Now, in addition to the "findings" requirement under New York statutory law, and, indeed, under New York case law,[8] these kinds of conditions or fees are subject to analysis under the Fifth Amendment to the U.S. Constitution.

The U.S. Supreme Court has developed a standard for evaluating takings claims arising in the context of "exactions," or land use decisions conditioning approval of development on the dedication of property to public use.[9] Under what has become known as the Nollan-Dolan test, a reviewing court must assess whether an "essential nexus" exists between the governmental interest advanced as the justification for the restriction and the condition imposed on the property owner. Where a sufficient nexus is present, the degree of the exactions demanded must have a "rough proportionality" to the projected impact of the applicant's proposed development. The Koontz decision makes clear that "monetary exactions" must satisfy the requirements of *Nollan-Dolan*.

Fortunately, local governments that seek to shift the costs of providing park and recreational facilities from taxpayers to residential developers by conditioning subdivision and site plan approvals on payments in lieu of parkland should be able to steer clear of a judicial challenge by carefully adhering to the requirements of the New York statutes. Indeed, if a board evaluates the municipality's present and future needs for park and recreational facilities and then makes an affirmative finding that the new development creates a need for additional facilities, it should be able to establish a sufficient nexus for the payment. To comply with the rough proportionality requirement, the board need only seek a payment that is commensurate with the demand that the new development will create for additional park and recreational facilities.

Since the requirements under New York law mandating specific findings essentially have become federalized by the U.S. Supreme Court's takings decisions, local governments that merely impose statutory park and recreation fees as a matter of course are cautioned to review their laws and their practices, because those municipalities that simply impose these fees, without making the necessary findings, may now find their decisions challenged in federal court.

1. See, e.g., Town Law §§277(4) and 274-a(6); Village Law §§7-730(4) and 7-725-a(6).

2. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

3. 133 S.Ct. 2586 (2013). See Anthony S. Guardino, "U.S. Supreme Court Divides Sharply in Koontz Ruling," NYLJ (July 24, 2013).

4. *Matter of Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*, 76 N.Y.2d 460 (1990).

5. 11 A.D.3d 471 (2d Dept. 2004).

6. 84 A.D.3d 819 (2d Dept. 2011).

7. Supra, n. 4.

8. See, e.g., *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 (1989).

9. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).