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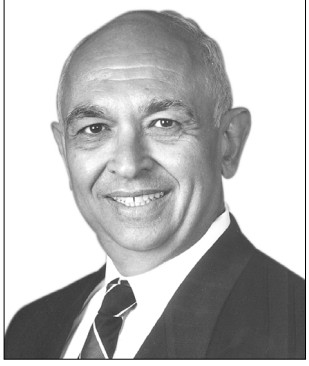
Money for Parks

The Court of Appeals Upholds 'In Lieu Of' Fees

ZONING AND LAND USE PLANNING



JOHN M. ARMENTANO

The law in New York permits local governments to demand that developers of residential subdivisions include land for parks or other recreational purposes in their plats.[1] The Legislature adopted this statutory requirement because it was concerned about 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.[2]

New York law also provides that a planning board may require a monetary payment in an amount to be established by the municipality if the planning board determines that, although the subdivision is a "proper case" for requiring park dedication, a suitable park or parks of adequate size to meet the requirement cannot be properly located on such subdivision plat.[3] Monies paid "in lieu of" a parkland set-aside must be deposited into a trust fund for use exclusively for recreational purposes.

The U.S. Supreme Court has developed a standard for courts to use when examining whether these types of "exactions" — land use decisions conditioning approval of development on the dedication of property (or money) to public use[4] — violate the Takings Clause of the Fifth Amendment of the U.S. Constitution.[5] As the Court has explained, a reviewing court must assess whether an "essential nexus" exists between the "legitimate state interest" advanced as the justification for the restriction and the condition imposed on the property owner.[6] Where such a nexus is present, the "degree of the exactions demanded" must have "the required relationship to the projected impact of [the applicant's] proposed development."[7]

In *Dolan v. City of Tigard*, the Supreme Court analyzed whether a municipality had made sufficient findings to support its decision to condition the applicant's expansion permit on a dedication of property for flood control and recreational purposes.

'Rough proportionality'

After considering the various standards adopted by states, the Court determined that a "rough proportionality" test would "best encapsulate what we hold to be the requirement of the Fifth Amendment."[8] It then held that, although "[n]o precise mathematical calculation is required," the dedication must be "related both in nature and extent to the impact of the proposed development."[9]

Future challenges to these types of fees are much less likely to succeed. Moreover, applicants can be required to pay governments' consulting fees. The case is a major victory for governments.

Relying upon *Dolan*, a developer filed an action in Supreme Court, Orange County, contending that a town code provision was a "taking" that violated the Constitution and the *Dolan* standard. The code both established an "in lieu of" fee of $1,500 per lot for subdivisions consisting of five or more lots and required applicants to pay consulting fees incurred by the town in reviewing the application. Recently, in *Twin Lakes Development Corp. v. Town of Monroe*,[10] the New York Court of Appeals rejected the developer's challenge and approved the exaction, the amount of the exaction, and the consulting fees.

As a result of the Court's decision, future challenges by other developers in New York to these types of "in lieu of" fees are much less likely to succeed. Moreover, the Court has confirmed that local governments may require applicants to pay the governments' consultants' fees, which include engineering, planning, and legal fees as well as clerical costs in the processing and reviewing of an application. The case is a major victory for governments.

The *Twin Lakes* case arose when Twin Lakes Development Corp., the owner of a 28-acre parcel in the Town of Monroe, applied to the town planning board for approval to subdivide its property into 22 residential lots. The board considered the application, undertaking a State Environmental Quality Review Act analysis that culminated in a Final Environmental Impact Statement. As required by Town Code §26B-2 (A)(11), Twin Lakes periodically deposited funds into an escrow account from which the town paid the consulting costs it incurred in conjunction with its review of the Twin Lakes application.

Ultimately, the board adopted a "Resolution of Conditional Final Approval" that imposed several conditions on Twin Lakes. In particular, it mandated a "payment in lieu of parkland dedication to the Town of Monroe" for each of the lots created and reimbursement for any outstanding consulting fees.

Twin Lakes paid $33,000 for "in lieu of parkland" fees ($1,500 x 22 lots) and $22,000 in consulting costs, all apparently "under

John M. Armentano, *a partner with the Long Island law firm Farrell Fritz, represents local governments and developers in zoning, land use and environmental matters, including litigation.*

protest." It then filed suit seeking to invalidate the two fee provisions on constitutional grounds and to obtain a refund of the fees it had paid, as well as attorney's fees.

Twin Lakes argued that the $1,500 per-lot recreation fee constituted an unconstitutional taking because the amount of the fee was not based on an "individuated assessment" of the recreational needs generated by its subdivision plan and thus was not roughly proportional to those needs. The trial court granted the town's summary judgment motion, the Appellate Division affirmed, and the case reached the Court of Appeals.

The Court first found that Twin Lakes had failed to demonstrate that the town's $1,500 per-lot fee constituted a taking.

It recognized that Town Law §277(4)(c) authorizes the town to impose recreation fees and that, when the town enacted the fees, it had made explicit findings that the demand for recreational facilities exceeded existing resources and that continued subdivision development, paired with "upward-spiraling land costs," would exacerbate the problem. Taken together, the Court held, these factors "clearly establish the essential nexus between the stated purpose of the condition and the fee."

Then, the Court observed that the town had concluded, with respect to Twin Lakes' application, that "parklands should be created as a condition of approval" but that the lot area and ownership patterns were not suitable for development of a park; the town therefore required "payment in lieu of parkland dedication." In the Court's view, these findings satisfied the requirements of Town Law §277(4)(c). Moreover, it held, these findings reflected the "individualized consideration of the project's impact contemplated by *Dolan*."

Significantly, the Court next declared that Twin Lakes "had identified no proof in the record" to support a conclusion that the $1,500 per-lot fee was not roughly proportional to the impact its development would have on the recreational needs of the town. In so doing, it invoked the presumption of constitutionality and placed the burden on Twin Lakes to show that the $1,500 per-lot fee was not "roughly proportional." Thus, it did not require the town to show that the fee was reasonable. Rather, it required Twin Lakes to show that it was unreasonable.

Consulting Fees

At this point in its decision, the Court turned to Twin Lakes' objections to the consulting fees the town had required that it pay. First, the Court pointed out that the power of the Town to charge "some amount" associated with the consideration of a land use application is clear,[11] although it added that this power is limited by the requirement that the fees charged be reasonably necessary to the accomplishment of the regulatory program.[12]

The Court noted that under the town code, an applicant is required only to reimburse the town for fees actually expended. The Court acknowledged that the town code's consulting fee provisions did not include an express audit component providing an applicant with the opportunity to review the fee assessment, but found no authority for the proposition that such a mechanism had to be contained within the fee provisions themselves as opposed to elsewhere in the statutory or regulatory scheme.

It then upheld the imposition of the fees, pointing out that the town code expressly limited the fees that could be exacted to those that were "reasonable," the town interpreted the fees as subject to the audit provisions of Town Law §§118 and 119, the town paid the same rate for consulting services as it charged applicants, the planning board audited vouchers submitted by consultants in the first instance and rejected any excessive or unnecessary charges, and applicants could inspect consultants' invoices upon request.

The Court concluded by noting that Twin Lakes "apparently" had paid the fees "under protest" but found that the record contained no indication of the nature of that protest; it also observed that Twin Lakes had not requested an audit of the fees.

This seems to undercut the Court's statement in *Video Aid Corp. v. Town of Wallkill*[13] that "[p]ayment under express protest is an indication that a tax is not paid voluntarily," although a review of the points of counsel to the Court in *Twin Lakes* shows that *Video Aid* apparently was not argued to the Court. The Court simply concluded that Twin Lakes had failed to establish that the consulting fees provision of the Monroe Town Code was improper. In essence, it is now clear that requiring applicants to pay a local government's fees is perfectly legitimate if the applicant is charged no more than the government is charged and if an audit process is in place.

Conclusion

The Court's decision in *Twin Lakes* upholding the statutory "in lieu of" provisions opens the door to municipalities to impose exactions without having to precisely calculate and analyze the basis for the charges, by relying on the strong presumption of constitutionality to which local laws are entitled.

Although placing the burden on plaintiffs to overcome the presumption seems unfair because all of the facts and data concerning the needs and future plans for recreational facilities are in the municipalities' control, if they exist at all, the *Twin Lakes* ruling may further empower municipalities in the regulatory process.

Highway impact fees have been expressly forbidden by the Court of Appeals,[14] but perhaps local governments could, pursuant to their local law power, enact exactions for open space or water supply, among other things, and developers would be required to pay certain amounts toward those items.

Clearly if the nexus could be established, the local law might be legal under the Municipal Home Rule Law, and it would be in furtherance of a legitimate public purpose. As to the amount of the fee, from a governmental point of view, reliance on the presumption of constitutionality may be dangerous and municipalities should attempt to justify the "price" of an exaction through the SEQRA process and public hearings on the local law. Under such circumstances, the presumption of constitutionality would be even more powerful than in *Twin Lakes*.

(1) See, e.g., Town Law §277.

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

(3) See, e.g., Town Law §277(4)(c).

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

(5) The takings clause provides, in pertinent part: "[n]or shall private property be taken for public use, without just compensation."

(6) See *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (citing *Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 (1987); *Bonnie Briar Syndicate v. Town of Mamaroneck*, 94 N.Y.2d 96, 105-106 (1999).

(7) Dolan, 512 U.S. at 388.

(8) Id. at 391.

(9) Id. It should be noted that the Supreme Court recently clarified the reach of the "rough proportionality" standard and concluded that the standard is not applicable to "questions arising where . . . the landowner's challenge is based not on excessive exactions but on denial of development." *Del Monte Dunes*, 526 U.S. at 703 (municipality denied a development plan outright).

(10) 1 N.Y.3d 98 (2003).

(11) See, e.g., *Suffolk County Bldrs. Assn. v. County of Suffolk*, 46 N.Y.2d 613 (1979).

(12) Id. (citing *Jewish Reconstructionist Synagogue of North Shore v. Incorporated Vil. of Roslyn Harbor*, 40 N.Y.2d 158, 163 (1976).

(13) 85 N.Y.2d 663 (1995).

(14) *Albany Area Builders Assn v. Town of Guilderland*, 74 N.Y.2d 372 (1989).