

DEVELOPERS CHALLENGE FEE FOR PARKS & RECREATION

James C. Kozlowski, J.D., Ph.D.

© 2003 James C. Kozlowski

One of the most significant publications of the National Recreation and Park Association (NRPA) is *Park, Recreation, Open Space and Greenway Guidelines* by James D. Mertes and James R. Hall. According to the American Planning Association (APA), the NRPA Guidelines are “[a]n essential resource for park and open space planning” which includes “sections on creating a planning framework, developing level of service guidelines, and classifying various open space resources.” Furthermore, the APA found the NRPA Guidelines provide “numerous formulas to allow municipalities to customize the park planning process.” In particular, many park and recreation agencies refer to the NRPA Guidelines to determine the required amount of land or fees to provide additional infrastructure and capital improvements to serve new developments in the community.

In developing and applying a given formula to the park planning process, a significant legal issue is whether the chosen methodology is consistent with the Takings Clause of the United States Constitution. In other words, to what extent can local government require a private developer of new residential or nonresidential property to assume the cost of increased demand for park and recreation facilities generated by such development?

FEES RELATED TO DEVELOPMENT’S IMPACT?

In the case of *Homebuilders Association of Metropolitan Portland v. Tualatin Hills Park and Recreation District*, No. A111827 (Or.App. 01/15/2003), several real estate developers and a developers’ association challenged the constitutionality of the district’s “system development charge” (SDC). The SDC was “a one-time fee imposed by a government unit on new developments, used to help offset financial costs resulting from the growth associated with those new developments.”

At the time, state law authorized government units to “pass resolutions imposing SDCs that mitigate the costs of, among other things, new park and recreation facilities.” Pursuant to this authorization, the park district’s board of directors, “acting in its capacity as a quasi-legislative governing body,” had unanimously adopted a “Resolution to Establish a Parks and Recreation System Development Charge on New Development Applicable at the Time of Application for a Building Permit.” In so doing, the board had reviewed “the work of consultants, several preliminary drafts, and extensive written and oral testimony from members of the public (including plaintiff Homebuilders’ Association).” The resolution set out its rationale as follows:

New Development within the Tualatin Hills Park and Recreation District contributes to the need for capacity increases and upgrades to capital improvements for parks and recreation facilities and, therefore, New Development should contribute to the funding for such capital improvements. This SDC will fund a portion of the needed capacity

increases for parks and recreation facilities as identified in the Tualatin Hills Park and Recreation District Parks and Recreation SDC Capital Improvements Plan (CIP), and will reimburse the District for a portion of the cost of excess capacity facilities available to serve New Development.

In accordance with state law (ORS 223.297 to 223.314), the district's resolution contained provisions controlling how the SDC was to be calculated (a "methodology report"), how to obtain exemptions from the SDC, how to obtain credits against the SDC, how to challenge expenditure of SDC revenues, and how to challenge the "methodology."

Plaintiffs claimed the district's SDC resolution violated the Takings Clause of the federal constitution. The Fifth Amendment to the United States Constitution, provides, in part: "nor shall private property be taken for public use, without just compensation." (The Fifth Amendment is made applicable against states by the Fourteenth Amendment.)

The trial court entered judgment against plaintiffs on all of their constitutional claims. Plaintiffs appealed.

METHODOLOGY

As summarized by the appeals court, the "actual methodology" of the SDC resolution occupied "31 pages of narrative, tables, and charts" to determine "the district's projected needs for future park and recreation facilities and improvements through 2015" in a list of projects called the Capital Improvements Plan (CIP).

Applying "current service levels to projected future residential and nonresidential population," each new project improvement in the CIP was "translated into dollars" to determine "the total amount of money that the district will need to accommodate the growth caused by new development" pursuant to the following formula:

To calculate the SDC for new residential development, the district begins with the total cost of new park and recreation facilities and divides it by the projected residential population increase to arrive at an "improvement cost per new resident" figure.

Using census data regarding the average number of residents per dwelling unit, that figure is expressed as an "improvement cost per new dwelling." Certain credits and discounts are then applied to that figure, resulting ultimately in a total one-time SDC of \$1,950 per single-family unit, \$1,499 per unit of a multi-family dwelling, and \$1,375 per unit of manufactured housing.

To calculate the SDC rates for nonresidential developments, the district begins by calculating the total cost of CIP projects typically used by nonresident employees of the development (for example, greenways and natural trails) but excluding those not generally used by employees (for example, playgrounds and neighborhood parks). That dollar amount is divided by the projected number of new employees, yielding a "per new

employee" rate: \$86. Again, certain discounts and reimbursements are subtracted, resulting in a revised "per new employee" rate of \$61.

To convert that figure into a per-square-foot rate for new nonresidential development, the district uses guidelines from the Metro Employment Density Study specifying typical "square feet per employee" requirements in specific types of development (for example, distribution warehouses average 2,500 square feet per employee and storage warehouses average 20,000 square feet per employee). Thus, a new 100,000-square-foot distribution warehouse would pay an SDC of \$2,440: 100,000 square feet at 2,500 square feet per employee, or 40 employees, at \$61 each.

Under this formula, the appeals court noted that "[a] single family dwelling that lasts for 50 years, for example, would be assessed around \$40 per year for parks and recreation."

TAKINGS CLAUSE

On appeal, plaintiffs contended that the challenged SDC resolution violated the Takings Clause of the Fifth Amendment the federal constitution. As noted by the appeals court, the United States Supreme Court has held that a governmental exaction "on the development or use of real property is a 'taking' under the Fifth Amendment unless there is an 'essential nexus' between the exaction itself and the goal that the exaction is designed to achieve." Moreover, "when an 'essential nexus' exists, the government unit imposing an exaction on development must make some sort of individualized determination that the extent of the burden imposed by the exaction is 'roughly proportional' to the impact that the proposed development would have and that the exaction would address."

Accordingly, to avoid "a taking for Fifth Amendment purposes," the appeals court acknowledged that "legislatively imposed development mitigation fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." In determining whether "legislatively imposed fees" effect "a taking for Fifth Amendment purposes," the appeals court noted that "legislative and quasi-legislative enactments enjoy a significantly higher degree of judicial deference than individualized adjudications." Further, the appeals court stated that "the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees."

On the other hand, the court cautioned that "the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." In so doing, the court adopted the following rationale for according "this deference" to "legislatively mandated fees":

While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation

needs, would likely face widespread and well-financed opposition at the next election.

Further, the appeals court found the United States Supreme Court has held that the "mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause of the Fifth Amendment." In other words, as interpreted by the Supreme Court, "requiring money to be spent is not a taking of property" under the Takings Clause.

The Takings Clause, it must be remembered, does not prohibit government from appropriating property. It requires only that, when government does so, it has to pay a fair price: Property shall not be taken "without just compensation." US Const, Amend V.

Applying these principles to the fee at issue, the appeals court found the district's resolution would easily pass constitutional muster under the Takings Clause. In this particular instance, the appeals court characterized the SDC as "a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property." Moreover, the court found that the SDC fee was "calculated by means of a carefully determined formula based on the impact the development will have on infrastructure." Further, the court found that the required fees paid by all developers were dedicated to mitigating the impact of development on the infrastructure.

As noted by the appeals court, "[p]laintiffs have the burden of demonstrating the invalidity of conditions imposed on their development." In this particular instance, the appeals court found that plaintiffs had failed to demonstrate that "the SDC is unrelated to the resolution's stated objective of providing parks and recreational facilities." Moreover, the appeals court found plaintiffs had not provided "any argument, analysis, or information indicating that the amount of the fees that the resolution imposes is, as a matter of law, unreasonable or arbitrary." On the contrary, in the opinion of the appeals court, the fees imposed on new development under the SDC methodology were reasonably related to the impact of such development on the increased demand for park and recreation facilities. As a result, the appeals court affirmed the judgment of the trial court which had upheld the constitutionality of the district's SDC resolution.