

Daily Development for Thursday, September 21, 1995

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EXACTIONS: Required payments to city's housing fund to compensate for loss of low income housing lack sufficient "nexus" to impact from developer's conversion of low rent units to condominiums and are therefore unlawful zoning practices under state law.

City of Portsmouth, New Hampshire v. Schlesinger, No. 94-1274 (1st Cir. 1995)

Developers in Portsmouth, New Hampshire sought to convert low-income housing into condominium units and also to increase the number of units. To obtain the required zoning change, they agreed to pay \$2.5 million in "impact fees" to the City, which the City was to deposit into a housing fund to compensate the City for the impact from the loss in low-income housing.

The City filed suit against the developers after their default on the promissory note and an issue arose as to whether the City Council could properly condition a zoning change upon payments into a fund to assist in the provision of low-income housing for its residents.

Held: A zoning change conditioned upon the payment of impact fees is proper if (1) the payment is directed to some committed capital expenditure required of the City due to the zoning change; and (2) the payment or amenity bears some "rational nexus" to the burden to be borne by the municipality due to the zoning change and the special benefits conferred on the developer. .

After reviewing the facts pertaining to this case, the state court ruled that "no fee [can] be imposed as a consequence of a diminution in low-income housing" and that no rational nexus existed between the amount of the impact fee and any burden imposed upon the City due to the zoning change.

This First Circuit Court of Appeals opinion is not the central opinion on the issue of state law, but is based upon that opinion and includes a summary of the lower state court ruling. The court goes on to conclude that the developer's claim is time barred as a matter of New Hampshire law.

Comment: Note that the issue is one of the legality of the device used by the City as part of its police power to zone. This is different from the U.S. Constitutional issue identified in U.S. Supreme Court decisions. The distinction may have significant procedural and remedial implications.

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