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Local Impact Fees — Home Rule Powers Should Permit Municipalities To Act

It has been nearly a decade since the New York Court of Appeals struck down an attempt by a town in upstate New York to enforce a transportation impact fee law. Although the Court in *Albany Area Builders Ass'n v. Town of Guilderland*/1 did not rule that local governments are forbidden from imposing all types of impact fees — indeed, the Court emphasized that it specifically was not deciding "the controversial question . . . whether local 'impact fees' are permitted"/2 — the legislative imposition of impact fees in New York since the Court's ruling in Guilderland has become virtually nonexistent. Two other decisions issued around the time of Guilderland, one by the Appellate Division, Third Department, invalidating a water district hook up fee in *Coconato v. Town of Esopus*,/3 and one by the Onondaga County Supreme Court invalidating a sewer connection fee in *Home Builders Ass'n v. County of Onondaga*,/4 seem to have reinforced the belief that impact fees have died in this state.

The time may be ripe, however, for towns, villages, and cities throughout New York to revisit this issue. The growing costs of construction and development, the looming breakdowns in existing infrastructure, the continuing concerns over mounting real property taxes, and the changing perspectives on the law/5 all argue in favor of such action. As a practical matter, even if courts reject them, impact fees — charges imposed by local governments on new development to finance capital improvements such as roads, sewers, and parking lots that the new development makes necessary — cannot be put into any worse position than they are in today. And it just may very well be that a local municipality that adopts carefully crafted enabling legislation under the supersession powers provided in the Municipal Home Rule Law/6 and then enacts impact fee legislation relating to uniquely local concerns will find that its impact fee legislation will withstand the Court of Appeals' scrutiny.

Significantly, some municipalities have been successful in obtaining "voluntary contributions" toward the infrastructure improvements necessitated by the development. However, to rely on voluntary contributions and not have the power to impose impact fees on all development is inadequate and forces the "cooperative" developer to shoulder a greater burden than would otherwise be necessary.

The "Guilderland" Case

The Court of Appeals' decision in Guilderland was quite narrow. The case arose after the Guilderland Town Board adopted a local law entitled the Transportation Impact Fee Law (TIFL). The TIFL provided that applicants for building permits who sought to make a change in land use that would generate additional traffic had to pay a transportation "impact fee" when the permit was issued. The amount of the fee was determined by a detailed schedule set forth in the law, which assessed fees based on size and use of the proposed development, the intention being to impose on the fee payer only "the fair share cost of improved roadways necessitated by the new development." Alternatively, the law allowed applicants to submit their own fee calculation study, but they had to use a methodology prescribed in the TIFL and had to pay the town three percent of the fee estimated by the independent study (up to $4,000) for "review and processing the study."

Two builders' associations and three individual building companies challenged the town's authority to enact the TIFL. The Appellate Division, Third Department, declared the TIFL invalid, concluding among other things that it was preempted by the general laws regulating the funding of roadway improvements. The case reached the Court of Appeals.

In its decision, the Court focused on the doctrine of preemption, which is an established limitation on home rule powers. Where the state has preempted a particular field, a local law regulating the same subject matter is deemed inconsistent with the state's interest, the Court noted. It then pointed out that the state legislature had enacted a comprehensive and detailed regulatory scheme in the field of highway funding that evidenced the Legislature's decision to regulate how roadway improvements were budgeted, how these improvements were financed, and how monies for these improvements were to be expended./7

In the Court's view, the TIFL intruded on the legislative scheme because permitting towns to raise revenues with impact fees "would allow towns to circumvent the statutory restrictions on how money is raised and, further, would permit towns to create a fund of money subject to limited accountability, not subject to the statutory requirements governing how funds for highway improvements are spent." The Court therefore concluded that the state had evidenced a purpose and design to preempt the subject of roadway funding and occupy the entire field, so as to prohibit additional local regulation.

Perhaps the fees are not inappropriate with respect to governments that own and maintain roads that are not subject to the same "strictures" that the Court found constituted preemption. Similarly, such fees may be proper when highways are not involved or when they are taken into account in the budgetary process.

The "Kamhi" Ruling

Interestingly, the same day the Court decided Guilderland it issued a decision in *Kamhi v. Town of Yorktown*,/8 holding that a town may exercise its supersession authority to adopt a law conditioning site plan (as distinguished from subdivision) approval for a multifamily residential development on the provision of parkland or its money equivalent.

The Court noted that it was "long settled" that a local government may impose such a condition so long as there is a sufficient nexus between the property and problem being redressed. Significantly, the Court then pointed out that there could be no question "about the uniquely local impact of the condition in issue." It declared that it had "long recognized that a town's planning needs with respect to its neighborhood parks and playgrounds are 'distinctively' matters of local concern."

Certainly the Court's decision in Kamhi did not resolve the question Guilderland specifically left open, namely whether any local impact fees are permitted. As a matter of fact, the Kamhi decision barely referred to the Guilderland ruling even though both were written by the same person — Judge (now Chief Judge) Judith S. Kaye. But the view reinforced in Kamhi and well recognized in the law that local governments may act with respect to purely local concerns under the Municipal Home Rule Law can serve as the basis for enabling legislation on impact fees.

What are those areas of local concern with respect to which local governments might impose impact fees? They could quite reasonably include local roads and local parking facilities, and perhaps local governments contemplating impact fee legislation should begin with these areas. A court should not find it difficult to distinguish between impact fees imposed with respect to a small road in a village and impact fees on a major highway that continues beyond a local government's boundaries, especially if the fees are connected to the mitigation process under the State Environmental Quality Review Act./9

There are, of course, other legal issues raised by impact fee legislation in addition to the power of a local government to enact such laws. For one thing, impact fees should closely relate to the problems they are intended to ameliorate./10

In addition, some have raised as a bar the United States Supreme Court's decision in Dolan v. City of Tigard./11 That case involved a city's conditioning building permit approval on the dedication of portions of a property owner's land to the city for a floodplain greenway and a pathway for pedestrians and bicycles. The Supreme Court concluded that the conditions that required the dedication of land constituted an uncompensated taking. There is nothing in the opinion, however, that would apply the same conclusion to a local government's conditioning certain land uses on payment of an impact fee.

It seems clear, though, that impact fees offer local governments a way to accommodate new growth and development with limited tax increases. Developers understandably argue that it is unfair for them to be charged for improvements for new residents while existing residents had the same services funded by local and state governments. Yet times have changed. It is coming to a point where local governments will have no alternative but to look to impact fees again. When doing so, they also should consider the litigation that undoubtedly will ensue and make certain that the first impact fees that are enacted are the ones most supportable under the law. For example, they should be the product of expert testimony delivered at public hearings at which all involved agencies under SEQRA are invited to participate and municipal findings are made based on the evidence. Guilderland points out the infirmities of one approach to impact fees; the next case should not fall victim to the same pitfalls. The municipality involved should give the courts a reason to distinguish Guilderland. This can be done by expert testimony at public hearings.

NOTES: 1. 74 N.Y.2d 372 (1989).

2. *Id.* at 379.

3. 547 N.Y.S.2d 953 (3d Dep't 1989).

4. 573 N.Y.S.2d 863 (Sup.Ct. Onondaga Co. 1991).

5. *See, e.g., McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995) (upholding local impact fee ordinance).

6. *See, e.g., Sherman v. Frazier*, 84 A.D.2d 401 (2d Dep't 1982); *see also* John M. Armentano, "Supersession Authority," N.Y.L.J. Jan. 8, 1997 at 5.

7. *See, e.g.*, Town Law Sections 102, 107, 108, and 109 and Highway Law Section 141.

8. 74 N.Y.2d 423 (1989).

9. *See* Kelly L. Munkwitz, "Does The SEQRA Authorize Mitigation Fees?" 61 Alb. L. Rev. 595, 599 (author states that "SEQRA regulations, in conjunction with the wide latitude the courts give to municipalities in SEQRA decisions, . . . indicate that such fees may be upheld," but notes that case law suggests that they will be struck down).

10. *See, e.g., Matter of Sanford*, N.Y.L.J., June 20, 1995 at 29, col. 6 (2d Dep't) (rejects town planning board's request that developer pay for relocation of a public roadway outside of the proposed subdivision as a condition precedent to sketch plan approval on the ground that there was an insufficient relationship between the proposed development and the problems the impact fee would ameliorate). Cf. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (nexus needed between the nature of an exaction of an interest in land and the nature of governmental interests).

11. 512 U.S. 374 (1994).

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