Real Estate and Land Use Litigation Alert

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Massachusetts Appeals Court Affirms that Town Must Refund Sewer Connection “Fee” Charged to Developers

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In June 2009, we reported on a Massachusetts Superior Court decision in which the court ordered the Town of Saugus to return more than $670,000 in fees paid by developers to connect their projects to the sewerage system in that town. That trial court’s decision has now been reviewed and affirmed in full by the Massachusetts Court of Appeals in *Denver Street LLC v. Town of Saugus.* This appellate decision provides a strong basis for similarly situated developers to object to “I/I reduction” fees in circumstances that are similar to those outlined in the *Denver Street* case. It also provides important lessons for municipalities who want to charge lawful fees for new sewer connections.

The facts in the case are set out in our June 2009 alert. The crux of the Superior Court’s ruling was that the disputed “fee” was in fact an unlawful tax imposed on developers. The court started with the well-established proposition that a municipality may lawfully charge reasonable fees for specific services, but lacks the power to tax unless that power is expressly granted by the Massachusetts Legislature. The factors used to distinguish a permissible fee from an unlawful tax were set forth by the Supreme Judicial Court in its 1984 decision in *Emerson College v. Boston*. According to those well-settled standards, fees, unlike taxes, are (1) charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society, (2) paid by choice, and (3) collected not to raise general revenues, but to compensate the governmental entity for providing the services.

The Superior Court analyzed each of these three factors in its decision; the Appeals Court focused on the first and third (the parties stipulated that the fee was paid “voluntarily” because the developers could have chosen not to develop their land). With respect to the “specific benefit” test, the court found “ample support in the record for the judge’s findings and conclusions that … the I/I reduction contribution does not benefit the fee payers in a manner not shared by others ….” To the contrary, because the town undertook its I/I reduction efforts to address long-standing sewer capacity problems, the court found that “every inhabitant of the town (as well as those living in the downstream communities bordering the Saugus River and beyond) benefitted from the I/I repairs to the dilapidated sewer system.” Accordingly, the so-called “fee” was more akin to a tax.

With respect to the “reasonable relationship to costs” test, the court found that “[t]he I/I reduction contribution did not compensate the town for services related to expenses it incurred in connection with the entry of new users to the sewer system.” In fact, much of the money collected to reduce I/I was apparently used for general maintenance or improvement of a sewer pump station—repairs that the court said “were not done to eliminate I/I.” So again, the money extracted from the developers was more akin to a tax than a fee.

The court summed up its conclusion succinctly in these terms: the disputed charge was an illegal tax and not a fee "[b]ecause new sewer users received no benefits that were not shared by other members of the town, and the amount of the I/I reduction contribution was not reasonably related to the cost of services from which the new users alone derive a benefit."

Our earlier alert raised some questions about the Saugus I/I reduction contribution fee; the Appeals Court decision suggests some answers. For example:

Q.	Could adjustments be made to the I/I contribution to satisfy the fee requirements?
	The amount of the charge likely could be modified to bear a reasonable relation to the services provided; but the first prong in the Emerson College *test may be difficult to satisfy where a fee is extracted from a discrete group of new users to solve a pre-existing problem that is caused by all of the town residents.*
Q.	Will towns modify their I/I reduction rules to require developers to pay on a gallon-for-gallon basis, as opposed to a greater ratio, for new wastewater flow?
	This remains to be seen. However, a reduction in the fee addresses only one prong in the three-prong test that distinguishes a permissible fee from an unlawful tax.
Q.	Will the *Denver Street* decision make developers more likely to challenge I/I reduction contributions?
	It is likely that I/I requirements in other towns share some or all of the problems that tainted the Saugus requirements. The savvy developer will hire experienced legal counsel to advise on whether the particular requirements of a particular town are likely to pass muster based on the teachings of the Denver Street *decision.*

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Mintz Levin's Real Estate and Land Use Litigation team has represented developers in a variety of different disputes regarding sewer connections and related fees. We will be closely watching new developments in this area.

If you have questions about the issues discussed in this alert, please contact

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