

**MITIGATION – HOW MUCH IS ENOUGH**  
**CITIZEN PLANNER TRAINING COLLABORATIVE**

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**Barbara J. Saint André**  
**KP LAW, P.C.**  
**101 Arch Street, 12th Floor**  
**Boston, MA 02110**  
**(617) 556-0007**  
**bsaintandre@k-plaw.com**

**I. THE QUEST FOR MITIGATION**

It seems that almost everywhere in the Commonwealth, building is booming, whether commercial or residential. New subdivisions, multi-family housing, mixed use, commercial, retail, and industrial developments are being planned, constructed, modified, and enhanced. These developments need permits and approvals from municipalities, including special permit, variance, subdivision approval, comprehensive permit, site plan, and building permits. This new growth brings tax revenue, but also impacts local services including streets, schools, emergency services, and other departments. The tax revenue, which goes into the general fund, is not always sufficient to offset the anticipated impacts from a development, and is not targeted specifically to those impacts. Increasingly, cities and towns have sought to offset projected development impacts by requiring, as a condition of a permit, through a development agreement, or by a by-law or ordinance, that the applicant provide mitigation to the municipality. This mitigation can take a number of forms, including payment of a fee, providing off-site mitigation such as water, sewer or street improvements, or conveyance of easements or land to the municipality to address infrastructure impacts. The potential pitfalls of each of these approaches is addressed briefly below.

**A. Regulatory Fees**

The simplest form of mitigation is to impose fees to offset the city or town's expected costs resulting from a proposed development. These include application fees to offset administrative costs, peer review fees as provided in G.L. c. 44, §53G, and conditions imposed on an approval to fund off-site improvements. One area that is somewhat controversial is the use of an "impact fee" or "mitigation fee". Whether characterized as an impact fee, a mitigation fee, or an application fee, whether a particular fee is valid depends first on whether it is truly a fee, or an illegal tax disguised as a fee.

Cities and towns have broad authority to adopt by-laws and ordinances under the Home Rule Amendment, including the ability to enact by-laws or ordinances establishing fees, or authorizing a local board or official to set fees. However, the Home Rule Amendment prohibits cities and towns from levying taxes other than those that are authorized by the State legislature.

See Article 89, §7 of the Amendments to the Massachusetts Constitution. A municipality may, however, establish fees for local services, provided that the fees are reasonable and proportional.

Any application, impact, mitigation or other fee must survive the test established by the state courts for determining when a “fee” is really a tax, and therefore beyond the municipality’s authority. A tax is “an enforced contribution to provide for the support of government.”

Emerson College v. Boston, 391 Mass. (1984). Valid fees, on the other hand, generally fall into two categories: proprietary fees (also called user fees), based on the rights of the town as proprietor of certain functions (such as water and sewer user fees), and regulatory fees (e.g. licensing and inspection fees). Silva v. Attleboro, 454 Mass. 165 (2009).

Generally, where a statute expressly grants a municipal agency the power to license or regulate an activity, the power includes the authorization to require fees to cover reasonable expenses that are incidental to the regulatory or licensing process. Southview Cooperative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395, 400 (1985). The reasonable expenses that may be the subject of a regulatory or licensing fee include the agency’s cost of conducting hearings, staff review of the application, inspections, and performing other services in connection with individual applications for approvals. Id. These costs are typically covered by the application fee. When setting application fees for special permits, subdivisions, comprehensive permits, variances, etc., the fee should be reasonable and proportional to the expected costs. The “critical question is whether the permit charges are reasonably designed to compensate the municipality for its anticipated regulation-related expenses...[and that the] charges are reasonably proportional to those expended by the[board] in administering the permit process.” Silva v. Attleboro, 454 Mass. 165, 173 (2009). In addition, many cities and towns have adopted G.L. c. 40, §22F, which provides that they may set certain fees and charges, including fees and charges for any permits, licenses, and certificates issued by the city or town or for any work or services performed.

The test for determining if an exaction is a valid fee or an invalid tax was established in Emerson College v. Boston, 391 Mass. 415 (1984). In Emerson, the city of Boston imposed a fee on the owners of certain large buildings for augmented fire services (proprietary fee). The Supreme Judicial Court (SJC) ruled that the fee must meet the following standards to be upheld:

1. The fee must be in return for a particular governmental services which benefits the party paying the fee in a manner not shared by other members of society;
2. The fee must be paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charges; and
3. The fee must not be collected to raise revenues but to compensate the governmental entity providing the services for its expenses.

Applying this test, the SJC struck down the fee. First, it found that the benefits of augmented fire protection were not limited to the owners of the building. Further, the fee was not paid by choice. Finally, it found that the fees collected by the city were targeted not for maintenance of the fire companies providing the augmented protection, but for general police and fire services. Thus, the fee failed to meet any of the tests for a valid fee, and was struck down as an illegal tax.

Recently, however, the SJC clarified the Emerson test. It ruled that the second factor, voluntariness, was “limited to the particular factual context of that case.” Silva v. Attleboro, 454

Mass. 165 (2009). The Silva case involved a regulatory fee charged by the city for a burial permit. The Court ruled that whether a charge is voluntary is not relevant in reviewing a regulatory fee, and that the fee charged by Attleboro was reasonably designed to compensate the board of health for its anticipated related expenses.

An example of this requirement that a fee be reasonable and proportional is found in the recent legislation legalizing adult use of marijuana, G.L. c. 94G. That statute contains the following provision regarding the use of host agreements between a municipality and an adult-use marijuana facility operator:

(d) No agreement between a city or town and a marijuana establishment shall require payment of a fee to that city or town that is not directly proportional and reasonably related to the costs imposed upon the city or town by the operation of a marijuana establishment. Any cost to a city or town by the operation of a marijuana establishment shall be documented and considered a public record as defined by clause Twenty-Sixth of section 7 of chapter 4 of the General Laws. G.L. c. 94G, §3.

## **B. Proprietary fees**

Proprietary fees are not the primary focus of the impact fee discussion. However, it is worth noting that proprietary fees are also subject to scrutiny when challenged. For example, where a sewer connection fee was imposed on new customers to fund removal of infiltration and inflow (I/I), the court in one case determined that it was an illegal tax because the connection fee provided a system-wide benefit that was not particularized to the new customers. Berry v. Danvers, 34 Mass. App. Ct. 507 (1993). See also Denver Street LLC v. Saugus, 78 Mass. App. Ct. 526 (2011) (“sewer bank” an illegal tax as it did not benefit the fee payers in a manner not shared by others). Where a hook-up fee was charged to cover the incremental costs necessitated by new customers, that fee was upheld. Bertone v. Department of Public Utilities, 411 Mass. 536 (1992).

## **C. Impact fees**

“Impact fee” is not defined in Massachusetts laws, but generally refers to charges collected from developers to fund or provide public facilities or improvements related to or necessitated by the proposed development. These might include a contribution toward school buildings or expansions, or improvements at a sewer treatment facility. Impact fees have been used in some areas of the country where they are expressly authorized by statute. Massachusetts has no such legislation, although bills have been introduced over the years to provide for impact fees. Lacking a statutory basis, any mitigation or impact fees must be authorized by the Home Rule Amendment.

The leading case in Massachusetts on impact fees is Greater Franklin Developers Association, Inc. v. Franklin, 49 Mass. App. Ct. 500 (2000). The town adopted “school impact fee” by-law, the stated purpose of which was to ensure that new development bears a proportionate share of the cost of capital facilities necessary to support the development. In particular, the town found that new residential development was straining the school system, and

expansion of the schools would be required by the new growth. The by-law prohibited the issuance of a certificate of occupancy for any new or expanded residential building unless the impact fee had been paid. The money was placed in accounts earmarked to cover the cost of expanding the schools in the southern or northern school district, depending on the location of the residential building.

The court analyzed the impact fee by-law based on the three criteria in the leading Emerson case. In looking at the first criterion, the court found that the fee was invalid because it failed to benefit the persons paying the fee in a manner not shared by other members of the community. In addition, the court noted the fee also failed the third criterion of the Emerson test (whether the fee is not to raise general revenue, but to compensate the town for expenses in providing a particular service).

As can be seen from the Franklin case, the test for a valid impact fee in Massachusetts is quite high. Impact fees, by their nature, are designed to raise revenue toward municipal services, such as schools and fire protection, that are impacted by new development. Such services, however, are viewed as core government services that benefit all citizens, not just the developer. There are exceptions, however. For example, the Cape Cod Commission Act explicitly authorizes towns in Barnstable County to impose impact fees on developments if the town has a local comprehensive plan certified by the Commission. The Commission has prepared a Model Impact Fee By-law consistent with the Act. Cities and towns in other areas could petition for special legislation to establish their own impact fee ordinance or by-law.

## **II. MITIGATION AND EXACTIONS**

Impacts of a proposed development on towns' infrastructure can be mitigated in a number of ways. Mitigation attached to a proposed development generally falls into two categories: conditions to mitigate anticipated detrimental off-site effects the development may create, and conditions that require the land owner to grant land or easements to the city or town for public improvements connected to the development.

### **A. Off-site impacts**

Conditions are often imposed in decisions issued by regulatory boards, whether special permits, variances, subdivisions, site plan approval, comprehensive permits, or others. Generally, there must be a nexus between the development impact and the off-site improvements required by the permit. In addition, the nature of the permit or approval may allow more or less discretion in imposing such conditions. For example, special permits are discretionary in nature, and local boards often impose conditions on special permits to mitigate off-site impacts. Some types of exactions are expressly allowed for special permits, in return for bonuses granted to the development. Under G.L. c. 40A, §9, zoning ordinances or by-laws may provide for special permits authorizing increases in permissible density of population or intensity of a particular use if the applicant, as a condition of the grant of the special permit, provides certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities.

Although the SPGA has fairly broad discretion to impose reasonable conditions, the conditions must relate to the standards of the by-law or ordinance. In addition, conditions that

require an applicant to perform off-site work over which it has no control or ability to complete are invalid. V.S.H. Realty, Inc. v. Zoning Board of Appeals of Plymouth, 30 Mass. App. Ct. 530 (1991) (special permit condition requiring developer to widen a state road invalid).

By contrast, the Subdivision Control Law grants much less discretion to the planning board; a subdivision that complies with the Subdivision Control Law, the planning board rules and regulations, and the recommendations of the board of health must be approved. In reality, many subdivisions as proposed do not comply with the planning board rules and regulations, requiring waivers. The planning board rules and regulations may take into account whether access from adjoining ways to the subdivision is adequate, thus creating an incentive for a developer to agree to improve those ways. North Landers Corp. v. Planning Board of Falmouth, 382 Mass. 432 (1981). The regulations need to be carefully drafted and clear as to what is required. The court in North Landers cited for authority the case of Rounds v. Water and Sewer Commissioners of Wilmington, 347 Mass. 40 (1960) “(planning board may condition approval by requiring reasonable construction outside the subdivision to bring water service to it).”

### **B. Grant of land or easements to municipality**

In some cases, a development may require the grant of easements to the municipality for public improvements. For example, easements to widen and improve roadways adjacent to a commercial development, or for sewer or water utilities, are not uncommon. In most cases, these easements benefit the developer as much as the municipality, and are given voluntarily to the city or town. Beyond such mutually agreeable transactions, however, the city or town must be careful with respect to requiring conveyances of land to the city or town.

With respect to subdivisions in particular, General Laws c. 41, §81Q states: “No rule or regulation shall require, and no planning board shall impose, as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner thereof”. Even if the planning board grants waivers of its subdivision regulations, this does not allow the board to require conveyance of land to the town in violation of §81Q. Collings v. Planning Board of Stow, 79 Mass. App. Ct. 447 (2011) (waiver of dead-end street limitation did not justify condition requiring applicant to convey land to the town for open space). An alleged promise to convey land to the town made during the public hearing is not enforceable. Framingham v. Shoppers World Community Center L.P., 55 Mass. App. Ct. 1111 (2002)(planning board requested construction of public park by developer was impermissible provision, thus alleged promise by developer to construct park was not enforceable).

Looking at this from a different perspective, the perspective of whether a city or town may be required to grant an easement or land to assist affordable housing, demonstrates that property rights are zealously protected from overreaching by local boards. The comprehensive permit statute, G.L. c. 40B §20-23, grants broad authority to a zoning board of appeals, and if a developer appeals, to the Housing Appeals Committee, to issue local permits and approvals. However, this does not include the authority to require a city or town to grant a developer an easement or land. In 135 Wells Avenue, LLC v. Housing Appeals Committee, 478 Mass. 346

(2017), the Supreme Judicial Court ruled that the Newton ZBA properly determined that it had no authority to waive a deed restriction held by the city on the site of a proposed comprehensive permit project. The SJC found that this case is governed by its prior decision, Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35 (2008), in which it had ruled that chapter 40B did not grant the ZBA or the HAC the authority to order the town to grant an easement over town land, “based on the fundamental distinction between the disposition of a property right and the allowance of a permit or approval.” Id. at 356

A local board also has to consider certain constitutional issues. The Takings Clause of the United States Constitution, as well as the Massachusetts Constitution, prohibits the taking of property by the government without just compensation. The Supreme Court outlined some of those restrictions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987). The Commission imposed a condition on a demolition permit for a beach house that the owner grant an easement for the public to cross the waterfront lot. The Commission claimed that the easement was justified by the impact of reconstructing the house on beach access. The Supreme Court found no nexus between the condition and the original purpose of the building restriction. The Court used the test of whether the condition substantially advanced a legitimate state interest.

The Supreme Court further refined this issue in Dolan v. Tigard, 512, U.S. 374 (1994), where it adopted a “rough proportionality” test. Dolan obtained a permit to expand her store, subject to a condition that she must dedicate the portion of her property in the floodplain for improvement of a storm drainage system, and dedicate a 15-foot strip of land for a pedestrian/bicycle pathway. The city argued that the pathway would improve traffic conditions on the adjacent way, and that the construction added to the need for stormwater management. The Court decided that a rough proportionality must be shown between the conditions imposed and the impact of the project. Although “[n]o precise mathematical calculation is required,...the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” The government has the burden of proving the connection between the condition and the impact of the project.

### **III. CONCLUSION**

Find the nexus; make it proportional and reasonable; use the public hearing process to explore the impacts and how to mitigate.

#### **DISCLAIMER**

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