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Leading Cases on
Project Approvals: Mitigation, Conditions and Extractions

New York State Bar Association
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Church v. Town of Islip
8 N.Y.3d 254 (1960)

Neighbors challenge zoning change from residential to commercial conditioned on property owner's consent to conditions limiting building area and requiring fencing and shrubbery. Held: Sustained.

"Appellants' arguments all revolved about the idea that this is illegal as 'contract zoning' because the Town Board, as a condition for re-zoning, required the owners to execute and record restrictive covenants as to maximum area to be occupied by building and as to a fence and shrubbery. Surely these conditions were intended to be and are for the benefit of the neighbors. Since the Town Board could have, presumably, zoned this Bay Shore Road corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation. Since the owners have accepted them, there is no one in a position to contest them."

Jenad, Inc. v. Village of Scarsdale
18 N.Y.2d 78 (1966)

Planning Commission conditioned subdivision approval on payment of recreation fee. Held: Sustained.

"In 1964 the Montana Supreme Court in *Billings Props., Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182, passed on a State statute which required land to be dedicated for park and playground purposes as a condition precedent to approval of subdivision plat and which statute authorized the county planning board to waive the requirement in appropriate cases. The Montana court remarked (p. 29, 394 P.2d p. 185) that: 'Statutes requiring dedication of park and playground land as a condition precedent to the approval of plats are in force in one form or another in most all states.' The court said this at page 33, 394 P.2d at page 187: 'Appellant does not deny the need for parks and playgrounds, however, it would require the city to purchase or condemn land for their establishment. But this court is of the opinion that if the subdivision creates the specific need for such parks and playgrounds, then it is not unreasonable to charge the subdivider with the burden of providing them.'" 18 N.Y.2d at 85.

Holmes v. Planning Bd. of Town of New Castle
78 A.D.2d 1 (2d Dep't 1980)

As a condition of site plan approval, Planning Board required applicant to provide easement across

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the rear of the parcel to facilitate common parking area behind commercial use. The condition was upheld as a reasonable exercise of the police power. Even though the traffic problem existed before the proposed development, "an exaction condition is not defeated by incidental benefit to the general public, provided that the proposed development is a contributing factor to the problem sought to be alleviated." 78 A.D.2d at 18.

Gordon v. Zoning Board of Appeals of Town of Clarkstown
126 Misc.2d 75 (Sup. Ct., Rockland Co., 1984)

Zoning Board conditioned side yard variance on dedication of road-widening strip across the property frontage. Held: Invalid.

"There is no question that the Zoning Board is authorized to impose reasonable conditions upon the granting of a variance. . . . What the board has done here, however, is require the petitioner to pay for her variance by prospectively ceding her land to the county. This the board cannot do. . . . [T]he condition bears no relation to the relief applied for by the petitioner and is therefore arbitrary and capricious."

Nollan v. California Coastal Comm'n
483 U.S. 825 (1987)

California Coastal Commission conditioned building permit for single-family residence on the property owners' transfer to the public of an easement across their beachfront property. Held: Invalid.

"Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. . . .

"Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," . . . Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.

. . . Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, . . .

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [H]ere, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”

Matter of St. Onge v. Donovan
71 N.Y.2d 507 (1988)

Zoning Boards conditioned variances, respectively, on continued occupancy of premises by applicant and discontinuance of another facility. Held: Invalid.

“[T]he condition imposed on the variance . . . clearly relates to the landowner rather than the use of the land. A “condition [that] bears no relation to the proper purposes of zoning . . . [is] properly ruled invalid.” 71 N.Y.2d at 517.

“By conditioning the variance on the elimination of the Port Crane operation, the Board has imposed a requirement completely unrelated either to the use of the land at issue or to the potential impact of that use on neighboring properties. . . . The Appellate Division, therefore, correctly found this condition to be invalid.” 71 N.Y.2d at 517.

Dolan v. City of Tigard
512 U.S. 374 (1994)

City Planning Commission conditioned building permit on dedication of a portion of property for flood control and traffic improvements. Held: Invalid.

“In evaluating petitioner's claim, we must first determine whether the “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city. . . . The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. . . . In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. . . . Other state courts require a very exacting correspondence, described as the “specifi[c] and uniquely attributable” test. . . . Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes ‘a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.’ We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a ‘reasonable relationship’ between the required dedication and the impact of the proposed development. . . . We think the “reasonable relationship” test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term “reasonable relationship” seems confusingly similar to the term “rational basis” which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but 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.”

City of New York v. 17 Vista Associates
84 N.Y.2d 299 (1994)

In order to obtain a permit to demolish single-room occupancy multiple dwelling, owner was required to obtain a certificate that there had been no harassment of SRO residents or an exemption from requirement. City agreed to expedite and grant demolition permit of owner paid \$500,000 into a trust to provide low- and middle-income housing. Owner agreed and City granted demolition permit, but then owner refused to pay, so City sued. Held: Dismissed.

“We hold that the agreement entered into between the parties, whereby the plaintiff, in exchange for a predetermined sum of money, would provide to defendant an expedited and favorable determination as to the SRO status of a building defendant was seeking to purchase, is void as violative of public policy and is unenforceable.”

Matter of Grogan v. Zoning Board of Appeals of Town of East Hampton
221 A.D.2d 441 (2d Dep’t 1995)

Zoning Board conditioned variance on imposition of scenic and conservation easement. Held: Sustained.

“[T]he record demonstrates that there is an essential nexus between the easement and the legitimate governmental interest of protecting wetlands and environmentally significant areas. Indeed, the imposition of the easement substantially advances this legitimated interest. . . . The respondent has sustained its burden of demonstrating a rough proportionality between the easement and the projected environmental impacts of the petitioners’ construction proposal.”

Ehrlich v. City of Culver City
12 Cal.4th 854 (1996)

Do *Nollan* and *Dolan* “apply to development permits that exact a fee as a condition of issuance, rather than, as in both *Nollan* and *Dolan*, the possessory dedication of real property?”

Yes, because the statute which authorized the fee, the Mitigation Fee Act, required a “reasonable relationship” between the monetary exaction and the public impact, which the Court read as the equivalent of “rough proportionality.” The \$280,000 fee was set aside, however, because the record was insufficient to determine whether there was the required reasonable relationship.

Eastern Enterprises v. Apfel
524 U.S. 498 (1998)

Not a land use or environmental case. The issue was whether the federal Coal Act effected an unconstitutional taking by requiring coal producers to pay into a retirement fund for coal miners that it had not employed. A plurality held that it did.

Justice Kennedy, dissenting, would have held that “an obligation to perform an act, the payment of benefits” cannot constitute a taking, because it “does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest.”

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, would also have held that there was no taking because “there is no specific fund of money; there is only a general liability; and that liability runs not to the government, but to third parties.”

City of Monterey v. Del Monte Dunes at Monterey, Ltd.
526 U.S. 687 (1999)

Rough proportionality applies to exactions, but not to regulatory takings.

“Although in a general sense concerns for proportionality animate the Takings Clause . . . , we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. . . . The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the developer’s anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner’s challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.”

Twin Lakes Dev. Corp. v. Town of Monroe
1 N.Y.3d 98 (2003)

As a condition of subdivision approval, the Planning Board imposed a per lot recreation fee in the amount established in the town code. Held: Sustained.

The Town Board found in enacting the fee “that the demand for recreational facilities exceeded existing resources and that continued subdivision development, paired with the ‘upward-spiraling land costs,’ would exacerbate the problem.” This finding, plus the fact that the fee was deposited in a trust fund for recreational purposes, was sufficient to establish the ‘essential nexus’ required under *Nollan*.

Matter of Smith v. Town of Mendon
4 N.Y.3d 1 (2004)

Planning Board conditioned site plan approval for single-family residence on filing of a conservation restriction with respect to area located in environmental protection overlay district. Held: Sustained.

“[W]e decline the Smiths’ invitation to extend the concept of exaction where there is no dedication of property to public use and the restriction merely places conditions on development.” 4 N.Y.3d at 12.

Lingle v. Chevron, U.S.A., Inc.
544 U.S. 528 (2005)

“Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. . . . The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. . . . In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. . . . Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.

Matter of Dobbs Ferry Development Associates v. Board of Trustees of the Vil. of Dobbs Ferry
81 A.D.3d 945 (2d Dep't 2011)

Planning Board imposed recreation fee as a condition of site plan approval for a single residential lot. Held: Invalid, at least on this record.

Although authorized by statute, the imposition of a recreational fee without “specific findings . . . as to the recreational needs created by the petitioner's improvement of the vacant lot as a single-family home” is unconstitutional. The remedy is to remit the matter to the Planning Board for further consideration.

Matter of Pulte Homes of New York, LLC v. Town of Carmel
84 A.D.3d 819 (2d Dep't 2011)

Planning Board imposed recreation fee as a condition of site plan approval for a residential lot. Held: Invalid, at least on this record.

The exaction was unconstitutional because "the Planning Board made no 'individualized consideration' prior to imposing the recreation fee and made no specific findings as to the recreational needs create by the petitioner's improvements." The remedy is to remit the matter to the Planning Board for further consideration.