Three-year reservation of lots seen as taking

Condition on permit may be unconstitutional

By Kris Olson
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A developer that was required to reserve for potential municipal use five building lots for three years as a condition of a permit had sufficiently alleged an unconstitutional taking to survive a motion to dismiss, a federal judge has ruled.

The developer had applied to the Concord Planning Board for final approval of an 18-lot subdivision plan. In its final decision, the board conditioned approval on the developer reserving two lots for potential future use as a public park and another three as potential future sites of affordable housing.

PINTO
Developer's counsel

For three years, the town prohibited the developer from erecting any buildings or performing other work on the parcels while the town decided whether to purchase them.

The full text of the ruling in *Symes Development & Permitting, LLC v. Town of Concord, et al.* can be found at masslawyersweekly.com.

The town argued that the restriction was valid because it was temporary. At the end of three years, the developer would either be paid fair market value for the reserved lots or be permitted to develop them, it argued.

Since the U.S. Supreme Court's decisions in

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Three-year reservation of lots deemed a taking

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Dolan v. City of Tigard in 1994 and *Nollan v. California Coastal Comm'n* in 1987, courts had begun recognizing a third category of unconstitutional taking that was neither a physical taking nor a "total regulatory taking" but one based on land-use exactions, U.S. District Court Judge Nathaniel M. Gorton noted.

The takings in *Nollan* and *Dolan* — demands that a developer dedicate a permanent property easement — were "more obvious" than the town's practice in the case before him, Gorton acknowledged.

Nonetheless, Gorton found that courts have repeatedly rejected the argument that government action must be permanent to qualify as a taking.

"Moreover, the alleged taking to which [the developer] objects falls well within the parameters drawn by the Supreme Court in its most recent application of the unconstitutional conditions doctrine," Gorton wrote, citing the 2013 Supreme Court decision *Koontz v. St. Johns River Water Mgmt. Dist.*

In *Koontz*, the court found the imposition of monetary exactions as a condition of a land-use permit subject to the requirements of *Nollan* and *Dolan*.

If asking for cash might constitute an unconstitutional taking, so, too, might a three-year reservation period, Gorton concluded.

The 11-page decision is *Symes Development & Permitting, LLC v. Town of Concord, et al.*, Lawyers Weekly No. 02-008-22. The full text of the ruling can be found at masslawyersweekly.com.

Symes Development & Permitting, LLC v. Town of Concord, et al.

THE ISSUE Did a developer make a sufficient showing that a municipality's requirement that it reserve five building lots in a proposed subdivision for three years constituted an unconstitutional taking, such that its claim should survive a motion to dismiss?

DECISION Yes (U.S. District Court)

LAWYERS Donald R. Pinto Jr. of Pierce Atwood, Boston (plaintiff)
David B. Lyons and Christina S. Marshall, of Anderson & Kreiger, Boston (defense)

Decision in keeping with trend

The Planning Board's actions in *Symes* are an extreme example of the tendency of local boards to aggressively use the leverage they have in granting land use permits to extract concessions, noted the plaintiff's attorney, Donald R. Pinto Jr. of Boston.

Nollan and *Dolan* do not prohibit all land-use exactions but require that the concessions imposed on developers have a nexus to the proposed project and be proportional to their impact, Pinto said.

Where the town's bylaw had not required the Planning Board to make any findings in that regard, it made it easier for Gorton to find that his client's claim was not subject to dismissal, Pinto surmised.

Boston land use attorney Daniel Dain said *Symes* offers municipalities another reminder that their permit-granting authority may allow them to mitigate the impact of a project but does not extend as far as to sanction "enforcing public bribes."

Even though the state's subdivision control law explicitly authorizes local boards to require developers to set aside lots for park purposes, it does not preclude a finding that such a requirement is an unlawful exaction, Pinto said. He pointed primarily to the lack of compensation for the three-year period during which the town deprived the developer of the use of the land.

Developers often decide it is not in their economic interest to pursue even meritorious challenges, said Boston land use attorney Nicholas P. Shapiro. He said he is thus "ecstatic" to see Massachusetts precedent on the *Nollan*, *Dolan* and *Koontz* line of cases, given how rarely such claims are litigated.

Symes will certainly provide ammunition for developers in the dialogue over exactions that naturally occurs with municipalities, Shapiro predicted. Indeed, municipalities are often even less subtle than Concord had been in putting a time limit on the restriction it imposed.

Real property law and land use regulation are a "creature of state law," so it can be easy to lose sight of the fact that there are federal limits on government power, too, Shapiro said.

"The Constitution applies to everything, including land-use permits," he said.

Over the past 10 to 20 years, federal courts have become much more hospitable to claims like his client's, Pinto said.

"The rule used to be you had to exhaust your state-law claims," Pinto said. "That's all changed."

To the extent that federal courts are now "reining in the excesses" of local boards overplaying their hands with permit seekers, Pinto sees that as a positive trend.

Shapiro also sees Gorton's decision as consistent with the general direction of the law related to takings, one that is likely to only accelerate under a conservative Supreme Court. Given that, Gorton "adroitly" cited to the court's most recent pronouncement, in the 2021 case *Cedar Point Nursery v. Hassid*, even though it was not directly on point.

One of the defendants' attorneys, David B. Lyons of Boston, declined to comment.

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Reservation without compensation

After acquiring an interest in approximately eight acres of land on Main Street in Concord, Symes Development & Permitting submitted to the town's Planning Board a proposal for an 18-lot residential subdivision.

In approving the definitive subdivision plan by a vote of 4-2 on Dec. 30, 2020, the Planning Board imposed several conditions, including a requirement that Symes reserve two lots plus a 5-foot-wide public access easement for public park purposes, for three years from the date of the Planning Board's endorsement of the plan.

It imposed a similar condition on three other lots, reserving them for potential future use for affordable housing.

Combined, the five lots represented nearly 28 percent of the lots approved for the project, Symes' complaint noted.

In both cases, the developer would receive no compensation during the three-year reservation period, unless and until the town decided to acquire the lots.

The imposition of the three-year reservation period was consistent with the board's decades-old rules and regulations. Moreover, the state's subdivision control law, G.L.c. 41, §81Q and §81U, expressly permits the reservation of land in a subdivision for park purposes.

The board's regulations did not require it to make findings that there was any nexus or relationship between Symes' proposed subdivision and the conditions it imposed, and Symes alleged that the board made no such findings.

As a separate challenge in Land Court was pending, Symes filed a single-count complaint in U.S. District Court on April 1, 2021, seeking under 42 U.S.C. §1983 "the damages it has suffered as a result of the Town's taking of a portion of the Locus through the imposition of unconstitutional land-use conditions."

The town filed a motion to dismiss for failure to state a claim on May 21.

Abstention not required

In addition to challenging Symes' §1983 claim on the merits, the town argued that Gorton should abstain from hearing it until the Land Court ruled on the developer's appeal, in which Symes was arguing that certain conditions the Planning Board imposed exceeded the board's authority, either under the subdivision control law or its own rules and regulations.

Resolution of the Land Court case "could settle the entire issue," the town argued.

But Gorton called that assertion "misguided."

While abstention may be appropriate "to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues," here "the state and federal questions at issue in the contemporaneous proceedings are independent of each other and any resolution of the state action will not affect this action," Gorton found.

In the Land Court case, Judge Howard P. Speicher on June 23, 2021, allowed Symes' motion for summary judgment in part and denied it in part.

With respect to the lots set aside for park purposes, the board had exceeded its authority only insofar as it had gone beyond the provision in the subdivision control law that allows a planning board to require that "no building may be erected" on the land during the three-year reservation period.

The town had also prohibited work on "street, utilities, building, or other improvements," which exceeded its statutory authority, Speicher ruled.

But more problematic was the reservation of lots for affordable housing purposes, according to Speicher.

While the subdivision control law authorizes a planning board to reserve lots in a subdivision "for any other public purpose," such a purpose must be related to the provision of subdivision improvements, Speicher noted.

"The commendable purpose of providing affordable housing is not one related to the provision of ways for access furnished with appropriate municipal utilities as authorized by the Subdivision Control Law," Speicher wrote.

Even if "other public purposes" encompassed the creation of affordable housing, "the reservation of land for any allowed purpose may not be required without just compensation," he added.

Here, if the town elected not to purchase the reserved lots, the developer would receive no compensation at all.

"Nothing in the Subdivision Control Law authorizes such a restriction on ownership without compensation," Speicher concluded. MLW

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