To Fee or Not to Fee, That Is the Legal Question: Guiding Principles Regarding Impact Fees

By Adam L. Wekstein

INTRODUCTION

Adam Wekstein

Impact fees, sometimes called "in lieu of" fees, are imposed on an applicant as a condition of a land use approval. Their theoretical purpose is to mitigate impacts of new development by funding the costs of municipal acquisition or improvement of infrastructure or property. In Economics 101 terms, they are designed to internalize the negative externalities of a proposed land use. As tax pressures on municipalities have increased, so have municipal efforts to employ impact fees (and municipal ingenuity in trying to apply them) to fund community benefits of a number of varieties—benefits which might otherwise be paid for by the community as a whole. This article summarizes the legal authority for such fees, their application and the statutory and constitutional limitations constraining their use.

In New York, municipal governments have the authority to impose impact fees only to the extent they are authorized by state legislation or the state constitution.[1] As discussed below, in some instances the power to impose impact fees is explicitly granted; in others it can be derived from New York's "home rule" constitutional and statutory provisions or based on other state legislation. Local regulations establishing impact fees that are not explicitly within the express ambit of state legislation cannot intrude into areas where a statewide regimen for the funding of or budgeting with respect to public infrastructure has been established by statute.[2]

The imposition of impact fees is also subject to federal constitutional constraints requiring that they genuinely advance the interest for which they are putatively enacted and have a real connection with those impacts of a development that they are supposedly designed to mitigate.[3] While having evolved significantly over the last three decades, the jurisprudence emanating from the United States Supreme Court, particularly after the 2013 decision *Koontz v. St. Johns River Water Management District*[4] leaves uncertainty as to the correct application of constitutional principles to impact fees.

RECREATION FEES

Express Authorization

Arguably, the most notable, enduring and regularly litigated impact fee in New York is the recreation fee imposed in connection with subdivision and site plan approval. Indeed, legislation authorizing in lieu of parkland fees for subdivisions was originally enacted in 1934.[5] The current enabling legislation for recreation fees is found in Article 16 of the Town Law (Sections 277(4) and 274-a(6)), Article 3 of the General City Law (Sections 33(4) and 27-a(6)) and Article 7 of the Village Law (Sections 7-730(4) and 7-715-a(6)). Such statutes expressly imbue the three principal types of municipal governments in New York with power to include within their subdivision and site plan regulations provisions requiring the reservation of parkland or the payment of a fee in lieu thereof as conditions of subdivision and site plan approval.

Even in the firmly grounded area of recreation fees, absent an express authorization either in the zoning enabling statutes or elsewhere in state legislation, the imposition of such fees would be improper. In *Riegert Apartments Corp. v. Planning Board of Town of Clarkstown*,[6] which was decided under a former version of the town law that authorized the imposition of recreation fees in connection with subdivision approval, but had no analogous provision for site plans, the Court of Appeals relied on the legal precept that "municipalities derive no power to regulate land use other than through legislative grant."[7] It held "although a town may require that, before approving a plat, either land or money-in-lieu-of-land be delivered to the municipality for developing parks, no such conditions may be imposed on the approval of a site plan."[8] The zoning enabling legislation has subsequently been amended to authorize imposition of recreation fees as a condition to site plan approval.[9]

Required Findings

In levying a recreation fee as a condition to subdivision approval a planning board is required to make two findings: (1) that a proper case exists for requiring a developer to show on the plat a park or parks suitably located for playground or other recreational purposes; and (2) that a suitable park or parks of adequate size

cannot be properly located in the subdivision or is otherwise not practicable.[10] The former prong mandates evaluation of the present and anticipated future needs for park and recreational facilities in the municipality based on projected population growth to which, of course, the particular subdivision development will contribute.[11] The second prong, requiring inquiry into whether the park should be provided within the subdivision or if as an alternative the developer should be required to pay the recreation fee, entails assessment of the size and suitability of any areas within the subdivision which could serve as possible locations for park and recreation facilities, as well as consideration of whether there is a need for additional facilities in the immediate neighborhood.[12] The same findings are required as a predicate to the imposition of recreation fees in connection with site plan approval.[13]

When such findings are not made by the municipal board approving a development application, courts invalidate that entity's imposition of recreation fees. In particular, recreation fees required for either subdivisions or site plans have been annulled when the approving board has failed to make the determination of unmet need and/or the demand created by the subdivision.[14]

Restriction of Funds for Recreational Use

Recreation fees collected by a municipality must be deposited into a trust fund that is to be used exclusively for park, playground or other recreational purposes, including the acquisition of property.[15] Trust fund moneys may be expended to acquire additional park land or to construct, rehabilitate or expand existing park or recreational facilities to meet the needs generated by new subdivisions, but may not be used to pay for the operation and maintenance expenses of existing parks.[16]

Municipal Home Rule Authority

The Municipal Home Rule power is a second source of authority for impact fees—one which theoretically could authorize a variety of fees, but that in practice is somewhat limited. The home rule authority is conferred on local governments under Article IX of the State Constitution and enabling legislation, such as the Municipal Home Rule Law. Municipalities are authorized to adopt local laws relating to their "property, affairs or government," provided that such legislation is not inconsistent with the state constitution or any general law. Home rule authority in New York allows municipalities to supersede certain provisions of state law in matters of purely local concern provided that the local law: (1) states its intention to supersede an identified provision of state law; (2) is not expressly prohibited by state law; and (3) is not otherwise preempted by state law.[17]

As discussed above, where state law specifically authorizes the imposition of impact fees, such as by the salient sections of the Town, General City and Village Laws cited previously, the municipal legislature may adopt laws implementing such fees and the fees may be assessed on a case-by-case basis on new developments, provided the constitutional requirements described in more detail below are satisfied. In *Kamhi v. Town of Yorktown*,[18] the Court of Appeals held that even without specific authorization in the state zoning enabling laws, a town may use its authority under the Municipal Home Rule Law to enact impact fee regulations relating to areas of purely local concern.[19]

However, on the same day that it decided *Kamhi*, the Court of Appeals significantly limited a municipality's authority to enact impact fee regulations through municipal home rule in *Albany Area Builders Association, Inc v. Town of Guilderland*.[20] In so doing, the court invoked the doctrine of implied preemption. *Albany Area Builders* considered a local law that imposed a transportation impact fee on new developments to help fund expansion of the town's existing transportation network to accommodate the impact of the development. The amount of the fee was based on the type and size of a development and the funds were deposited into a special account to be used only for capital improvements related to the expansion of the roadway network and transportation facilities. New York's highest court invalidated the local law, holding that state law (provisions of the Town Law and Highway Law) preempted it. It discussed the applicable preemption principles as follows:

> The preemption doctrine represents a fundamental limitation on home rule powers . . . While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern.". . . Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field. . . . [21]

The decision concluded that the existence of the state's comprehensive and detailed regulatory regimen, including an "elaborate budget system" for funding highway improvements and repairs, established the legislature's intent to preempt the field.[22] Accordingly, *Albany Area Builders* forecloses municipalities from enacting impact fees to fund many common improvements in instances where state law provides an extensive mechanism for financing such infrastructure. For

example, *Coconato v. Town of Esopus*[23] held that a fee imposed on new development to fund water supply infrastructure which was calculated based on the number of new dwelling units and the square footage of commercial space, was impliedly preempted by Articles 12 and 12-A of the Town Law. The Third Department found that those provisions of the state law established a comprehensive scheme for financing water district improvements —a scheme which could not be superseded under the Municipal Home Rule Law.[24]

The questions of when an impact fee adopted under the Municipal Home Rule Law would constitute a legitimate regulation of an area of local concern, and when such a fee would be impliedly preempted by a comprehensive state regulatory regimen is beyond the scope of this article (and perhaps beyond the ability of its author to discern a principled distinction between the former and the latter).

Other Sources or Potential Sources of Authority

Incentive Zoning

Impact fees can be established under the incentive zoning provisions in state enabling legislation—that is, General City Law § 81-d, Town Law § 261-b and Village Law § 7-703. By this mechanism a municipality is empowered to enact zoning regulations or other local laws establishing districts in which land use applicants may be the recipients of incentives or bonuses. These may be issued in the form of increased density, area, height or use, to advance the specific purposes authorized by the municipal legislature. To obtain these bonuses the land use applicant must provide community benefits or amenities, defined to include: "housing for persons of low or moderate income, parks, eldercare, daycare or other specific physical, social or cultural amenities, or *cash in lieu thereof . . .* "[25]

Each zoning district in which the incentives are available must be delineated and incorporated in the locality's zoning map.[26] Moreover, the incentive zoning law must describe: (1) the incentives or bonuses which may be granted; (2) the procedures for obtaining the bonuses for specific property; (3) which benefits may be accepted by the municipality; (4) the criteria for approval of and the methodology for determining the adequacy of the amenities being provided; and (5) the procedure for the imposition of terms and conditions attached to approvals.[27] In the event the enumerated amenities cannot immediately be provided or otherwise are not practical, the in lieu of fee may be imposed, in an amount to be determined by the municipality's governing body, and must be deposited into a trust fund to be used by the municipality solely for those specific benefits or amenities authorized by its governing body.[28]

SEQRA

Another potential, though legally questionable, source of authority for the imposition of impact fees could be the State Environmental Quality Review Act (SEQRA, collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617). A significant function of SEQRA is mitigation of proposed impacts of an action to the extent practicable.[29] Nothing in SEQRA, however, as much as suggests that cash payments can serve as mitigation. Nonetheless, one interesting and somewhat solitary law review article posits (but does not definitively answer) the question of whether mitigation impact fees can be imposed under SEQRA.[30]

At least one lower court case, *Malta Properties v. Town of Malta*,[31] tends to suggest that a Draft Generic Environmental Impact Statement (GEIS), which studied potential development and infrastructure within a commercial corridor, may serve as a mechanism to impose mitigation fees on a specific commercial development in that corridor to pay for necessary infrastructure and highway-related improvements.[32] In so doing, the court recognized that an impact fee cannot be assessed for already existing municipal infrastructure without constituting a tax, but drew a distinction between an impact fee and a mitigation fee; in the author's opinion this differentiation amounts to a distinction without a difference. Anecdotal information reflects that municipalities have employed an area-wide GEIS as a basis to impose mitigation fees in connection with approval of projects within the geographic area that was the subject of the SEQRA review. One such example is the Town of Colonie.[33]

Without a Connection Between the Fee and a Development's Impacts, the Fee Can Be an Ilegal Tax

Impact fees that do not have a relationship to potential impacts of the proposed development which is subject to the fees may be invalidated as an unauthorized tax. Distinguishing between an impermissible tax (disguised as an impact fee) and a legitimate fee may not always be simple. One general statement of the distinction reads as follows: "taxes are imposed for the purpose of defraying the costs of government services generally. . . ." Fees, on the other hand, have been characterized as the "visitation of the costs of special services upon the one who derives a *benefit* from them."[34]

The Third Department employed this distinction between fees and taxes to hold that the imposition of "source" and "storage" fees only on new subdivisions or proposed changes in use was an impermissible tax.

In *Phillips v. Town of Clifton Park Water Authority*[35] the court stated

> [T]he law does not permit a municipality to charge "newcomers" an impact fee to cover expansion costs of an existing [facility] absent a demonstration that such a fee is necessitated by the particular project (as opposed to future growth and development in that municipality generally) or a demonstration that such newcomer would be primarily or proportionately benefitted by the expansion.

Key findings in *Phillips* were that the fee would fund improvements to the water system benefiting everyone in the district and that the proposed development did not require improvements to the system.[36]

As such, even in instances when statuary authority, either direct or implied through the home rule power, authorizes the adoption of legislation providing for the imposition of an impact fee, the law adopted must benefit the project that is burdened by the fee.

In the context of recreation fees, if a reviewing board makes the specific findings required by relevant case law—that is, that a proposed project will contribute to a need for additional recreational facilities and that such need cannot be met by the provision of suitable on-site facilities—it will be found not to be a tax.

Constitutional Strictures on Impact Fees: Essential Nexus and Rough Proportionality

As the law has evolved it has become apparent that impact fees may now be viewed as an "exaction"—that is, a condition imposed by government on land use approvals. In turn, in order for an exaction to survive Takings Clause[37] scrutiny, it must comply with the two-part test articulated by the United States Supreme Court in *Nollan v. California Coastal Commission*[38] and *Dolan v. City of Tigard*.[39] There must be an "essential nexus" between the exaction and the justification advanced for its imposition and, assuming that nexus is present, the exaction must be "roughly proportional" both in nature and extent to the impact it is designed to mitigate. Legal uncertainty remains as to whether impact fees are exactions that are subject to such heightened scrutiny in all, most or only some circumstances.

The Circuitous Course of Exactions Jurisprudence

A discussion of the nonlinear evolution of the law of "exactions" is necessary in order to rationalize the principles relating to impact fees. In *Nollan*, the Supreme Court invalidated the imposition of an easement allowing the public to cross the portion of a beach owned by the landowner as a condition to approval of the demolition of a beachfront bungalow and its replacement with a larger house. It held that the condition failed to advance substantially a legitimate state interest, in that there was no "essential nexus" between the easement and the public goal that was the alleged purpose of the condition.[40] In *Dolan*, a municipality conditioned a permit authorizing the razing and reconstruction of a plumbing supply store on the dedication of a portion of the store owner's property for use as a public greenway and storm drainage channel and pedestrian/bicycle path. While the Court found that an "essential nexus" existed between the imposed land use conditions and their purported goals, it held that the conditions were nonetheless unconstitutional because they were not "roughly proportional" in nature and extent to the potential impact of the approved development.[41] Among other things, the Court relied on the fact that the same objectives could have been achieved by imposing restrictions not requiring public access.

Importantly, the exactions which were reviewed in *Nollan* and *Dolan* were both easements permitting public access over private property. The reasoning in those cases, in part, was that if the government had by fiat opened private property to the public outside of the context of the land use entitlement process, just compensation would have been due the landowner, and that the *Nollan/Dolan* nexus requirements on exactions were necessary to prevent the process from being employed as a pretext to achieve the same result without reimbursing the landowner for its property interest.[42] The question remained open as to whether the heightened constitutional scrutiny applied only to conditions providing public access, those taking discrete property rights, or even ones imposing a fee in lieu thereof.

Seawall Associates v. City of New York[43] (a post-*Nollan*, but pre-*Dolan* decision), rephrased and emphasized the nexus required by *Nollan* in invalidating New York City's single room occupancy (SRO) ordinance. The challenged law prohibited owners of SROs, the availability of which supposedly mitigated the city's problem with homelessness, from demolishing or altering such units, required them to restore SROs to habitable conditions and to rent the units (rather than keep them vacant) at controlled rents. It included, as an alternative, the option to pay a fee that would effectively purchase an exemption from the strictures set forth in the preceding sentence. The Court of Appeals held that the ordinance effectuated a taking, finding that it did not substantially advance its alleged purpose—that is, it failed to have a "close nexus" to its purported objective of relieving homelessness. It further held that as the restrictions in the ordinance itself constituted a taking, the ability the law conferred on landowners to pay a fee in lieu of complying with the regulations could not rescue the SRO ordinance.[44]

Certainly, *Seawall*'s result suggested that the essential or close nexus standard was not narrowly confined only to land use permitting conditions that opened property to the public. In fact, at least temporarily, in *Manocherian v. Lenox Hill Hospital*[45], the Court of Appeals found that the *Nollan* test for takings applied to "all property and land-use regulation matters." Five years later in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*[46] the same court held that the essential nexus/rough proportionality standard does not apply to property regulations in general (in that case a zoning enactment), but only in the context of exactions imposed during the land use approval process.[47] Still to be determined was what exactly constitutes an "exaction." Is it confined solely to approval conditions opening property to public use? Or did it encompass permitting conditions, in general, or impact fees, in particular?

Then, in *Twin Lakes Development Corp. v. Town of Monroe,*[48] the Court of Appeals grappled with the constitutionality of a recreation fee imposed as a condition of subdivision approval. In *Twin Lakes*, the applicant claimed that a $1,500 per lot fee in lieu of reservation of parkland, fixed by local legislation under Section 277(4) of the Town Law and applied to its property by the Planning Board as a condition of final subdivision approval, effected a taking of property without just compensation. The crux of the landowner's claim was that absent an individualized determination in each case of the appropriate amount of the fee, the imposition of the fee constitutes a taking, because that amount may not be "roughly proportional" to the impact of the proposed subdivision on the community's need for park and recreation facilities. New York's high court held that the plaintiff had failed to demonstrate that the recreation fee violated the rough proportionality test. It relied, among other things, on: (1) the explicit findings made by the town board when that board increased the amount of the fee, that the demand for recreational facilities exceeded the Town's existing resources and continued subdivision development, combined with increasing land costs, exacerbated the problem; and (2) the planning board's individualized findings that the proposed subdivision would contribute to the need for new parkland and that no land suitable for such a purpose existed within the parcel being subdivided. Significantly, the court found that nothing in Supreme Court case law "precludes municipalities from establishing the amount of fees to insure adequate recreational facilities can be provided."[49] It bears emphasizing that the *Twin Lakes* court employed the *Dolan* analysis to assess the validity of the recreation fee.

In *Smith v. Town of Mendon*,[50] the Court seemed to constrict the instances in which the two-pronged "essential nexus" and "rough proportionality" standard applies. It appeared to restrict application of the standard solely to the literal physical dedication of land to public use or the payment of a fee in lieu of such dedication. In *Smith*, the applicants sought approval for development of a single-family home. Although a majority of the property was encumbered by environmental protection overlay districts (EPODs), created by the town putatively to protect environmentally sensitive features, the proposed house and associated disturbance were to be located outside of the EPODs. The town's planning board required as a condition of approval the creation of a perpetual conservation easement encumbering the land within the EPOD districts. Other than duration, the substantive restrictions of the easement generally paralleled the restrictions of the then-applicable EPOD regulations.

Smith held that despite the fact that the conservation easement permanently restricted use of the land (without regard to the nature of any regulatory regimen that might be effective in the future) and potentially expanded the breadth of the municipality's discretion in making a determination as to whether or not to permit activities within the EPODs, the condition imposing the easement was not an "exaction." The Court recognized that "exactions are defined as 'land use decisions conditioning approval of the development on the dedication of property to public use'. . . . " The decision explained that the imposition of a "do no harm" restriction, which does not authorize third parties to enter private property, is not an exaction subject to the *Nollan/Dolan* test. It reads, in part, as follows:

> In practice, the Court has identified exactions in only two real property cases, *Nollan* and *Dolan*, both of which involved the transfer of the most important "stick" in the proverbial bundle of property rights, the right to exclude others. In *Twin Lakes Development Corp. v. Town of Monroe*, 1 A.D.3d 98, 769 N.Y.S.2d 445 (2003), we also characterized a fee imposed in lieu of the physical dedication of property to public use as an exaction. Outside of these two narrow contexts, neither the Supreme Court nor this Court has classified more modest conditions on development permits as exactions.[51]

Koontz: The Confusing Culmination of the Journey (For Now)

The final step in mind-numbing impact fee/exaction odyssey was the Supreme Court's decision in *Koontz v. St. Johns River Water Management District.*[52] In *Koontz* (over a vigorous four-justice dissent) the Court extended the *Nollan/Dolan* standard to apply to exactions that: (1) are formulated as conditions precedent to the issuance of a permit (i.e., conditions

which, if left unfulfilled, will result in the denial of a permit); and, more significantly for the topic at hand, (2) *involve the payment of money for off-site improvements*, rather than simply to those which are made in lieu of the dedication of land to public use.

By way of background, Koontz purchased a mostly undeveloped 14.9-acre parcel of land near Orlando, Florida. Although much of the property qualified as wetlands under Florida law, its northern portion was well-drained and, at least in Koontz's view, suitable for development. Koontz applied to the St. Johns River Water Management District (the "District"), for permits to allow him to develop 3.7 acres in the northern portion of his lot. To mitigate the environmental impacts of his proposed development, Koontz offered to dedicate a conservation easement to the District over the remaining approximately 11-acre southern section of his property. In response, the District advised Koontz that it would approve his development application only if he limited his development to one acre of the northern piece and granted a conservation easement over the remaining approximately 13.9 acres of property to the District *or*, alternatively, if he granted a conservation easement over an approximately 11-acre portion of his land *and* funded improvements to offsite wetlands owned by the District. Koontz rejected both alternatives.

Settling a split among jurisdictions, the Supreme Court held that the *Nollan/Dolan* standard is applicable to conditions to a land use permit requiring that an applicant pay money to fund off-site public improvements. In determining that the *Nollan/Dolan* standard applies to conditions of land use permits exacting money, rather than solely to those mandating dedication of land for public use, the Court reasoned that

> The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[53]

The Wake of *Koontz*

Unresolved issues as to the constitutional constraints on impact fees remain in the post *Koontz* environment.[54] One potentially-recurring issue that springs readily to mind is the legality of the widespread regulatory requirements for provision of affordable housing or the payment of a fee in lieu thereof as a condition of development approval. If the inclusionary housing mandate were an exaction, as the author believes is arguably the case, in the post-*Koontz* world it would be subject to heightened constitutional scrutiny. It may be difficult to establish in many, if not most, cases that the requirement for an affordable housing impact fee is roughly proportional to the impact that a given development will have on the demand for/supply of affordable housing. Thus far, although there appears to be no precedent in New York, the limited number of cases reviewing affordable housing set asides or fees in lieu thereof have treated them as regular land use regulations, and thus valid if reasonable.[55]

Another question is whether the essential nexus/rough proportionality rubric applies only to review of conditions imposed in a development approval resulting from an administrative process or to similar burdens created via legislation. The issue is brought into focus by Justice Thomas' concurrence in the denial of certiorari from a case that upheld the City of San Jose's inclusionary zoning ordinance. The ordinance required reservation of a percentage of units in residential development projects to be affordable or, as one alternative, payment of a fee in lieu of providing such housing. He expressed concern that if such a condition had been imposed by administrative action it would clearly have been subject to heightened scrutiny under *Nollan*, *Dolan* and *Koontz*. Such precedent established that a board "may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use," but that there is a persistent split of authority as to whether the imposition of the same condition would be subject to such a standard of review if it is imposed by legislation.[56] He lamented that: "the decision below, for example, reiterated the California Supreme Court's position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears 'a reasonable relationship to the public welfare'" and stated, "I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking'."[57] The author submits that in New York, cases such as *Seawall Associates*, *Manocherian* and, most importantly, *Twin Lakes Development*, evince a willingness to apply heightened scrutiny to land use conditions imposed by legislation. *Bonnie Briar Syndicate* (which predates *Twin Lakes Development*) might be read to suggest the opposite.

Endnotes

1. *See Riegert Apartments Corp v. Planning Board of Town of Clarkstown*, 57 N.Y.2d 206, 455 N.Y.S.2d 558 (1982).
2. *See Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, 547 N.Y.S.2d 627 (1989).
3. *See Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), *cert. denied*, 541 U.S. 974 (2004).
4. *Koontz, supra*.
5. *See Riegert*, 57 N.Y.2d at 210, 455 N.Y.S. 2d at 560.
6. *Riegert Apartments Corp. v. Planning Board of Town of Clarkstown*, 57 N.Y.2d 206, 455 N.Y.S.2d 558.
7. *Id.* at 209, 455 N.Y.S. 2d at 560.
8. *Id.* at 208; 455 N.Y.S.2d at 559.
9. *See* Town Law § 274-a(6); General City Law § 27-a(6); Village Law § 7-715-a(6).
10. Town Law § 277(4)(b) and (c); General City Law § 33(4)(b) and (c); Village Law § 7-730(4)(b) and (c); *see Bayswater Realty & Capital Corp. v Planning Board of Town of Lewisboro*, 76 N.Y.2d 460, 470-471, 560 N.Y.S.2d 623, 629 (1990).
11. *Id*. at 471, 560 N.Y.S.2d at 629.
12. *Id.*
13. *See* Town Law § 274-a(6); General City Law 27-a(6); Village Law § 7-715-a(6).
14. *See Bayswater Realty & Capital Corp., supra*; *Pulte Homes of New York LLC v. Town Board of Town of Carmel*, 84 A.D.3d 819, 921 N.Y.S.2d 867 (2d Dep't 2011); *Dobbs Ferry Development Associates v. Board of Trustees of Village of Dobbs Ferry*, 81 A.D.3d 945, 916 N.Y.S.2d 840 (2d Dep't 2011); *Sepco Ventures, LLC. v. Planning Board of Town of Woodbury*, 230 A.D.2d 913, 646 N.Y.S.2d 862 (2d Dep't 1996).
15. Town Law § 277(4)(c); General City Law § 33(4)(c); Village Law § 7-730(4)(c).
16. 91 Op.St.Comp. 86 (1991).
17. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144 (1989) (citing Municipal Home Rule Law § 10(1)(ii)(d)(3)).
18. *Id.*
19. In *Kamhi*, the Court held that the town could employ its powers under the Municipal Home Rule Law to enable its planning board to impose a fee in lieu of parkland reservation as a condition of site plan approval, at a time when Section 274-a of the Town Law conferred no express authority to do so. Nonetheless, the Court struck down the local law at issue in that case because of infirmities in the procedure by which it was adopted.
20. *Albany Area Builders Association et al.v Town of Guilderland*, 74 N.Y.2d 372, 547 N.Y.S.2d 627, *supra* note 2..
21. *Id*. at 377, 547 N.Y.S.2d at 629 (citations omitted).
22. *Id*. at 377-378, 547 N.Y.S.2d at 629.
23. *Matter of Oshatz*, 152 A.D.2d 29, 40-41, 547 N.Y.S.2d 953, 955 (3d Dep't 1989), *lv. denied*, 76 N.Y.2d 701, 558 N.Y.S.2d 891 (1990)
24. *See Home Builders Association of Central New York v. County of Onondaga*, 151 Misc.2d 886, 573 N.Y.S.2d 863 (Sup. Ct. Onondaga Co. 1991) (invalidating a local law adopted by a county establishing a sewer impact fee based on the conclusion that Article 5-A of the County Law established a comprehensive scheme for the establishment, administration, operation and improvement of County Sewer Districts).
25. General City Law § 81-d(1)(b); Town Law § 261-b(1)(b); Village Law § 7-703(1)(b).
26. General City Law § 81-d(3); Town Law § 261-b(3); Village Law § 7-703(3).
27. General *City* Law § 81-d(3)(e); Town Law § 261-b(3)(e); Village Law § 7-703(3)(e).
28. General City Law § 81-d(1)(b); Town Law § 261-b(3)(h); Village Law § 7-703(3)(h).
29. *See* 6 N.Y.C.R.R. 617.11(d)(5) (requiring SEQRA findings statements to, certify, among other things, that "adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigation measures which were identified as practicable").
30. *See* Kelly L. Munkwitz, *Does SEQRA Authorize Mitigation Fees*, 61 Alb. L. Rev 595 (1997).
31. *Malta Properties 1, LLC v. Town of Malta*, 2015 WL 13049238 (Sup. Ct. Saratoga Co. 2015), aff'd, as modified, 143 A.D.3d 1142, 39 N.Y.S.3d 544 (3d Dep't 2016).
32. A challenge to the imposition of the mitigation fee under the authority of the Town of Malta's GEIS in connection with the approval of a hotel/restaurant development was dismissed as time-barred in *Lakeview Outlets Inc. v. Town of Malta*, 166 A.D.3d 1445, 89 N.Y.S.3d 733 (3d Dep't 2018).
33. The reader is referred to the "GEIS" tab on the website of the Town of Colonie Department of Planning and Economic Development (http://www.coloniepedd.org/index.php?subj=78), which includes GEISs and SEQRA findings for several overlay zones that appear to form the basis for the imposition and amount of the fees.
34. *Albany Area Builders Association v. Town of Guilderland*, 141 A.D.2d 293, 298, 534 N.Y.S.2d 791, 794 (3d Dep't 1988), *aff'd, Albany Area Builders, supra*. note 2.
35. *Matter of Phillips v. Town of Clifton Park Water Auth*., 286 A.D.2d 834, 835, 730 N.Y.S.2d 565, 567 (3d Dep't 2001).
36. *Id*.; cf. *Albany Area Builders*, 141 A.D.2d at 298, 534 N.Y.S.2d at 794 ("to the extent that the transportation impact fee imposes the expense of highway improvements upon a small group of home buyers even though the benefit of such improvements is enjoyed by the public generally, this fee indeed resembles a tax.").
37. The Fifth Amendment to the United States Constitution provides, in part, "Nor shall private property be taken for public use, without just compensation."The takings clause of the Fifth Amendment is made applicable to the States and, consequently, their subdivisions, by the Fourteenth Amendment.
38. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
39. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
40. In an oft quoted passage the *Nollan* Court explained the purpose of the required the connection between an exaction and its putative ends as follows:

> [T]he 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."

Nollan v. California Coastal Commission, 483 U.S. at 837.

41. The Supreme Court made clear that the burden is on the municipality to show that the requisite "rough proportionality" is present and that it must do so by making an effort to quantify its findings, which, in turn, must include more than a conclusory statement that the imposed condition could offset some of the development's impacts. *Dolan,* 512 U.S. at 395-396.

42. The Court portrayed this reasoning as being a particularized version of the "unconstitutional conditions" doctrine, pursuant to which "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385.

43. *Seawall Assoc. v City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989).

44. *Id*. at 113, 544 N.Y.S.2d at 553 ("if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a ransom cannot make it lawful.")

45. *Manocherian v Lenox Hill Hosp*., 84 N.Y.2d 385, 393, 618 N.Y.S.2d 857, 861 (1994), *cert. denied*, 514 U.S. 1109 (1995).

46. *Bonnie Briar Syndicate v. Town of Mamaroneck*, 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999), *cert. denied*, 529 U.S. 1094 (2000)

47. *See City of Monterey v. Del Monte Dunes*, 586 U.S. 687, 703 (1999) (refusing to extend rough proportionality beyond review of exactions, land use decisions conditioning approval on dedication of private property to public use).

48. *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 769 N.Y.S.2d 445, *supra* note 3.

49. *Id*. at 106, 769 N.Y.S.2d at 825.

50. *Matter of Smith v Town of Mendon*, 4 N.Y.3d 1, 789 N.Y.S.2d 696 (2004).

51. *Id.* at 11-12, 789 N.Y.S.2d at 701 (emphasis added; citations omitted). While in *Lingle v. Chevron USA, Inc*., 544 U.S. 528 (2005), the United States Supreme Court narrowed the instances in which a governmental action effects a regulatory taking, and eliminated a quarter-century old takings test that required a land use regulation to substantially advance a legitimate state interest, to which both the Supreme Court and the New York courts had repeatedly alluded and, in some cases affirmatively applied, it left the rough proportionality and essential nexus taking standards intact in the context of land use exactions.

52. *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595, *supra* note 3..

53. *Id*. at 613. The dissent insisted that heightened scrutiny only applies to instances where the government forces the landowner to relinquish a property interest that it could not have acquired outside of the land use permitting process without paying just compensation. It would have held that a requirement of the payment of money only, as opposed to the taking of a specific interest in property or a specific separately identifiable fund of money (e.g., a lien on a specific parcel of property or a bank account) does not trigger the takings clause.

54. *See, e.g., The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State*, 63 American University Law Review 619 (2014).

55. *See Home Builders Association of Greater Chicago v. City of Chicago*, 213 F.Supp.3d 1019 (N.D. Illinois 2016) *app. dismissed*, 2017 WL 5197144 (6th Cir. 2017) (holding that an ordinance requiring provision of affordable housing or payment of a fee in lieu thereof was merely a valid use restriction, rather than an exaction subject to the essential nexus/rough proportionality standard, and that Koontz did not hold that all impact fees are subject to heightened scrutiny*); California Building Industry Association v. City of San Jose,* 351 P. 3d 974, 61 Cal.4th 435 (Sup. Ct. Cal. 2015), *cert denied*, 136 S.Ct. 928 (2016) (finding that inclusionary zoning requirements are generic use restrictions, rather than a requirement to pay money or give up land and, therefore, are not exactions subject to heightened scrutiny); 2910 *Georgia Avenue, LLC v. District of Columbia*, 234 F.Supp.3d 281 (D.D.C. 2017); *see generally*, Note, Affordable Housing Ordinances: Exactions or Use Restrictions in the Post *Koontz* Era?: An Analysis of *California Building Industry Association v. City of San Jose,* 48 Urban Lawyer 899 (Fall, 2016).

56. *California Building Industry Association v. City of San Jose*, 136 S.Ct. 928 (2016)(concurring opinion per Thomas, J.).

57. *Id*. at 928-29.

Adam L. Wekstein is a founding partner of Hocherman Tortorella & Wekstein, LLP. His practice concentrates on land use, zoning, environmental and constitutional law and appellate practice. He has handled numerous complex litigation matters on both the trial and appellate levels. He appears regularly before municipal agencies and boards seeking land use approvals and environmental permits.

Mr. Wekstein has lectured and/or written articles regarding various zoning, environmental law, property rights, and constitutional issues for the Local and State Government Law and Environmental Law Sections of the New York State Bar Association, Lorman Education Services, the Practicing Law Institute, The New York Zoning Law and Practice Report, The Urban Lawyer, the Municipal Law Re-source Center of Pace University and the Westchester Municipal Planning Federation. He is a member of the Executive Committee of the Local and State Government Law Section of the New York State Bar Association.

Mr. Wekstein graduated from Cornell University and the State University of New York at Buffalo Law School, *cum laude*, where he was an editor of the *Law Review.* He served as a law assistant at the New York State Supreme Court, Appellate Division, Third Department.