U.L. v. Carteret 16 Feb. 1984

Plainsboro.

Commercial Development exactions (3)

Plainsboro - special assessments (3)

Pgs 6

PI ± 5123

CA000493E

Feb. 16, 1984

To: John Payne
Fr.: Rachel H.
Re: Commercial Development exactions/taxation in Plainsboro;
Comparable San Francisco program

The MLUL allows a town to require a developer to pay its pro-rata share of the "cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefore, located outside the property and necessitated and required by construction or improvements within the subdivision." N.J. Stat. Ann. S40:55D-42. This seems to eliminate payments to fund housing construction, unless it's claimed the listed improvements aren't all inclusive, and that the section is mainly designed to assure that the developer's contribution doesn't exceed municipal costs attributable to the development. Prior New Jersey case law required a "rational nexus" between the exaction cost, the portion of the improvement necessitated by the development, and the extent to which the development benefited from the improvement. Bracer v. Borough of Mountainside, 55 N.J. 456, 262 A.2d 857 (1970); Longridge Builders, Inc. v. Princeton Planning Board, 52 N.J. 348, 245 A.2d 336 (1968). The prior case law doesn't seem to have limited possible exactions for off-tract improvements to the improvements now listed in the MLUL. It seems mainly to have required that the need for the off-tract improvement be totally or partially caused by th development, and that the exaction cost reflect costs attributable to the development, e.g. that the developer pay only his "fair share" of the total cost of the improvement. Divan Builders v. Planning Board of Township of Wayne, 66 N.J. 582, 334 A. 2d 30 (1975).

It could be argued that the MLUL merely codified the then-existant standards, and that when it was passed there was no conception that a new development could legitimately necessitate any off-tract improvements besides those specified. Mt. Laurel II changed this scenario by requiring that a town which purposefully attracts jobs must also provide housing for job-holders. New commercial development now not only forces a municipality to make the off-tract improvements listed in the MLUL - it also forces the municipality to provide low income housin Arguably, this municipal cost is even more traceable to new commercial development than the cost of the listed off-tract improvements, because the housing cost is constitutionally-mandated, and the other improvemen are not. However, this argument is weak in light of the MLUL's explici ness.

S.F. Program

The S.F. program described at 7 Harv. Env. L.R. 449 (1983) amounts t an exaction imposed on new office developments. It requires office developers to build, rehabilitate, sponsor or finance new "affordable" housing in order to get a building permit. Although it is not codified in an ordinance (the city is relying on its discretionary authority to issue buildihg permits), the S.F. program is more legally justifiable than a comparable N,J. program would be. First, California's subdivision exaction law is apparently quite permissive. Second, the Calif. State Hsg. Law requires that cities provide their fair share of regiona lower income housing. Third, the S.F. office space market remains very tight and lucrative, so that a building permit arguably confers a "windfall" on a developer, enabling him to reap benefits created by externalities.

The article criticizes the S.F. program in two respects. First, developers can arrange their own residential housing deals, independent of city direction. This lowers developer costs, but it doesn't allow the city to control what is built and to gear resulting housing construction to specific need. Second, a developer can sponsor housing affordable to those earning 120% of the median income. However, developers required to contribute a given number of units (1 BR=1 Unit) do receive more unit credits for moderate or low income units, and for units sponsored without a government subsidy.

The article reports that the program has been generally successful, providing 437 new units from 1980 to Feb. 1983 out of a total of 2,637 committed units. It does not specify what percent of the units are low or moderate income. It also reports similar programs in Toronto, Denver, London (G.B.) and Santa Monica. As an alternative to the current S.F. set-up, it suggests giving bonuses to contributing developers in order to make the program more attractive. If Plainsboro couldn't justify requiring mandatory contributions from new commercial developers, it might use this approach on a non-mandatory basis.

Taxing existing commercial units: I havn't found any way to justify imposing a special tax on existing commercial properties, although since Plainsboro's fair share is partially derived from that property, it is obviously causing housing need.

Feb. 27, 1984

To: John Payne
Fr.: Rachel H.
Re: Plainsboro- special assessments

N.J. Stat. Ann. S 40:56-1 allows municipalities to make "local improvements", and to assess their cost on properties that are in the vicinity or that are benefited by the improvement.[1] Such special assessments are not "taxes" in the constitutional sense, and thus do not violate the tax uniformity clause of the state constitution, although they are selectively imposed. McNally v. Tp. of Teaneck, 75 N.J. 33,4[illegible] (1977). Special assessments could potentially be levied against Plainsboro non-residential property.

The assessment should be made "upon completion" of the improvements- S 40:56-24- or may be made as soon as the improvement is started, if the municipality has title to the property to be improved. S 40:56-43 The assessment can be paid in installments- S 40:56-35- which may coincide with the term of the loan or bond used for financing. Chapter 16[illegible] of the Laws of 1983, amending S 40:56-35. The statute also allows periodic assessments for maintenance of an improvement.

One problem with the special assessment approach is that the statut[illegible] states that "local improvements" "may include any of the following", a[illegible] then lists specific projects, including construction and upgrading of

1. A "local improvement" is defined as one permitting a special assessment. In Riddlestorffer v. City of Rahway, 82 N.J. Super. 36,42 (Law Div. 1963), the court stated that a contract providing hospitalization insurance to municipal employees was not an "improvement" under the statute. No other similar cases were found.

streets, bridges, beaches, utility connections, water mains, plus waterway clearance, stream widening, construction of parking facilities and pedestrian malls. Housing is not listed as a potential "local improvement."[2]

Another problem is that the "benefit" to which the statute refers has been construed to mean a rise in property values attributable to the improvement. Thus, while a "local improvement" that provides "gener municipal benefits may be financed by a special assessment, at the discretion of the municipality, the cases assume that the improvements have created an increase in property values. E.g., McQueen v. Tn. of W. New York, 56 N.J. 18 (1970)(subsequent installation of parking meters didn't preclude municipality from using a special assessment to pay for a parki lot; the "benefit" to assessees is the incremental increase in property value); In re P.S. E. & G., 18 N.J. Super. 357 (App. Div. 1952)(questic was not whether plaintiff used or needed the sewer line for which it was assessed, but whether plaintiff's property value rose). Obviously, if "benefited by" was more liberally construed, this would not be a problem

Ideally, according to the cases above, the amount of a special assessment would equal the increase in property values. In McNally, however, the court upheld an assessment based on the cost of the improvement, saying that absent other proof, the property value increase could presumptively equal the cost of the improvement. 75 N.J. at 42. In McNally, the municipality determined assessment amounts by dividing the cost of new paving and curbs among the abutting properties on a foot-front basis The court said that this methodology was valid, unless plaintiff could

2.For a case where the "expressio uniis" mode of statutory construction was rejected, despite the failure to override a gubernatorial veto of an "explicit" amendment, see N.J. Civil Svc. Assn. v. Mayor of Camden, 135 N.J. Super. 312 (Law Div. 1975). See also Resnick v. E. Brunswick Tp. Bd. of Ed., 77 N.J. 88, 389 A.2d 944 (1978)(on expressio uniis)

show that the increase in the value of his property was less than the assessment cost. 75 N.J. at 44. See also N.J. Stat. Ann. S 40:56-27 (assessments must be proportionate to benefits), and S 40:56-37 (municipality must pay the excess of cost over assessment).