Land Use Proffers: Developers, Counsel Need to Be Aware of Legal Boundaries

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It is common for municipalities to request that a zoning applicant provide community benefits or proffers as a condition of a major site plan or other land use approval. Despite the frequency of this practice in the zoning arena, the law imposes serious limits on the legality of requiring such proffers. A recent decision by the U.S. District Court for the Southern District of Florida in *Megladon v. Village of Pinecrest,* reinforces the limits on proffers established by the holding in the 2013 U.S. Supreme Court decision in *Koontz vs. St. Johns River Water Management District. Koontz* established the principle that a municipality is not allowed to require financial or similar community proffers as a condition of granting a zoning or other land use application, unless those proffers have a sufficient "nexus and rough proportionality" to the anticipated impact of the project on the community. If a proffer does not meet the "nexus and rough proportionality" test, it may violate the "unconstitutional conditions doctrine" of the Fifth Amendment to the U.S. Constitution, which prohibits the taking of property without just compensation. Given the frequency of requested proffers by local governments and the amount of such proffers, which can be in the hundreds of thousands of dollars, it is important for developers and land use counsel to be aware of the legal boundaries of required proffers.

In the *Koontz* decision, the U.S. Supreme Court reversed a decision by the Florida Supreme Court regarding proffers required by the St. Johns Water Management District in connection with an application by the property owner to develop a portion of its 15 acres of land. Although the applicant offered to deed to the district a conversation easement on the undeveloped portion of its land (11 acres) to mitigate the development, the district required that the property owner either reduce the development (while increasing the acreage of the property to be deeded to the district) or deed the 11 acres to the district and hire contractors to make improvements to district-owned land several miles away. The court ruled that such proffers— including purely monetary proffers—had to meet the "nexus and rough proportionality" test to avoid violating the unconstitutional conditions doctrine. The court stated: "Our decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government 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."

In *Megladon*, the Village of Pinecrest sought to condition the approval of a land use application for the construction of a new single-family home on the dedication to the public of a 7.5-foot strip of land on the property. The district court reiterated the *Koontz* ruling that requiring the property owner to deed land to the village as a condition of zoning approval must have sufficient "nexus and rough proportionality" to the impact of the project at issue. The district court stated: "As we've explained, the parcel has always supported a single-family home, and Megladon plans to do nothing more than build a new single-family residential building. Nothing in the [second amended complaint] suggests that the process of subbing out an old single-family home for a new one will substantially increase traffic congestion or otherwise impose costs on the public that dedications of property can offset."

The requirement that a zoning applicant pay impact fees is different than requiring the provision of community proffers. An impact fee is usually assessed to mitigate the direct, anticipated effect of a new project on a city's or county's infrastructure, such as sewer capacity, traffic generation and stormwater run-off. For example, if an applicant is proposing to develop a new 200-unit apartment building on vacant land, the applicable local government will normally assess an impact fee or require some action to mitigate the new project's incremental effect on the jurisdiction's existing sewer capacity.

By contrast, required community proffers often do not relate directly and proportionately to the anticipated impact of the project on that jurisdiction. For example, assume a developer submits a zoning application to build a new hotel in a city. It would be of questionable legality for the city to require the developer to fund the construction of a new senior center miles away as a condition of receiving approval for the new hotel. (The use of the term "proffer" in these circumstances is a misnomer. Given the legal limits imposed by Koontz on mandatory (involuntary) land use "conditions," municipalities prefer to label these conditions as voluntary "proffers.")

Even though the case law establishes clear limits on the permissibility of land use approval conditions, developers of large projects rarely challenge in court the imposition of community proffers of questionably legality. The reluctance to sue a municipality over proffers is usually based on a lawsuit's adverse economic and political effects, which can be dramatic. The filing of a lawsuit stops the approval process for a project while the case is pending. During that time (which can easily exceed one year), the developer must continue to pay mortgage costs, taxes and insurance relating to the real estate. Furthermore, the delay may cause the developer to miss its original target date for construction and occupancy of the project. The developer is also required to incur significant legal fees on litigation with no guarantee of success. And finally, there is understandable reluctance on the part of a developer to create an adversarial relationship with a local government that ultimately has the final say over whether the project will become a reality. As a result, although developers frequently engage in vigorous negotiations with a local government over community proffers and their costs, the outcome of such discussions is usually an agreement by the developer to provide the proffers (subject to any reductions in their cost after negotiation).

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In sum, the imposition of community proffers creates challenges for a zoning applicant. It is important for developers and their lawyers to understand the law on this subject so they are prepared to respond intelligently when a proffer is required in connection with a major project.

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