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RE: P&A CLIENT ADVISORY (2012:06)
Denver Street LLC v. Town of Saugus, 462 Mass. 651 (2012)

We are writing to advise our public sector clients of Denver Street LLC v. Town of Saugus, 462 Mass. 651 (2012), a recent decision by the Supreme Judicial Court of Massachusetts ("SJC") that overturns a prior decision of the Appeals Court regarding the legality of a municipal fee charged to new sewer users to compensate for additional anticipated impacts to the sewer system likely to be caused by the proposed development, and to require contribution to inflow and infiltration ("I/I") reduction by the developer.

At issue in Denver Street was Saugus' requirement that new sewer users pay an I/I reduction contribution fee. Developers filed suit alleging that the I/I charge was an illegal tax rather than a lawful fee. The amount of the charge was calculated according to a formula multiplying the number of gallons of proposed flow by a factor of ten. The charge was intended to compensate Saugus for repairs to the municipal sewer system required pursuant to an Administrative Consent Order ("ACO") with the Massachusetts Department of Environmental Protection ("DEP"). The ACO required Saugus to reduce I/I in its sewer system and imposed a ten-year moratorium on new connections, but allowed Saugus to establish a sewer bank allowing a certain amount of new flow into the system in proportion to I/I removed from the system during the course of the ten years. The developers argued that the charge was an illegal tax because they did not receive a sufficiently particularized benefit and because the charge was designed to raise revenue rather than compensate the Town for previously incurred expenses. The Appeals Court ruled in favor of the developers in a 2011 decision, and Saugus appealed the decision to the SJC.

In analyzing the legality of the Saugus I/I reduction contribution fee, the SJC applied the familiar Emerson College v. Boston, 391 Mass. 415 (1984) test for determining whether a charge constitutes a lawful fee or an unlawful tax. The Emerson Court designated three factors that distinguish fees from taxes:

1. Are fees charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society?

2. Are fees paid by choice, in that a party paying the fee has the option of not utilizing the government service and thereby avoiding the charge? and

3. Are fees collected not to raise revenues but to compensate the governmental entity providing the services for its expenses?

The developers argued that the Saugus I/I charge did not meet the first and third prongs of the Emerson College test. The SJC disagreed, finding that the developers and the Appeals Court had given insufficient weight to the central importance of the ACO in their analyses. The developers did in fact receive a particularized benefit, namely accelerated access to the sewer system via the Town's sewer bank that was authorized by the ACO absent which the developers would have had to wait ten years to connect. The SJC rejected the Appeals Court's conclusion that any particularized benefit must be weighed against any benefit to the public and instead held that the first prong is satisfied if a limited group receives a benefit that is sufficiently specific and special to its members. The SJC further held that the Saugus charge satisfied the third prong of the test in that the charges paid by the developers reimbursed the Town for some of the monies the Town previously spent on I/I removal, and the ten-to-one ratio charged to the developers was inherently reasonable since the ACO required the Town to remove ten gallons of I/I for each gallon of new flow.

While this case is certainly favorable to municipalities, it should be noted that the SJC's analysis is based upon the specific facts at issue and should not be interpreted as a general ruling that I/I charges will be deemed a permissible fee in every case. However, municipalities, particularly those subject to ACOs, can take comfort in the fact that they may charge I/I fees if such fees are sufficiently related to the reduction of I/I in the sewer system in accordance with the SJC's analysis in this case. We are happy to assist our clients in reviewing their I/I fees to determine whether they satisfy the requirements of the Emerson College test as recently clarified by the SJC.

Please contact Christopher Petrini or any of the other attorneys at P&A should you have any questions regarding the Denver Street decision or the legality of I/I fees in your community.

Thank you.