

March 6-8, 2013

LAND USE FOR A LIFETIME:

Changing Demographics & Shifting Priorities

**Common
Problems,
Common
Solutions,
Common Law:
Impact Fees and
Special Permitting**

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Fee or Tax - Why does it Matter under American Law?



- 1. Taxing Powers of Local Governments are limited by State Constitutional and Statutory Provisions**
- 2. Usually means that if a Developer Funding Requirement (for, example an Impact Fee) is labeled a Tax It will be Ultra Vires**

The Importance of Ultra Vires?

- A regulation is **ultra vires** if it varies, modifies, or affects "the ambit of the legislative pronouncement" in the empowering statute or attempts to place an inconsistent interpretation or construction on the statute
- Taxing Powers of Local government are **limited**
 - If a required payment is a tax **rather than a fee**, it will usually be invalid as **ultra vires**



"ULTRA VIRES"

Impact Fee: Relax It is Not a Tax

- Most state courts have recognized impact fees as permissible exercises of the police power
- The focus of controversy shifts to the standard of reasonableness which must be met since all exercises of the police power must be “reasonable”



Distinguishing Fee from Tax



– A fee is based on the need for government expenditure caused by fee payer

- Ex: **Adding** infrastructure for a new development
- Amount must be proportionate to that need and fees collected must be expended to benefit those who pay them

– A tax is for future, general needs

Example General Fund Budget - Where a Dollar Goes

**Leading Judicial Decisions
Getting the Distinction
Correct**

Jordan v. Village of Menomonee Falls 28 Wis. 2d 608,
137 N.W. 2d 442 (1965). (appeal dismissed) 385 U.S.
4 (1966)

- Requiring a payment in lieu of actual dedication was constitutional
 - Dedication fees are equally legitimate when imposed pursuant to zoning ordinances that are enacted for the purpose of "facilitat[ing] the adequate provision of transportation, water, sewerage, schools, parks and other public requirements."
- Test used:
 - (1) there must be a **reasonable connection** between the need for additional capital facilities and the growth resulting from new development, and (2) there must be a **reasonable connection** between the expenditure of the fees collected and the facilities capacity provided thereby.'

City v. City of West Jordan, 606 P.2d 217 (Utah 1979).
(decision on rehearing) 614 P.2d 1257 (Utah 1980)

- **Court held that the city's authority included the power to impose imposition of a development fee to promote the health, safety and welfare of city residents**
 - the amount of the exaction or impact fee was "within the prerogative of the City Council to determine, and so long as it is within **reasonable limits**, so that it cannot be characterized as capricious or arbitrary, the court will not interfere therewith."

A COURT THAT GOT IT WRONG

Drees v. Hamilton Twp. 132 Ohio St.3d 186 (2012)

- **Court held the exaction was operating as a tax, and therefore unauthorized:**
 - Lack of special benefit inuring to the targets of the fee directly for money paid was major determinate
- **SO?**
 - Ignored OH's own decisions
 - Goes against rough proportional share concept
 - Leaves OH with bifurcated approach to impact fees. Sometimes OK, sometimes NOT

Takings and Impact Fees: Various Approaches

- ① **Nollan/Dolan Applies to All Impact Fees**
- ② **Nexus and Rough Proportionality**
- ③ **Heightened scrutiny should apply to all forms of development exactions**

Nollan/Dolan Applies to Impact Fees Imposed Adjudicatively but not to those Imposed Legislatively

- *Ehrlich v. City of Culver City*
- Impact fees imposed by administrative agency are subject to Nollan/Dolan, but those imposed by legislation fall within police power
- Discretionary imposition provides an inherent risk of dedications unrelated to legitimate ends



Nollan/Dolan Does Not Apply

- *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)
 - Test is an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence
- Court found it “reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners.”



The Dual Rational Nexus Test Obviates the Need to Apply Nollan/Dolan

- **The Dual Rational Nexus Test covers all the points of Nollan/Dolan – IS A STRICTER STANDARD**
- **Dual Rational Nexus Test**
 - **(1) Impact fees may be no more than the government's infrastructure costs which are reasonably attributable to the new development [AKA PROPORTIONATE SHARE], and (2) The new development required to pay impact fees must benefit from the expenditure of those fees**

St. Johns River WMD v. Koontz
(77 So. 3d 1220)

Florida Supreme Court

- **CAVEAT**
- **USSCT granted cert Oct 5, 2012**
- **Nolan/Dolan applies only to exactions involving:**
 - interest in real property
 - in exchange for permit approval
 - where approval is given

