

**Rocky Mountain Land Use Institute
2013 Annual Land Use Conference**

**COMMON PROBLEMS, COMMON SOLUTIONS,
COMMON LAW: IMPACT FEES
AND SPECIAL PERMITTING**

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INTRODUCTION

Hawaii Insurers Council v. Lingle, 201 P.3d 564 (2008)

“... not every exaction by state authorities is a tax ... The legislature may delegate police powers [and enable] delegates to assess fees. Generally a fee is exchange for a service rendered or a benefit conferred and the amount [and the fee] normally bears a relationship to the value of the service or benefit.”

[the classic] regulatory fee is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes [such as deliberately discouraging particular conduct], or it may serve to raise revenue to defray the agency’s regulatory related expenses.

NEXUS BETWEEN THE REGULATORY SCHEME AND THE FEE

Rule 1: Nexus Between the Regulatory Scheme and the Fee

Must be intended for a public purpose tied to the regulatory scheme.

“... a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behavior; (3) the presence of actual or properly estimated costs of the regulation; and (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from or causes the need for the regulation.”

Westbank First Nation v. B.C. Hydro, [1999] 3 S.C.R., para 44

620 Connaught v. Canada (A.G.), para 25

TAX/FEE DISTINCTION / JUDICIAL SCRUTINY

“Raising revenues is one of the most powerful tools of government. It involves the taking of property by the government. That is why taxes may be levied only by elected legislators in Parliament or the legislature of a province under the *Constitution Act, 1867*. Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.”

620 Connaught Ltd. v. Canada (Attorney General) 2008 SCC 7,
[2008] 1 SCR 131

RESULTS OF ILLEGAL TAXATION

“the user charge constituted an indirect tax which, since it was not tailored to the cost of regulating the licensees, could not constitute a [Provincial power]” para 2

“When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle.” para 15

Kingstreet Investments Ltd. v. Province of New Brunswick et al 2007 SCC1

NEXUS BETWEEN THE REGULATORY SCHEME AND THE FEE

Regulatory schemes usually involve expenditures of funds on costs which are either known or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated.

“... in Ontario Home Builders ... the charge levied was meticulous in its detail and clearly operated so as to limit recoupment to the actual costs. In Allard – evidence was led by city officials demonstrating the actual costs of annual road repair ... In both cases there was a fairly close nexus between estimated costs and the revenues raised through the regulatory scheme.”

Westbank, supra, para 27

NEXUS BETWEEN THE REGULATORY SCHEME AND THE FEE

“Finally the individual subject of the regulatory charge will usually either benefit from the regulation, or cause the need for regulation ... In Allard, the gravel trucks caused the need for the repair of the roads; in Ontario Home Buildings, the developers and the new home owners caused the need for new schools. In both cases the individual being charged also benefitted from the regulation.”

Westbank, supra, para 27

BURDEN SHOULD BE ROUGHLY PROPORTIONAL TO BENEFIT

Rule 2: Burden Should be Roughly Proportional to Benefit

“Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided ...”

Although the cost of granting letters probate bears no relation to the value of the estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service which indicates that the levy is tax and not a fee.

Eurig Estate (Re), [1998], 2 S.C.R., para 21

USED FOR THE PURPOSE

Rule 3: Used for the Purpose

“Those conclusions are supported by the evidence before the Court which showed that probate fees do not “incidentally” provide a surplus for general revenue, but one rather intended for that very purpose. The revenue obtained from probate is used for the public purpose of defraying [the court administration and the AG Ministry] in general, and not simply to offset the costs of granting probate.”

Eurig, supra, para 20

REGULATORY FEES SHOULD NOT RISE ABOVE THEIR SOURCE

Rule 4: Regulatory Fees Should Not Rise Above Their Source

“A surplus itself is not a problem so long as the municipality made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme ...”

Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371,
p. 41

REGULATORY FEES SHOULD NOT RISE ABOVE THEIR SOURCE

“However as stated in Allard ... the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge, and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to match revenues from fees with the cost associated with the regulatory scheme.”

DELEGATION OF DEVELOPMENT COST CHARGE (IMPACT FEE) POWER

S. 933(2) Development cost charges may be imposed under subsection (1) for the purpose of providing funds to assist the local government to pay the capital costs of

(a) providing, constructing, altering or expanding sewage, water, drainage and highway facilities, other than off-street parking facilities, and

(b) providing and improving park land

to service, directly or indirectly, the development for which the charge is being imposed.

AMOUNT OF DEVELOPMENT COST CHARGES

S. 934(2) Development cost charges may vary as provided in subsection (3), but must be similar for all developments that impose similar capital cost burdens on the local government.

(3) Development cost charges may vary with respect to one or more of the following:

(a) different zones or different defined or specified areas;

(b) different uses;

AMOUNT OF DEVELOPMENT COST CHARGES

c) different capital costs as they relate to different classes of development;

(d) different sizes or different numbers of lots or units in a development.

(4) In setting development cost charges in a bylaw under section 933 (1), a local government must take the following into consideration:

(a) future land use patterns and development;

(b) the phasing of works and services;

AMOUNT OF DEVELOPMENT COST CHARGES

- (c) the provision of park land described in an official community plan;
- (d) how development designed to result in a low environmental impact may affect the capital costs of infrastructure referred to in section 933 (2) and (2.1);
- (e) whether the charges
 - (i) are excessive in relation to the capital cost of prevailing standards of service,

AMOUNT OF DEVELOPMENT COST CHARGES

- (ii) will deter development,
- (iii) will discourage the construction of reasonably priced housing or the provision of reasonably priced serviced land, or
- (iv) will discourage development designed to result in a low environmental impact in the municipality or regional district.

AMOUNT OF DEVELOPMENT COST CHARGES

(5) A local government must make available to the public, on request, the considerations, information and calculations used to determine the schedule referred to in subsection (1), but any information respecting the contemplated acquisition costs of specific properties need not be provided.

USE OF DEVELOPMENT COST CHARGES

935(1) A development cost charge paid to a local government must be deposited by the local government in a separate special development cost charge reserve fund established for each purpose for which the local government imposes the development cost charge.

USE OF DEVELOPMENT COST CHARGES

935(3) Money in development cost charge reserve funds, together with interest on it, may be used only for the following:

(a) to pay the capital costs of providing, constructing, altering or expanding sewage, water, drainage and highway facilities, other than off-street parking, that relate directly or indirectly to the development in respect of which the charge was collected

OFF-SITE ADJUDICATIVE EXACTIONS

“For its part, S. 37 is neither a municipal capital gains tax, nor a tool to sell upzoning to supplement their coffers. ... its use must be governed by the principles of planning ...

OFF-SITE ADJUDICATIVE EXACTING

In short, there must be a nexus between the development and ... the benefits demonstrating that the benefits pertain to the development (whether on or off-site), not to unrelated municipal projects (however meritorious).”

Sterling Silver Development Corp. v. Toronto
2006 16 M.P.L.R. (4th) 293

OFF-SITE ADJUDICATIVE EXACTIONS

“... the intersection works have long been identified as necessary for safety reasons and the City should have acted itself rather than await a development. If the City waited, it can't really be unsafe.

OFF-SITE ADJUDICATIVE EXACTIONS

“The intersection improvements fall into the category of improvements the City would like to see but not that related to this development.”

Davenport Three Develco Inc. v. Toronto, (2006) 33
O.M.B.D. 157

(a proportional contribution might have been acceptable)

ON-SITE DEDICATION EXACTIONS

1. Uniform Statutory Dedication

- parks 5%
- streets and roads necessary to serve the subdivision
- latecomers/proportionality

2. Adjudicative On-Site Exactions

- no nexus/Nollan/bad faith
- with nexus/Dolan/fails on proportionality/fails on source

DEVELOPMENT OF ENGLISH PLANNING OBLIGATION

“The [U.S.] courts, following the decision of the Supreme Court in Nollan v. California Coastal Commission (1987) 483 U.S. 835 apply what has been called the “rational nexus” test.”

[Amenity being extacted was \$14,000,000 bridge crossing a river on the other side of the town]

DEVELOPMENT OF ENGLISH PLANNING OBLIGATIONS

“This requires the planning authority, which exacts a contribution to infrastructure as a condition of this consent to demonstrate that, ‘the development will cause a need for new public facilities and that the contribution required is proportionate to that need and will actually be used to provide those facilities.’”

DEVELOPMENT OF ENGLISH PLANNING OBLIGATION

“This ... is very similar to the test of necessity and proportionality in [the Minister’s] circular 16/91”

Tesco Stores Ltd. v. Secretary of State for the Environment,
1995 1 W.L.R. 759

DEVELOPMENT OF ENGLISH PLANNING OBLIGATIONS

“...that planning obligations are only sought where they meet all of the following tasks. A planning obligation must be:

- (i) necessary to make the proposed development acceptable in planning terms;*
- (ii) relevant to planning;*
- iii) directly related to the proposed development;*

DEVELOPMENT OF ENGLISH PLANNING OBLIGATION

- (iv) fairly and reasonably related in scale and kind to the proposed development;*
- (v) Reasonable in all other aspects.*

The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold.

DEVELOPMENT OF ENGLISH PLANNING OBLIGATION

It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms.

Office of the Deputy Prime Minister, January 30, 2004

www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_032594.pdf027110.hcsp