



# Exactions and Impact Fees

Tips for Practitioners in the Post-*Koontz* Era

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**Brian J. Connolly**, Otten Johnson Robinson Neff & Ragonetti, P.C., Denver, Colorado

**Karen A. Avilés**, Assistant City Attorney, City and County of Denver, Colorado

**Cameron C. Artigue**, Gammage & Burnham PLC, Phoenix, Arizona

# Session Overview

*“In general, the art of government consists in taking as much money as possible from one party of the citizens to give to the other.”*

- Voltaire



# Session Overview

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- What is an exaction? What is an impact fee?
- Review law on exactions and impact fees
  - Federal constitutional law: *Nollan*, *Dolan*, and *Koontz*
  - RIPRA in Colorado
- Practice pointers on exactions and impact fees
  - For government agencies
  - For private sector landowners and developers

# Defining Exactions and Impact Fees

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- Exaction

- a requirement imposed on an ad hoc basis during the processing of a discretionary land use application as a condition of approval of the application.
- An exaction can take many forms, including:
  - » a conveyance or dedication of property for a public purpose;
  - » a requirement to construct public improvements such as a new traffic signal; or
  - » a requirement to pay money to finance acquisition or construction of public facilities.

# Defining Exactions and Impact Fees

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- Impact Fee
  - a legislatively enacted fee;
  - imposed on a broad category of property owners during the development process;
  - designed to defray the capital costs of new governmental facilities necessitated by the new development.
  - The fee is generally collected at the time a building permit or certificate of occupancy is issued.

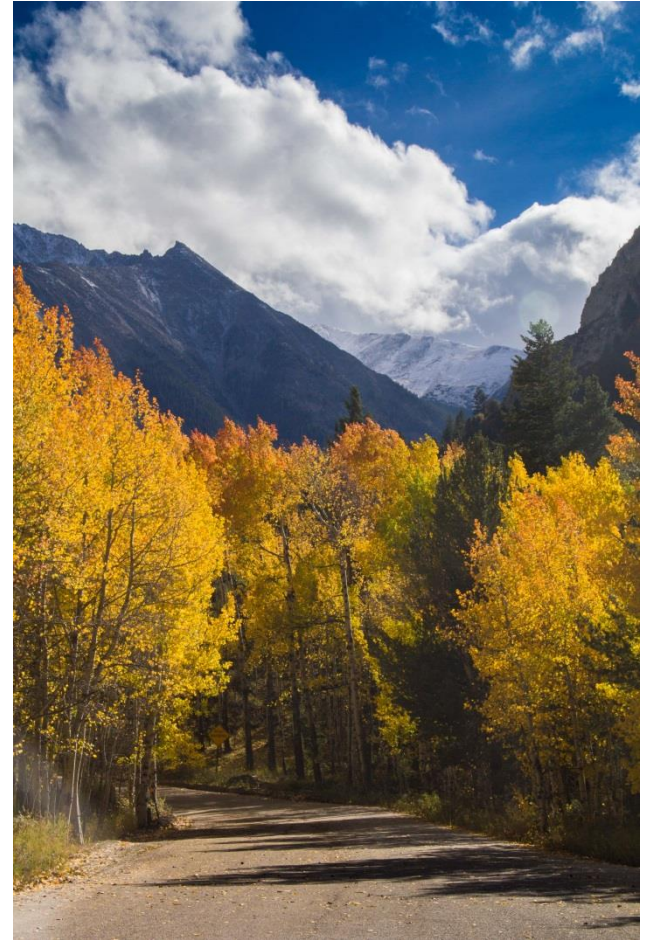
# Defining Exactions and Impact Fees

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- Contrast exactions and impact fees with...
  - User fees
    - Compensation for a service, claimed in right of proprietorship
  - Taxes
    - Excise, other property, etc.
    - Imposed by virtue of sovereignty

# Purposes

- Make new development pay the cost of capital facilities necessary to serve new residents/development, mitigate impacts to existing community
- Important planning tools
- Subject to abuse





# Common Legal Challenges

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- Does the governmental unit have the authority to impose the fee or exaction?
- Is the fee or exaction an impermissible tax?
- Does the fee or exaction bear a reasonable relationship or rational nexus to the need for improvements necessitated by the new development?
- Are the fees calculated properly and have resulting revenues been managed according to law?
- Does the fee or exaction violate the Takings Clause of the United States Constitution?



# The Law: Exactions and Fees

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- Federal constitutional law
  - *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
  - *Dolan v. City of Tigard*, 512 U.S. 374 (1994)
  - *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. \_\_\_\_; 133 S. Ct. 2586 (2013)
- State statute (in Colorado)
- Home Rule Powers

# Federal Constitutional Law

No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- Roots in Fifth Amendment Takings Clause, Fourteenth Amendment Due Process Clause
  - “Unconstitutional conditions” cases
  - Taking of property—land or money—by the government is compensable
  - Government must, as a baseline, act so as to rationally further a legitimate governmental purpose
- Concern: requiring private parties to give up constitutional rights in order to obtain a government benefit

# *Nollan*



# Nollan

*“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury.”*

- Test: must have (1) a legitimate state interest, and (2) the exaction must further the state interest
  - Is this really heightened scrutiny? Requires a more individualized determination than rational basis, but...
- Most exactions probably meet the essential nexus test

# *Dolan*



# *Dolan*

*“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”*

- Compares the scope of the exaction to the impact of the proposed development
  - Requires the government to make an individualized determination
  - Heightened scrutiny: burden on government to show that the cost-impact ratio is roughly proportional
- Fact-specific inquiry
- Less clear that an exaction meets this test



# Koontz





# *Koontz*

- Denial of permit because of petitioner's failure to accede to permit conditions is no different from grant of permit and taking of property interest
- Demands for money must meet the *Nollan-Dolan* essential nexus and rough proportionality standards

# Distinguishing Taxes and User Fees

*“This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws that may impose financial burdens on property owners.” –Koontz*



# Monetary Exactions vs. User Fees

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Distinguishing between monetary exactions, user fees and taxes...

- Cases have addressed the distinction between taxes and user fees
- Cases have not addressed the distinction between user fees and exactions or between taxes and exactions
- What did the Supreme Court mean by “user fees”? Is an impact fee a “user fee”? Are all *legislatively-enacted* fees “user fees”?

# Monetary Exactions vs. User Fees

- What we know...
  - User fees
    - Ex.: government can charge tolls for use of a toll road
    - *“Service charges, tolls, water rates and the like are . . . contractual in nature, either express or implied, and are compensation for the use of another’s property, or of an improvement made by another, and their amount is determined by the cost of the property or improvement and the consideration of the return which such an expenditure should yield. The charge is made, not by virtue of the sovereignty of the governmental unit, but in its business or proprietary capacity.”* – Northern Illinois Home Builders Ass’n, Inc. v. County of Du Page, 649 N.E.2d 384, 393 (Ill. 1995)
  - Monetary Exactions
    - Ex.: requiring payment of money for off-site mitigation (Koontz)
    - *“An exaction generally requires developers to supply or finance public facilities or amenities made necessary by proposed development.”* – Holmdel Builders Ass’n v. Twp. of Holmdel, 121 N.J. 550, 570 (N.J. 1990)

# Monetary Exactions vs. User Fees

- What we don't know about the distinction...
  - “Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.” – *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 641 (Tex. 2004)
  - Payment into an affordable housing fund was determined to fall into the scope of legislatively-enacted fees (*Holmdel*)
  - ...and other difficult questions

# Monetary Exactions vs. User Fees

- Implications of the distinction...
  - **User fees:** *“Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that the reality of [the fee] belies its express language before we conclude that the deductions are actually takings.”* –United States v. Sperry Corp., 493 U.S. 52, 60 (1989)
  - **Monetary exactions:** *“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”* –Dolan v. City of Tigard, 512 U.S. 374, 391 (1994)

# Monetary Exactions vs. Taxes

- For federal purposes, a county stormwater service fee was held to be a tax in *DeKalb Cty. v U.S.*, 108 Fed.Cl. 681 (2013) (holding Supremacy Clause barred application of fee to property owned by federal government).
  - Georgia Supreme Court had determined similar assessment was a fee for state law purposes.
  - “Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.”
  - Standard for distinguishing fee vs. tax may change with nature of issue presented.



# Monetary Exactions vs. Taxes

- *DeKalb* court rejected test applied in *Massachusetts v. U.S.*, 435 U.S. 444 (1978), which held that a state's implied immunity from federal taxes did not prohibit the federal government from imposing a tax on a state if:
  - The tax is imposed in a nondiscriminatory manner
  - The tax is a fair approximation of the benefits received by the taxed entity
  - The tax does not produce revenues that exceed the cost of the benefit provided.



# Monetary Exactions vs. Taxes

- *DeKalb* court instead applied test established in *San Juan Cellular Tel. Co. v. PSC*, 967 F.2d 683 (1<sup>st</sup> Cir. 1992), which addressed question of whether a charge was a fee or tax for purposes of Tax Injunction Act.
- Three-part inquiry:
  - Which governmental entity imposed the charge? (legislative body or regulatory agency?)
  - Which parties must pay the charge? (broad class or narrow group?)
  - For whose benefit are the revenues generated by the charge spent? (to benefit general public or provide a particularized benefit).

# Monetary Exaction vs. Taxes

- “The test used to distinguish between taxes and user fees ... states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here exports); (2) are based upon a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefit.” –*U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (rejecting argument that harbor maintenance charge was a user fee because it was based on value of goods, instead of extent of use of harbor); *aff’d*, 523 U.S. 360 (1998).

# Statutory Law (Colorado)

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- Regulatory Impairment of Property Rights Act (RIPRA)—C.R.S. §§ 29-20-201 through 205
  - Passed in 2001 to establish regularity and predictability for local governments and development community regarding exactions
- Impact Fee Act
  - Passed in 2001 to provide express enabling legislation for impact fees by local governments—C.R.S. §§ 29-20-102(2) and 104.5

# RIPRA

- Applicable to conditions on land use approvals
- Requires essential nexus and rough proportionality for *ad hoc* discretionary conditions including:
  - Property dedications
  - Monetary payments
  - Providing services
- Inapplicable to legislatively-formulated assessments
- Provides procedure for challenging an exaction
- Burden on local government to establish nexus, proportionality (based on “substantial evidence”)

# Impact Fee Act

- Local governments authorized to impose impact fees as a condition of issuance of a development permit
- Must be used for expenditures by the local government (not a school or special district)
- Only for *capital facilities*
- Fee must be set to match the reasonable impact of new development on existing capital facilities; must be no greater than necessary to defray impacts; may not be used to remedy existing deficiencies
- Fees must held in separate accounts and must be used only for the purposes for which they were collected

# Best Practices



Source: [www.karletowncentre.com](http://www.karletowncentre.com)

- From the perspective of a government lawyer
- From the perspective of an Arizona private-sector lawyer
- From the perspective of a Colorado private-sector lawyer



# Government Perspective

- **How Developed and Imposed:**
  - Exaction General Standards
  - Fees – determination of amount
  - Imposed through
    - Ordinance/Regulations
    - Plat Note
    - Site Plan Note
    - Development Agreement



# Government Perspective

- **What:**

- General Standards for Exactions
  - Land Requirements:
    - Amount
    - Title
    - Environmental
  - Construction requirements
- Development Specific Analysis
  - Uses, density
  - Existing infrastructure
  - Transportation Engineering Plan



# Government Perspective

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- **When:**

- **Exaction**

- Exactions occur when development seeks a Plat, Site Plan or Permit
    - No Plat, Site Plan or Permit until exaction requirements are met

- **Fee**

- Fee imposed at building permit or certificate of occupancy
    - No Permit or CO until fee paid

# Structural Drivers of Negotiations



Source: [www.city-data.com](http://www.city-data.com)

- Constant Development of New Infrastructure
- Council-Manager Governments
- Districted City Councils
- Tradition of Constituent Service
- Competition over Retail Sales

# Legal Drivers of Negotiations

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- Hazy Vested Rights Doctrine
- Confusion & Distaste for Impact Fees
- All Rezoning = Legislative (in Arizona, but other states differ)
- Development Agreements = Legislative (not everywhere)

# This Adds Up To:

- Lots of Informal Communication with Senior Staff and Elected Officials
- Potential Disputes and Litigation



Source: [www.alexmaclean.com](http://www.alexmaclean.com)

# New Problems Raised by *Koontz*

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- Applicable to Impact Fees?
- “Yes, If” is the Logical Equivalent of “No, Unless,” but Only “Yes, If” can be an Actual Decision
- Inconsistent with Desire for Ripe Claims
- Questions of Authority, Formality, and Remedy



# Developer Best Practices

- Things to remember:
  - Profit is the driving force behind real estate development
  - Profits are affected by...
    - Cost uncertainties (materials, construction costs, consulting fees, etc.)
    - Cost uncertainties are in turn driven by uncertain timeframes
  - In the approval process, developers want...
    - Approval
    - Speed
    - Lowest possible cost



# Developer Best Practices



- Things to remember, cont'd:
  - Options for developers when presented with an exaction
    - Pay up
    - Pay under protest and sue later for a refund
    - Sue (after *Koontz*)
  - These options are affected by...
    - Monetary exaction vs. tax or user fee
    - Legislative vs. ad hoc exaction
    - *Nollan* and *Dolan* analysis
    - Remedies and procedures provided by state law

# Developer Best Practices

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- Things to remember, cont'd:
  - Negotiating power disparities vary based on the wealth and influence of the private property owner
  - Larger developers are better able to...
    - Negotiate with local governments (i.e. hire lawyers, consultants, etc.)
    - Absorb cost of exactions into a project
    - Pursue legal remedies against local governments

# Best Practices: Private Sector

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If concerned about the propriety of an exaction...

- Do the nexus and rough proportionality analyses—is there a case?
- Know state law procedural requirements
- Encourage use of development agreements—they benefit developers too!
- Converse, educate, inform, etc.

# Best Practices: Private Sector

- Consider litigation strategy
  - Statutory administrative remedies?
  - Pleading—notice pleading is generally sufficient to establish a claim of an unconstitutional condition
  - Summary judgment
    - Essential nexus is a question of law; rough proportionality is more likely to be a question of fact
    - “Heightened scrutiny”
      - Appears to place some additional burden on government, but Supreme Court cases are not clear on the extent...
      - Some states expressly put the burden on the government to establish the validity of the exaction (Colorado requires substantial evidence)
      - “[T]he validity of an exaction in an individual case is not presumed but must be shown by the government.” – *Town of Flower Mound v. Stafford Estates, L.P.*, 125 S.W.3d 620, 639 (Tex. 2004).



**Brian J. Connolly**

Otten Johnson Robinson Neff & Ragonetti, P.C. / Denver  
(303) 825-8400 / [bconnolly@ottenjohnson.com](mailto:bconnolly@ottenjohnson.com)

**OTTENJOHNSON**  
ROBINSON NEFF + RAGONETTI™

**Karen A. Avilés**

City and County of Denver, Colorado  
(720) 865-8772 / [Karen.Aviles@denvergov.org](mailto:Karen.Aviles@denvergov.org)



**Cameron C. Artigue**

Gammage & Burnham PLC / Phoenix  
(602) 256-4418 / [cartigue@gblaw.com](mailto:cartigue@gblaw.com)

**GAMMAGE  
&  
BURNHAM**  
Attorneys at Law