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## **CASE LAW REGARDING DEVELOPMENT IMPACT FEES**

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You want to know if the courts have upheld development impact fees.

### **SUMMARY**

Development impact fees are one-time fees governments impose on proposed developments to defray some of the cost of constructing or improving public infrastructure needed to service them. Courts have generally upheld impact fees if state law authorized them, the development necessitated the infrastructure improvements, and the improvements benefited the development.

In reaching their decisions, courts generally apply a two-part test. The first part consists of three prongs, each testing whether the fee violates a different constitutional protection. Fees sanctioned by a state law are more likely to withstand claims that they violate due process guarantees. Those that apply equally to all developments within a class (e. g. , residential) are more likely to withstand claims that they violate equal protection guarantees. And those that are based on the degree to which a development necessitates infrastructure improvements are more likely to withstand claims that they take property by forcing some people to pay for improvements that benefit everyone.

The second part examines the extent to which a development actually created the need for the infrastructure. Courts generally look for a "rational nexus," which exists if the jurisdiction (1) shows how the development created the need for the infrastructure, (2) identifies the cost of providing that infrastructure, and (3) bases the fee amount on the extent to which the development benefits from the infrastructure.

The likelihood that an impact fee will pass the nexus test may depend on the type of infrastructure the fee funds. It may be easier to demonstrate the nexus for water and sewer connections and other types of on-site improvements than it is for parks, schools, and other types off-site improvements. This point also applies

to other types of exactions, such as open space land dedications.

## **DUE PROCESS ISSUES**

### ***Enabling Act***

Courts are more likely to uphold a local impact fee ordinance if a state enabling act authorizes it. But they will still strike down the ordinance if it does not conform to the act. New Jersey's Supreme Court did this with respect to an ordinance under which the fees were used to fund townwide roadwork. It held that the enabling act limited the use of the fees to roadwork necessitated by the development that paid them (*New Jersey Builders Ass'n v. Mayor and Tp. Committee of Bernards Tp. , Somerset County*, 108 N. J. 223 (1987)).

Connecticut law does not explicitly authorize development impact fees, but a Connecticut Supreme Court decision on another type of development fee suggests that they cannot be imposed without an enabling act. In striking down a fee to recoup the town's cost of supervising infrastructure work in new subdivisions, the court stated that the statutes did not authorize fees for this purpose, as they did for processing subdivision applications and inspecting site work (*Avonside Inc. v. Zoning and Planning Commission of Avon*, 153 Conn. 232 (1965)).

The legislature may have tacitly confirmed the court's reasoning when it subsequently authorized fees in lieu of parking spaces (CGS § 8-2c), open space land (CGS § 8-25), and affordable housing units (CGS § 8-2i). Connecticut land use law professor Terry Tondro opined that "the explicit state authorization in these two instances [parking and open space] will undoubtedly lead a reviewing court to conclude that only in those cases may an impact fee be charged (*Connecticut Land Use Regulation*, 2ed (1992), p. 261).

### ***Municipal Powers***

Some courts have upheld development impact fees even though no statute explicitly authorized them. In these cases, the courts found the necessary authorization in municipal powers laws. For example, Kansas' Supreme Court held that a city could impose impact fees without an enabling act because the municipal powers statutes allowed them to imposed fees for any purpose (*McCarthy v. City of Leawood*, 257 Kan. 566 (1995)).

Connecticut courts have not ruled on whether the towns can impose development impact fees under the municipal powers statutes, which do not seem as broad as Kansas'. Kansas' statute allows cities to "levy for revenue purposes any tax, excise, fee, charge or other exaction other than permit fees or license fees for regulatory purposes" the law does not prohibit (Kan. Stat. Ann. § 12-137, emphasis added). Connecticut's statute authorizes municipalities only to "assess, levy, and collect taxes for general or special purposes on all property, subjects or objects which may be lawfully taxed, and regulate the mode of assessment and collection of taxes and assessments not otherwise provided for..." (CGS § 7-148(c)(2)(B), emphasis added).

## **Invalid Tax**

Courts have ruled on whether development impact fees constituted unauthorized taxes, basing their decisions largely on who benefited from the improvements the fees funded. They generally invalidated fees used to fund improvements that were not necessitated by the development that paid them. Idaho's Supreme Court struck down a capital improvements impact fee precisely because the city used the fees for citywide improvements (*Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740 (1995)).

## **Spending Plan**

The courts have also struck down development impact fees when the jurisdiction had no plan to spend them. Arkansas' Supreme Court struck down a park impact fee because the plaintiff, a residential developer, could not determine if the city would spend the fees to construct or improve parks that benefited his subdivision (*City of Fayetteville v. IBI, Inc.* 659 S. W. 2d 505 (1983)).

## **EQUAL PROTECTION**

State enabling acts generally leave it for municipalities to decide whether to impose development impact fees, which can lead to a situation where developers in some jurisdictions must pay fees while those in others, do not. Consequently, developers have claimed that this pattern violates their constitutional right of equal protection under the law.

The courts have generally rejected this argument. Florida's Supreme Court ruled that equal protection does not guarantee territorial uniformity (*Home Builders and Contractors Association v. Palm Beach County*, 451 So. 2d 848 (Fla. 1983)). And Maryland's Supreme Court ruled that equal protection does not guarantee uniformity within a jurisdiction if imposing fees in certain areas but not others served a legitimate public purpose (*Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15 (1994)).

## **TAKINGS**

The constitutional protection against taking property without just compensation usually applies to situations where a government agency actually takes property (i. e. , eminent domain) or imposes a regulation that limits the owner's use of that property. But it also applies to situations where the government imposes fees on some groups to pay for an improvement that benefits the larger public.

The courts have generally rejected claims that impact fees take property if they directly benefited the development that generated them. The Illinois Supreme Court upheld a statute authorizing transportation impact fees because counties could impose them only to pay for improvements that were "specifically and uniquely attributable" to the development. It simultaneously struck down another statute authorizing fees because it failed to link them in this manner (*Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 165 Ill. 2d 25

(1995)).

The California Court of Appeals upheld a transit impact fee based on a minimum "rational relationship" test (*Blue Jeans Equities v. City and County of San Francisco* 3 Cal. App. 4<sup>th</sup> 164 (1992)). In reaching its decision, the court first decided whether it should apply the U. S. Supreme Court's more stringent test, which held that a land use regulation had to "substantially advance" the "legitimate state interest" for which it was imposed (*Nollan v. California Coastal Commission*, 483 U. S. 825 (1987)).

Applying this rule, that court invalidated a regulation conditioning building permits on granting public easements because it interfered with the owner's use of his property. Conversely, the California court held that this rule should not apply to the fee regulation since it did not interfere with the owner's use of his property. Instead it upheld the fee based on the minimum relationship test, which requires the fee to bear only a sufficient relationship to the city's legitimate interest in defraying transportation costs in the area where the fees were imposed.

## **NEXUS**

If a fee satisfies the due process, equal protection, and takings tests, the courts then determine if there is a link or nexus between the development generating the fees and the infrastructure they will fund. The nexus exists if the development creates a need for the infrastructure and will benefit from it. The courts have used three tests to determine if a nexus exists.

1. The "rational relationship" test looks for a reasonable connection  
between the fee imposed on the development and the infrastructure.
2. The "specifically and uniquely attributable" test requires the fee  
imposed on the developer to be specifically and uniquely attributable to his development.
3. The "rational nexus" test requires:
  - a. proof that the new development needs the infrastructure,
  - b. identification of the infrastructure cost, and
  - c. a fee amount based on the extent to which the development will reasonably benefit from the infrastructure.

The rational nexus test "has emerged as the mainstream test to be applied to development impact fees" (Nelson, "Development Impact Fees: The Next Generation," in Freilich and Bushek, *Exactions, Impact Fees and Dedications*, 1995). The Florida Supreme Court applied this test when it upheld water and wastewater connection fees (*Contractors and Builders Association of Pinellas County et al. v. City of Dunedin*, 329 So. 2d 314 (1976)).

It subsequently applied the test to park improvement fees, which it upheld because they were proportionate to the cost of improving the parks near the development that generated the fees. It also noted that the jurisdiction faced a deadline for spending the fees (*Hollywood, Inc. v. Broward County* 440 So. 2d 352 (Fla. 1983)). The appellate courts also applied the test when they upheld impact fees for acquiring parks and open spaces and making road improvements.

In applying the rational nexus test, the Utah Supreme Court discussed how to calculate fees for different types of infrastructure. It stated that that newly developed properties should bear no more than their equitable share of the improvement costs and that jurisdictions had to determine that share based on the extent to which a development benefits from the improvements (*Banberry Development Corporation v. South Jordan City*, 631 P. 2d 899 (Utah 1981)).

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