QUINLAN™ June 25, 2017 | Volume 11 | Issue 12

Zoning Bulletin

in this issue:

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Mat #41945599

Fair Housing Act—City rejects application to rezone land to permit higher-density development

Developer contends decision to deny rezoning creates a disparate impact on Hispanics in violation of the Fair Housing Act

Contributors

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POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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ISSN 0514-7905

Citation: *Avenue 6E Investments, LLC v. City of Yuma, Arizona, 217 F. Supp. 3d 1040 (D. Ariz. 2017)*

ARIZONA (05/1/17)—This case addressed the issue of whether a city's refusal to rezone land to permit higher-density development created disparate impact on Hispanics in violation of the federal Fair Housing Act.

The Background/Facts: In 2008, Avenue 6E Investments, LLC, and Saguaro Desert Land, Inc. (the "Developers") applied to the City of Yuma (the "City") to rezone a 42-acre parcel of undeveloped land (the "Property") from R-1-8 (minimum 8,000-square-foot-lots) to R-1-6 (minimum 6,000-square-foot-lots). Such a rezone would give the Developers 198 lots on which they intended to construct "affordable and moderately priced homes." Both the R-1-8 and R-1-6 zones were considered low-density zoning in the City, and were only one density grading apart. The City's planning staff found that the rezoning request was "consistent with the City's General Plan for the area, which designated the area for low-density residential development". The City's planning staff recommended that the City Council approve the rezoning request.

Meanwhile, the City Council also heard much neighborhood opposition to the rezoning request. The opposition was "primarily based" on the "belief that higher-density development and lower-priced homes would increase crime and reduce property values." The Developers were known for developing low and moderately priced homes, with at least half of the purchasers of their homes being Hispanic. The substance of comments from the opposition indicated that an expectation of increased crime and lower property values was based on the "demographics" associated with the Developers' other developments.

Due at least in part to the neighborhood opposition, on September 2008, the City Council denied the Developers' rezoning application.

The Developers filed a legal action against the City. Among other things, the Developers claimed that the City's refusal to rezone the land created disparate impact on Hispanics under the federal Fair Housing Act, 42 U.S.C.A. § 33601 et seq. ("FHA").

Under the FHA it is unlawful to "make unavailable or deny" a "dwelling" to a person because of that person's race, color, religion, sex, familial status, or national origin. (42 U.S.C.A. § 3604(a).) A dwelling includes "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." (42 U.S.C.A. § 3604(b).) A FHA violation can be established under a theory of disparate treatment or disparate impact. "Disparate treatment is intentional discrimination; a governmental body cannot 'zone land or refuse to zone land out of concern that minorities would enter a neighborhood.' Disparate impact discrimination, on the

other hand, includes actions taken by 'governmental bodies that create a discriminatory effect upon a protected class or perpetuate housing segregation without any concomitant legitimate reason.' "

An FHA claim based on a disparate impact theory is evaluated under "the familiar burden-shifting framework," and therefore a plaintiff (i.e., the party bringing the legal action) must first make a prima facie (i.e., first impression) showing of disparate impact. If such a showing is made, the burden then shifts to the defendant (i.e., the party which the legal action was brought against) to prove that the challenged practice "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." "If the defendant satisfies that burden, the plaintiff may still prevail by showing that the defendant's interests could be served by a less discriminatory alternative."

To making a prima facie showing of disparate impact, plaintiffs are required to establish: "(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices." Thus, here, to establish a prima facie showing of disparate impact, the Developers' had to show that the City's actions had a discriminatory effect on Hispanics through statistical analysis. If the Developers could make such a showing, the burden would then shift to the City (as described above).

In this case, arguing that there were no material issues of fact in dispute, the City asked the court to decide the matter in its favor on the law alone. The City argued that the Developers "could not meet their prima facie burden of establishing [a] disparate impact claim under the FHA because of the glut of housing opportunities in the southeast portion of [the City] that were similar to [the Developers'] proposed development on the Property." Alternatively, the City also argued that the Developers "failed to present the appropriate statistics to meet the prima facie test for disparate impact and also that it had a legitimate and nondiscriminatory basis for denying the rezoning request."

The court granted the City's motion for summary judgment on the City's first argument, finding that the Developers could not meet their prima facie burden because of other housing opportunities in the area. The court denied the City's alternative motion as moot and therefore did not address the City's challenge to the Developers' statistical showing of disparate impact.

The Developer appealed. On appeal, among other things, the United States Court of Appeals for the Ninth Circuit reversed the lower court's finding of summary judgment in favor of the City as to the Developers' disparate impact claim under the FHA.

On remand, the City renewed its motion for summary judgment based on its argument that the Developers "failed to present the appropriate

statistics to meet the prima facie test for disparate impact and also that it had a legitimate and nondiscriminatory basis for denying the rezoning request."

DECISION: City's Motion for Summary Judgment denied.

In denying the City's Motion for Summary Judgment, the United States District Court for the District of Arizona held that the Developers' made a prima facie showing that the City's refusal to rezone the Property had a discriminatory effect on Hispanics, in support of the Developers' FHA disparate impact claim.

Again, to making a prima facie showing of disparate impact, the Developers were required to establish: "(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices." The court found that the City's denial of the Developers' rezoning application was the "outwardly neutral" practice at issue. The court also found that the Developers had shown, through expert analysis, that the rezone denial had a disproportionate effect on Hispanics. More specifically, the court found that the Developers' expert had established that higher-density housing (as the rezoning request sought) would result in reduced housing prices, at which a greater percentage of Hispanics were qualified as home buyers. The court concluded that the Developers "did not just show that the denial of a request to lower the density increases housing costs and that Hispanics are generally less wealthy than whites in [the City]." Rather, the court found that the Developers "provided statistical evidence—based on a pool of qualified home purchasers within the relevant market area and during the relevant time frame—regarding the racial makeup of those priced out of the market as a result of the price increase associated with the City's denial of [the Developers'] rezoning application."

The City objected to the conclusions of the Developers' expert. The City had argued that the Developers' expert did not know where within the City any particular home purchaser actually wanted to buy a house, and therefore could not quantify where there were lost housing opportunities. But the court rejected this argument, finding that:

> Here, [the Developers] did not simply rely on statistics that show increased home prices adversely affect Hispanics generally. They did not simply look at 'all persons who purchased any kind of housing in [the City] at any price range during the relevant time period.' Rather, they 'narrowly defined the particular type of housing and price ranges at issue, based on the facts of the case, and showed how decisions affecting the availability of housing in those price ranges, using actual [City] homebuyer data, had a significantly disproportionate impact on qualified Hispanic buyers.' That is, they showed the racial makeup of those priced out of a housing opportunity due to the denial of [the Developers'] rezoning request and consequently [the Developers'] proposed housing development.

Moreover, the court found that the Developers' expert analysis constituted a necessary "sufficient statistical demonstration." The court found that the analysis showed that the City Council's decision to deny the Developers' rezoning request would "increase the cost of housing by a certain amount" and then showed that the "increase disparately impacts the ability of members of the protected group to buy a dwelling" on the Property. In other words, the analysis showed that "to the extent that the higher price reduces the size of the purchaser market for the dwelling, the reduction is disproportionately high for the protected group."

Further, the court here found evidence of discriminatory intent that bolstered the Developers' disparate impact case. In its order remanding the case back to this court, the Ninth Circuit had concluded the language alleged to have been used by the neighbors opposing the Developers' rezoning request was "sufficiently racially charged to raise the inference of racial animus and to put the decision-making body on notice." The Developers also put forth evidence to support its allegations that such comments were in fact made in letters and during council meetings. Therefore, the court here concluded that there was "evidence that the neighbors opposing the rezoning request did so because of discriminatory animus against Hispanics and that they communicated such animus to the City Council." Evidence also showed that the City Council, at least in part, based its denial on the opposing neighbors' concerns. Such evidence, concluded the court, "bolsters [the Developers'] disparate impact claim."

Finally, the court emphasized that a showing of disparate impact here was not the end of the court's analysis. "[A] developer's ability to show disparate impact does not impose a duty on a municipality to approve all zoning applications in a particular price range," said the court. Rather, with such a showing, the burden then shifts back to the City to "demonstrate that the action that creates an adverse effect on minorities is supported by adequate justification."

Here, the City had asserted two "legally sufficient reasons" for denying the rezoning: First, the City contended that neighbors relied on the Property's preexisting zoning and plat and that its denial was out of concern for property values. Second, the City contended that its denial was based on the Developers' failure to accept the City's proposed compromise of a buffer of 8,000 square foot lots along two of the Property's borders. The court found that the record did not support the City's arguments. Rather, the court found that that the Developers' rezoning request was "consistent with and conformed to the City's General Plan," and that buffer issue was not a legitimate basis for denying the rezoning request but rather created an issue of fact regarding whether there was an alternative to the City's outright denial of the rezoning request that would have had a less discriminatory effect. Thus, the court concluded

that there was evidence sufficient to raise an issue of fact for the jury as to whether the zoning denial was indeed necessary to achieve the City's zoning goals and plans. Accordingly, with issues of fact in dispute, the court concluded that summary judgment was in appropriate here.

See also: *Avenue 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493 (9th Cir. 2016), cert. denied, 137 S. Ct. 295, 196 L. Ed. 2d 214 (2016).*

See also: *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).*

See also: *Darensburg v. Metropolitan Transp. Com'n, 636 F.3d 511 (9th Cir. 2011).*

See also: *Reinhart v. Lincoln County, 482 F.3d 1225 (10th Cir. 2007).*

Case Note:

In its decision, the court rejected several other arguments of the City. Those arguments challenged that Developers' expert analysis, and included arguments that the analysis was flawed and unreliable.

Use/Short-term rentals—Property owners rent their single-family homes on a short-term basis to transient guests

County maintains such short-term rentals are not a permitted use under the zoning regulations

Citation: *Bostick v. Desoto County by and through its Board of Supervisors, 2017 WL 1910098 (Miss. Ct. App. 2017)*

MISSISSIPPI (05/09/17)—This case addressed the issue of whether a "single family dwelling" may be continuously rented to a succession of transient guests on a short-term basis and yet retain its character as a single family dwelling.

The Background/Facts: Tom Bostick and Larry Poe (the "Homeowners") each owned houses in a residential subdivision in DeSoto County. The Homeowners did not live in those houses but rather offered the houses for short-term rent on HomeAway.com and other websites. In December 2014, Desoto County (the "County") filed legal actions in court, asking the court to "halt the short-term rental" of the Homeown-

ers' properties. The County alleged that the use of the properties violated the County zoning regulations because the use of the houses for short-term rentals did not meet the definition of "single family dwelling," which was the applicable permitted use in the zoning district.

The chancery court consolidated the actions. The court concluded that it was not the intention of the County zoning regulations to allow "so-called vacation rentals in a residential subdivision." The court permanently enjoined the Homeowners from renting their homes as "so-called vacation rentals."

The Homeowners appealed. They argued that the County zoning regulations did not prohibit the rental of a "single family dwelling" to "transient guests" on a "short-term basis."

The Court's Decision: Judgment of chancery court affirmed.

The Court of Appeal of Mississippi held that, under the County zoning regulations, short-term rentals to transient guests were not a permitted use.

In so holding, the court looked at the language of the County zoning regulations. Permitted uses in the district in which the Homeowners' properties were located included "[s]ingle family dwellings." The County zoning regulations defined a "dwelling" as "[a]ny building . . . designed or used as a residence . . . but not including . . . a room in a hotel, motel or boarding house." The County zoning regulations defined "hotel" as a "building in which overnight lodging is provided and offered to the public for compensation, and which is open to transient guests."

The court acknowledged that a house may be a "dwelling" "as long as it is 'designed' as a 'residence,' even if it is not 'used' as such." Still, the court found that the County's interpretation of the definition of "dwelling" was not "manifestly unreasonable." The County had determined that the Homeowners' properties were being used as "hotels," which excluded them from the definition of "dwelling"—the permitted use. The court concluded that although the Homeowners' properties "lack[ed] some common, recognizable features of most hotels, the County reasonably concluded that they [were] being used as hotels," as that term was defined in the County zoning regulations. Furthermore, since the zoning regulations defined a "dwelling" as specifically excluding "a room in a hotel," the court concluded that it was "not manifestly unreasonable for the County to apply the exclusion to a property being used as a hotel."

The court found additional support for the injunction against the Homeowners' use of their properties for short-term rentals in the specific definition of "single family dwelling." The County zoning regulations defined "single family dwelling" specifically as "[a] dwelling designed for and occupied by not more than one family . . . ."

(Emphasis added). Regardless of whether any particular group that rented from the Homeowners met the definition of a "family," the court concluded that "the transient nature of the rentals resulted in the houses being 'occupied by . . . more than one family,' " which was a non-permitted use under the applicable zoning regulations.

Accordingly, the court concluded that the Homeowners' rental of their houses for occupancies by a succession of short-term, transient renters was inconsistent with the permitted use of a "single family dwelling."

Applicability of Zoning Regulations—Billboard company seeks changes to billboards it claims qualify as a legal nonconforming use protected by a grandfathering statute

Government contends applicable billboard regulations are safety regulations and not zoning regulations and are therefore not subject to grandfathering

Citation: *Metropolitan Government of Nashville and Davidson County v. Board of Zoning Appeals of Nashville and Davidson County, 2017 WL 1655597 (Tenn. Ct. App. 2017)*

TENNESEE (05/02/17)—This case addressed the issue of whether an ordinance governing static display billboards and digital display billboards was a zoning ordinance to which a state statutory grandfather clause may apply, or a safety ordinance to which the grandfather clause would not come into play.

The Background/Facts: CBS Outdoor, Inc. ("CBS") owned billboards in the City of Nashville (the "City"). CBS sought to replace two existing static display billboards with two digital display billboards. In furtherance of that goal, CBS applied to the Department of Codes and Building Safety (the "Department") of the Metropolitan Government of Nashville and Davidson County ("Metro"). The Department denied the

permits. CBS appealed to the Board of Zoning Appeal ("ZBA"). The ZBA voted to issue both permits. Metro then appealed.

On appeal, on the merits, Metro argued that the BZA permits violated a Metro ordinance requiring 2,000 feet between digital billboards and a set distance between digital billboards and residential property. CBS did not dispute that the proposed digital billboards failed to comply with the Metro ordinance. Rather, CBS asserted that the proposed billboards qualified as a legal, preexisting, nonconforming use protected by the grandfather clause in Tenn. Code Ann. § 13-7-208.

To invoke the protections of Tenn. Code Ann. § 13-7-208, CBS had to make two threshold showings. The first of those showings was that: "there has been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions)." Thus, in order for Tenn. Code Ann. § 13-7-208 to apply, the applicable ordinance had to be a zoning ordinance.

Here, Metro and CBS disagreed as to whether the sign ordinance applicable here constituted a "zoning ordinance," with the grandfather clause Tenn. Code. Ann. § 13-7-208 therefore either applicable or inapplicable.

The trial court concluded that the ordinance at issue—governing digital display billboards—was a "lighting regulation, not a zoning regulation, and that Tenn. Code. Ann. § 13-7-208 therefore [did] not apply." The trial court thus determined that the BZA "erred in issuing permits to CBS to allow conversion of its static billboards in violation of the distance requirements in the Metro Code."

CBS and the Property Owners appealed.

DECISION: Judgment of trial court affirmed.

The Court of Appeals of Tennessee held that the sign ordinance applicable here was not a zoning ordinance, but rather was a safety ordinance, and therefore was not subject to the applicability of the grandfather clause of Tenn. Code. Ann. § 13-7-208.

In so holding, the court looked to prior caselaw that had adopted a "substantial effect" test for determining whether an ordinance is a zoning ordinance. Under that test, if an ordinance is found to "substantially affect" the property owners' use of land, it is concluded to be a zoning ordinance. More specifically, the "substantial effect test" is "a two-part test that examines both the terms and the effects of the challenged ordinance." Under the first step, courts review the terms of the challenged ordinance and the municipality's comprehensive zoning plan "to determine whether the ordinance is so closely related to the zoning plan that it can be fairly characterized as tantamount to zoning." Under the second step, courts determine whether the challenged ordinance "substantially affects the use of the property that is the subject of the litigation." If both parts of the test are satisfied, a challenged ordinance may be held to be tantamount to zoning.

Here, CBS argued that the applicable ordinance was a zoning ordinance, while Metro argued that it contained non-zoning lighting restrictions. Here, the appellate court agreed with Metro, finding that the regulations operated "as a means to accomplish specific objectives in the zoning code," but were not "tantamount to zoning." Specifically, the court found that the regulations prohibiting digital signs in certain districts based on the height of the signs and their distance from other signs and from residential property were "of a character and purpose different than that reflected in the statement of purpose of the zoning code; they [did] not reflect the land use policy considerations and objectives inherent in the development of the comprehensive zoning code." Thus, the court found that while a component of the overall zoning ordinance was the allowance or prohibition or regulation of particular signs, the actual sign ordinance here functioned primarily to complement the uses of property as reflected in the zoning districts. The signing regulations reflected the City's powers and responsibility to provide for the public safety, but did "not impair the use of the property upon which the sign is located."

See also: *Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 466 (Tenn. 2004).*

See also: *SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467 (Tenn. 2012).*

See also: *Metropolitan Government of Nashville and Davidson County v. Board of Zoning Appeals of Nashville & Davidson County, 2014 WL 5147757 (Tenn. Ct. App. 2014), appeal denied, (Nov. 24, 2015).*

Case Note:

In its decision, the court noted that a 2004 amendment to Tenn. Code Ann. § 13-7-208—which clarified that rebuilt structures must still conform to existing zoning regulations governing setbacks, height, bulk, and location—"ma[de] clear that the legislature did not intend that Tenn. Code Ann. § 13-7-208(d) give landowners with non-conforming uses immunity from all local regulation of reconstructed structures."

Zoning News from Around the Nation

LOUISIANA

The state Senate has approved Senate Bill 162, which "bans local

government from implementing affordable housing mandates under a policy known as inclusionary zoning." The bill aims to remove mandates and "instead encourages voluntary negotiations between developers and cities to create affordable housing in exchange for incentives such as tax breaks or zoning variances." Advocates of inclusionary zoning—and opponents of the bill—insist the policy is an essential tool to getting more workforce housing into the core neighborhoods of New Orleans with access to public transportation and neighborhood services." Critics of inclusionary zoning—and proponents of the bill—argue that the inclusionary zoning policy "has failed to create widespread change in other cities and could . . . reduc[e] housing supply and driv[e]up rents."

Source: *The Times-Picayune*; www.nola.com

MASSACHUSETTS

The Massachusetts' Legislature is considering House Bill 3214, "An act relative to methadone clinic zoning." Under Massachusetts' "Dover Amendment" (MGL c. 40A, § 3), zoning exemptions are made for "certain service-producing facilities" on an "agricultural, religion, or non-profit educational basis." The bill would address the Dover Amendment exceptions and allow communities to control the zoning of methadone clinics. It would require methadone clinics to adhere to the same 500-foot buffer zone from "any facility in which children commonly congregate" and allows for local communities to set their own zoning by-laws as well.

Source: *The Millbury-Sutton Chronicle*; www.millburysutton.com

NEW HAMPSHIRE

Effective June 1, a new state law requires communities allow in-law apartments and other accessory dwelling units in all single-family zoned areas and "cannot restrict size to anything less than 750 square feet." Proponents of the new law argue it will "help increase the availability of affordable housing while also helping the state's rapidly aging population remain at home with live-in help." Opponents of the law say municipalities should be allowed to decide their own zoning regulations. Local communities have or may adopt their own amendments to meet the requirements of the new law, and may add some restrictions such as: requiring either the main home or new unit to be owner-occupied; ensuring new units have adequate septic, sewer, and water available; and mandating sufficient parking be available to accommodate the new unit.

Source: *New Hampshire Union Leader*; www.unionleader.com

ZONING PRACTICE JULY 2017

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 7

PRACTICE DEVELOPMENT IMPACT FEES

Managing Strategic Growth Using Lawful Impact Fees

By Paige H. Gosney and Martin P. Stratte

When assessing a development plan for a proposed residential, commercial, or industrial project, planners are faced with a multitude of questions related to how the proposed project may impact existing infrastructure and facilities, including roads, utilities, and sewer and water treatment systems.

If the proposed development is residential, there are additional questions, such as whether there are adequate schools, parks, and police and fire resources available to service the proposed project and the residents who would reside there.

When existing facilities and municipal service capabilities are inadequate, and new or additional infrastructure is necessary to support a proposed project, agencies can use development impact fees to secure the funding to construct the facilities and provide the services.

A development impact fee is a monetary exaction *other than a tax or special assessment* that a local governmental agency charges a project applicant in connection with approval of a project. The purpose of a development impact fee is to defray all or a portion of the cost of public facilities related to the proposed project or to accumulate the funds necessary for new capital improvements that will serve the proposed project.

A development impact fee is voluntary and must be reasonably related to the cost of the service that will be provided by the local agency. If a development impact fee does not relate to the impact created by the project, or exceeds the reasonable cost of providing the public service, then the fee may be declared a special tax and be subject to voter approval requirements.

The power to exact development impact fees arises from a local agency's police power to protect public health, safety, and welfare. This police power allows a city or other local agency to act in the interest of its citizenry and to enact and enforce ordinances and regulations that are not in conflict with state or federal law.

When calculated in accordance with clear, well-reasoned methodologies and developed in conjunction with local land-use regulations and comprehensive zoning plans, impact fees can provide the financing necessary to construct and expand public facilities and infrastructure.

However, as the use of impact fees has increased—often becoming a necessary tool used by local agencies to fund the infrastructure to support and sustain new development—so has the level of scrutiny on the part of developers suspicious of planning agency overreach. This has inevitably led to an increase in lawsuits that seek to challenge the amount of impact fees assessed.

This article discusses the legal standards applicable to impact fee programs, including constitutional requirements; identifies distinctions between development impact fees and other land-use-related exactions; examines commonalities between impact fee programs used in jurisdictions across the country; and provides recommendations for local agencies seeking to establish a valid impact fee program.

CONSTITUTIONAL REQUIREMENTS

The U.S. Supreme Court has issued three significant decisions that are fundamental to understanding the lawful imposition of development impact fees: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 570 U.S. 2588, 186 L. Ed. 2d 697 (2013).

Nollan

In *Nollan*, landowners proposed the construction of a two-story home within the same footprint as their existing one-story beachfront house. As a condition of issuing a coastal development permit, the California Coastal Commission required that the property owners grant a public access easement across the beach in front of their house.

The property owners successfully argued, and the U.S. Supreme Court affirmed, that the exaction (i.e., the grant of a public easement) was not related to the impact created by the development (i.e., the increased building height).

In so doing, the U.S. Supreme Court held that proof of such an "essential nexus" was required if an exaction was to be lawful. However, the court, did not specify or discuss exactly how close or precise the nexus must be.

Dolan

In *Dolan*, the owner of a hardware store applied for an expansion of her downtown store, which was located in a floodplain. The city wanted her to dedicate a bike path and a greenway along a stream that bordered her property to the city as a condition of approval.

The U.S. Supreme Court crafted a more refined test for the exaction of real property, ruling that in order for the government to require project-specific exactions, the government must demonstrate that (1) an essential nexus exists between the legitimate state

interest and the exaction imposed by the city (i.e., reconfirming the decision in *Nollan*) and (2) the nature of the exaction must be "roughly proportional" to the impact created by the project.

Thus, in order to meet the "rough proportionality" component of *Dolan* for ad hoc project-specific fees, a city or local agency does not need to make a precise mathematical calculation. However, it must make some sort of individualized determination that the required exaction is related, both in nature and scope, to the actual impact of the proposed development.

Koontz

In *Koontz*, the U.S. Supreme Court held that land-use agencies imposing conditions on the issuance of development permits must comply with the "nexus" and "rough proportionality" standards set forth in *Nollan* and *Dolan*, even if the condition consists of a requirement to pay money and the permit is denied for failure to agree to the condition. The *Koontz* decision was the first case in which a monetary exaction was found to be an unconstitutional condition.

STATE STATUTORY REGULATIONS

In addition to the U.S. Supreme Court decisions in *Nollan*, *Dolan*, and *Koontz*, which establish the essential nexus and rough proportionality standards that are applicable to all government-imposed conditions on the development of real property, most individual states have established their own statutory regimes that are specific to development impact fees (as opposed to other types of exactions) and impose requirements and obligations above and beyond the constitutional standards outlined above.

Below are some examples of state statutory regulations that govern development impact fees. While these statutory regimes contain many similarities, they represent just a handful of examples, and brief summaries do not account for the differences and unique features of each statute. Accordingly, it is crucial that planners familiarize themselves with the regulations and landmark case holdings that govern development impact fees in their own state.

California

The Mitigation Fee Act (Government Code §§66000 *et seq.*) codifies the *Nollan/Dolan* tests and further requires that a city or other local agency identify (1) the fee's purpose and use; (2) the reasonableness of the relationship between the fee and a given project; and (3) the reasonableness of the relationship between the amount of the fee and the cost of the public facility attributable to the project (Government Code §66001).

In addition, California's Mitigation Fee Act includes certain noticing and protest procedures for development impact fees, dedications, reservations, or other exactions that a developer can use to waive its right to challenge an exaction if not paid under protest within the specified time frame; however, the waiver provision does not apply if the city or local agency fails to give the requisite formal written notice at the time it imposes the fee (Government Code §66020).

Georgia

The regulations governing development impact fees in Georgia include, among other things, provisions outlining minimum standards for local ordinances that impose impact fees, the refund of development impact fees, and administrative appeal and arbitration provisions for developers wishing to challenge the imposition of such fees (§§36-71-1 *et seq.*).

Idaho

Idaho's development impact fee regulations are similar to Georgia's and, like California's, also give a developer the right to pay the fees under protest without waiving its right to appeal the fees at a future date (§§67-8201 *et seq.*).

Rhode Island

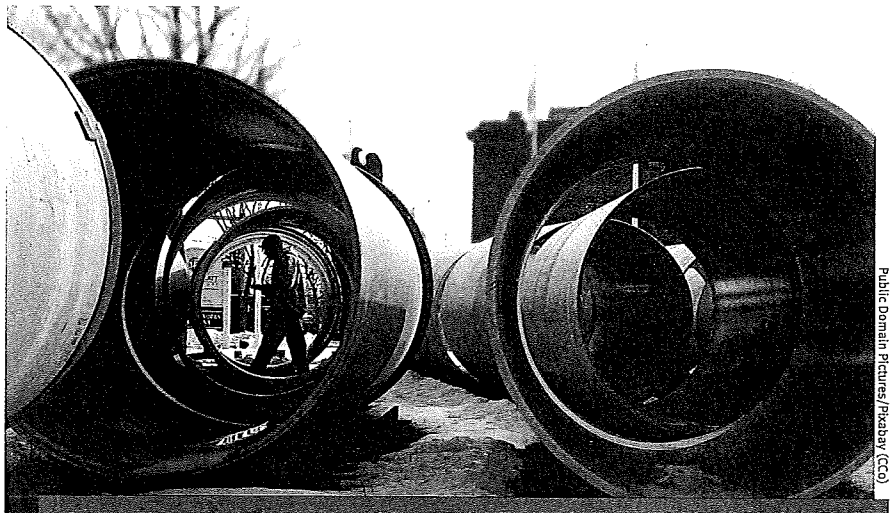
The Rhode Island Development Impact Fee Act (§§45-22.4-1 *et seq.*) is also similar to the California and Georgia development impact fee regulations as it codifies the *Nollan/Dolan* tests and provides minimum standards for local fee ordinances, protest procedures, and standards for calculating development impact fees.

South Carolina

The South Carolina Development Impact Fee Act (§§6-1-910 *et seq.*) is also similar to those states discussed above. It identifies certain projects that are exempt from the Act's provisions and sets forth detailed requirements for calculating the amount of fees.

COMMON TYPES OF IMPACT FEES AND OTHER TYPES OF DEVELOPMENT-RELATED EXACTIONS

Generally speaking, development impact fees usually encompass the following categories or types: infrastructure fees; sewer fees; water fees; police and fire protection fees; school fees; park fees; traffic impact fees; and so-called "fair share" programs. However, not every jurisdiction chooses to assess development impact fees in these categories, nor



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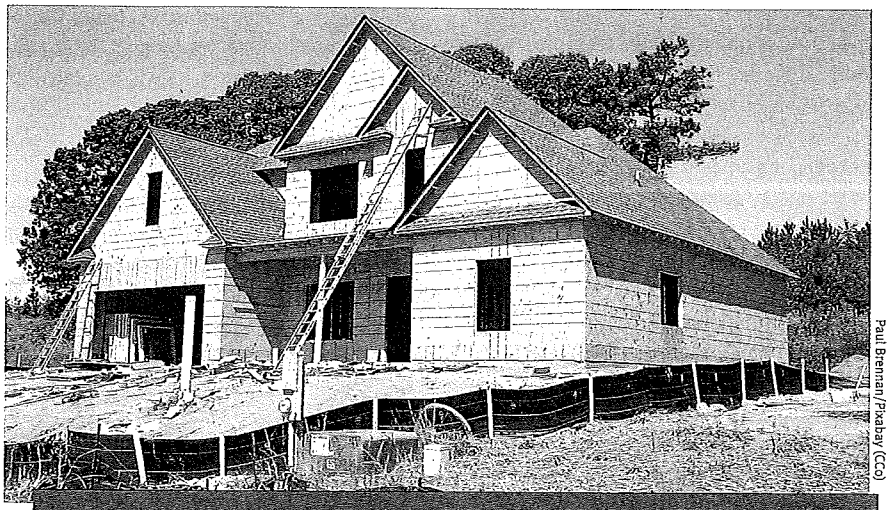
Development impact fees are a common tool to help finance the development of new infrastructure. It is vital your local impact fee policy is on sound legal footing.



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In-lieu fees are commonly used to avoid compliance with local inclusionary housing ordinances, with fees dedicated to a common fund for the development of affordable housing.

do they use development impact fees as the mechanism for funding necessary local infrastructure and services.

Although this article examines development impact fees, there are several other types of exactions that local governments can impose on landowners and developers that agencies and planners should be aware of and understand.

In-Lieu Fees

Local governments use "in-lieu" fees to allow for the payment of a fee in exchange for an exemption from compliance with a particular zoning ordinance or land-use regulation. Thus, such fees are said to be paid in lieu of compliance with a particular ordinance or regulation. The use of impact fees by local governments arose from the use of in-lieu fees.

For example, suppose the developer of a residential use in an urban area desires to construct a high-density project but cannot (or doesn't want to) provide the minimum number of parking spaces that would be required by the zoning code. In exchange for the payment of an in-lieu fee, the local government could approve the project with a reduced number of parking spaces.

The developer would then pay into a fund comprised of in-lieu fees from other projects, which the government could use to construct a parking garage for multiple nearby residential developments.

Another common example is when the developer of a proposed residential project wants to avoid having to comply with the provision of low- or moderate-income units in accordance with an inclusionary housing ordinance. In exchange for the payment of an in-lieu fee, the local government could approve the project without the minimum number of required low- or moderate-income units. The local government could then use pooled in-lieu fees to develop a project that provides affordable housing.

Compensatory Mitigation Fees

Federal, state, and local regulatory agencies use mitigation fees to compensate for impacts to the habitats of animal and plant species that will be affected by development. Federal or state regulatory agencies often use these fees in conjunction with environmental programs, such as multispecies habitat conservation plans.

Consider a development project that will be constructed on previously undisturbed land that is the home to a certain species of lizard. Federal or state regulatory agencies may require a developer to pay a mitigation fee to compensate for the damage to the lizard's habitat. The agency could then use this fee to improve or protect areas of the lizard's habitat located elsewhere.

Some states have extensive programs that oversee the payment of compensatory mitigation fees into "banks." This approach is known as mitigation or conservation banking.

Affordable Housing or 'Linkage' Fees

New development often results new low-wage jobs. However, in many cities, the workers who perform these jobs are not able to afford housing due to high rental costs. In recognition of this link between new development and affordable housing demand, some local governments require developers to pay "linkage" fees into an affordable housing fund.

Although affordable housing fees are a type of impact fee, these fees are distinguishable because the fees do not result in the improvement or expansion of public facilities and infrastructure.

Special Taxes

A special tax generally refers to a tax levied for a specific purpose, rather than a tax levied and then placed into the general fund. Special taxes must be approved by a two-thirds majority of the qualified voters in the service area, which is usually the jurisdictional area of the local government agency that initiates the special tax.

The amount of the special tax is not typically limited to the relative benefit it provides to property owners or taxpayers.

Often, local governments levy special taxes on a per-parcel basis, either according to the square footage of the parcel or as a flat charge, although the laws in many jurisdictions commonly provide flexibility to levy the special tax on any "reasonable basis." Moreover, local governments commonly levy special taxes to obtain funds for services such as libraries, hospitals, schools, fire protection, and public safety.

Special Assessments

A special assessment is a charge levied against real property that is particularly and directly benefited by a local improvement, in order to pay for the cost of that improvement. The rationale of a special assessment is that the assessed property has received a special benefit over and above that received by the general public; the local improvement, such as the paving or lighting of a street, directly benefits and increases the value of adjacent real property. The public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.

Generally speaking, a special assessment may be a fixed sum. Alternatively, a special assessment may be an amount that

fluctuates with the assessed valuation of the property, with the expenses of the improvement, or in accordance with the manner in which the assessed property is used.

Thus, strictly speaking, a special assessment is not really a tax, but rather a benefit to specific real property financed through use of public credit.

Property-Related Fees

A property-related "fee" or "charge" is any levy other than an ad valorem tax, a special tax, or a special assessment that is imposed by a local government on a parcel or a person as an incident of property ownership. These usually include user fees or charges for property-related services, but do *not* apply to fees or charges imposed as a condition of property development, such as development impact fees.

The rationale for distinguishing between property-related fees and development impact fees is that the development impact fees are imposed as an incident of the voluntary act of development, whereas property-related fees arise from property ownership.

OVERVIEW OF DEVELOPMENT IMPACT FEE ELIGIBILITY IN THE UNITED STATES

As previously discussed, most individual states have established their own statutory regimes that are specific to development impact fees. Set forth below is a listing of the different types of development impact fees eligible for use by local governments in various jurisdictions throughout the United States as of 2015.

As Figure 1 shows, all surveyed jurisdictions allow for the imposition of fees for development-related impacts to roads. On the other side of the spectrum are school fees, which are only allowed in 10 of the states analyzed in the survey.

As for the average amounts of impact fees charged per type of land use, residential uses are typically charged higher amounts of impact fees per unit in comparison to every 1,000 square feet of nonresidential uses, including retail, office, and industrial. Overall, single-family residential uses are charged the highest amount of total impact fees and industrial uses are charged the lowest. (See Figure 4.)

Furthermore, the types of fees resulting in the highest amounts of charges incurred by residential uses are typically for impacts

Figure 1: Facilities Eligible for Impact Fees by State

State	Roads	Water	Sewer	Storm Water	Parks	Fire	Police	Library	Solid Waste	School
Arizona (cities)	X	X	X	X	X	X	X	X		
Arizona (counties)	X	X	X		X	X	X			
Arkansas (cities)	X	X	X	X	X	X	X	X		
California	X	X	X	X	X	X	X	X	X	X
Colorado	X	X	X	X	X	X	X	X	X	
Florida	X	X	X	X	X	X	X	X	X	X
Georgia	X	X	X	X	X	X	X	X		
Hawaii	X	X	X	X	X	X	X	X	X	X
Idaho	X	X	X	X	X	X	X			
Illinois	X									
Indiana	X	X	X	X	X					
Maine	X	X	X		X	X			X	
Maryland	X	X	X	X	X	X	X	X	X	X
Montana	X	X	X	X	*	X	X	*	*	*
Nevada	X	X	X	X	X	X	X			**
New Hampshire	X	X	X	X	X	X	X	X	X	X
New Jersey	X	X	X	X						
New Mexico	X	X	X	X	X	X	X			
Oklahoma	X	X	X	X	X	X	X		X	
Oregon	X	X	X	X	X					***
Pennsylvania	X									
Rhode Island	X	X	X	X	X	X	X	X	X	X
South Carolina	X	X	X	X	X	X	X			
Texas (cities)	X	X	X	X						
Utah	X	X	X	X	X	X	X			
Vermont	X	X	X	X	X	X	X	X	X	X
Virginia****	X									
Washington	X				X	X				X
West Virginia	X	X	X	X	X	X	X			X
Wisconsin (cities)	X	X	X	X	X	X	X	X	X	

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* can be imposed by super-majority vote of city council or unanimous vote of county commission
** school construction tax up to $1,600 per unit authorized in districts with populations up to 50,000 (NRS 387.331)
*** development tax of up to $1.00/sq. ft. for residential and $0.50/sq. ft. for nonresidential may be imposed by school districts
**** impact fees may be imposed on by-right residential subdivision of agriculturally-zoned parcels for a broad array of facilities under certain circumstances
Source: Clancy Mullen, *Summary of State Impact Fee Acts*, August 2015 (www.impactfees.com - state information)

Figure 4. Average Fees by Land Use, 2015

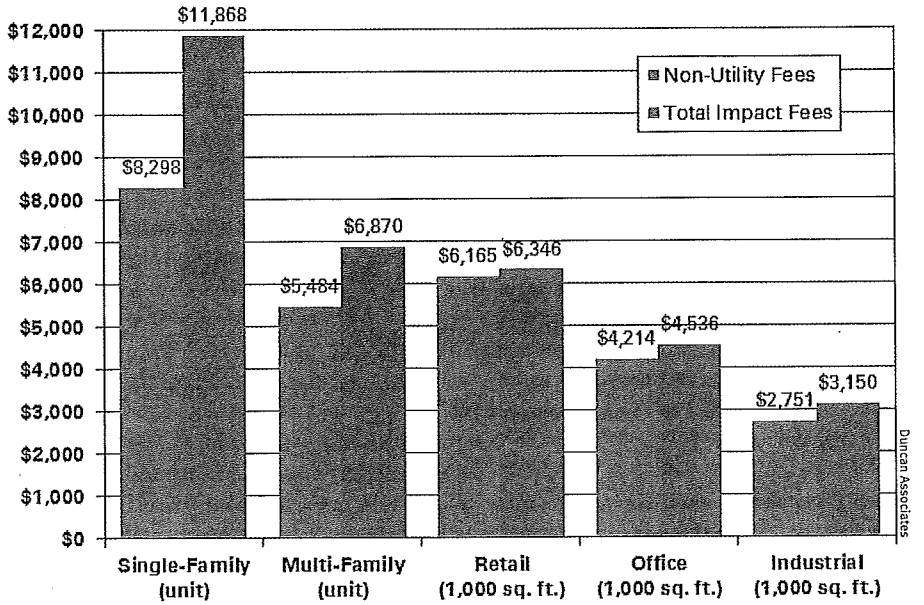

Table 1. Average Fees by Land Use and Facility Type, 2015

Facility Type	Single-Family (Unit)	Multi-Family (Unit)	Retail (1,000 sf)	Office (1,000 sf)	Industrial (1,000 sf)
Roads	$3,256	$2,201	$5,605	$3,403	$2,063
Water	$4,038	$1,387	$647	$606	$627
Wastewater	$3,694	$1,777	$663	$640	$642
Drainage	$1,397	$784	$1,056	$891	$1,097
Parks	$2,812	$2,099	**	**	**
Library	$403	$314	**	**	**
Fire	$472	$347	$388	$339	$211
Police	$365	$283	$403	$259	$171
General Government	$1,689	$1,200	$745	$751	$436
Schools	$4,769	$2,562	**	**	**
Total Non-Utility*	$8,298	$5,484	$6,165	$4,214	$2,751
Total*	$11,868	$6,870	$6,346	$4,536	$3,150

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* Average of total fees charged by jurisdictions, not sum of average fees by facility type (non-utility excludes water and wastewater

** rarely charged to nonresidential land uses, with the exception of school fees in California

related roads, parks, and utilities (i.e., water, wastewater, and drainage), whereas the highest amounts of charges incurred by nonresidential uses are typically for impacts related to roads. (See Table 1.)

According to *National Impact Fee Survey: 2015* prepared by Duncan Associates, with the exception of California, the average amounts of impact fees have been declining since the beginning of the Great Recession in 2008 (impactfees.com/publications%20pdf/2015_survey.pdf). However, the survey indicates that the increase of the amounts of impact fees charged in California slowed from 2012 to 2015.

ESTABLISHING AND IMPLEMENTING A VALID DEVELOPMENT IMPACT FEE PROGRAM

A well-planned fee program can generate sufficient funds to allow the city to mitigate impacts created by new development.

Conversely, a poorly planned fee program can result in the city either collecting too little money and being forced to pay for new development through its general fund, or collecting too much money based on an unsupported fee program, thus exposing the city to a fee challenge and significant litigation costs. Accordingly, the following principles should guide the creation and implementation of a fee program.

Identify and Plan for Areas of Future Growth

Planners should be aware of where and how growth will occur in their jurisdiction and use this information to plan for specific public facilities and infrastructure that may be needed for future development. The local agency's comprehensive plan is a valuable tool for sharing this information.

For example, if the agency's comprehensive plan projects new development to occur in a concentrated area geographically separated from existing development, new schools, fire stations, libraries, and other facilities may be required to service the new development. This will necessarily have an impact on the cost of new infrastructure and, of course, on the uses to which the resulting fee revenues may be devoted.

> It is essential that local agencies and planners understand and adhere to the *Nollan/Dolan* nexus and rough proportionality standards when calculating the amount of development impact fees to be imposed on a particular project.

Tailor Impact Fees to Address Specific Impacts

It is important for local agencies and planners to tailor each fee to address a particular impact, as broad-brush fees are subject to legal challenge and will likely result in appeals or payment of the fee under protest by the developer. Keep in mind that each fee must bear a reasonable relationship to the impact it is intended to mitigate and the agency must also be able to clearly account for each fee collected.

Conversely, creating too many fee categories may generate administrative difficulties in implementing and accounting for fees once they are collected from developers and project applicants.

Don't Make New Development Pay More Than Its Fair Share

It is essential that local agencies and planners understand and adhere to the *Nollan/Dolan* nexus and rough proportionality standards when calculating the amount of development impact fees to be imposed on a particular project.

New development cannot be required to pay for existing deficiencies, and the amount of any impact fee must bear a reasonable relationship to the actual cost of providing the public services demanded by the new development on which the fee is imposed.

If a development impact fee is excessive or fails to meet these constitutional standards, a legal challenge by the developer is almost certain to result.

Imposing Too Many Exactions May be Detrimental to the Local Economy

It is axiomatic that a proposed development can only pay so many fees before the project will no longer "pencil out" for the developer.

Thus, at the outset, a local agency should consider what types of developments are most affected by high impact fees and whether the kinds of development the agency wants to encourage within its jurisdiction will be helped or hindered by new fees.

For example, housing advocates often argue that impact fees on residential projects can price many low- and moderate-income wage earners out of the local housing market and encourage developers to construct larger, more expensive homes, because high-end occupants can more easily absorb higher impact fees.

Similarly, business groups often argue

that imposing fees on commercial developments may prevent a city or local agency from attracting businesses that will help generate valuable tax dollars. Accordingly, local agencies and planners should consider providing fee waivers for certain types of projects or outright exempting such projects from impact fees.

Consider Using Development Agreements Instead of Impact Fees

In certain jurisdictions, such as California, fees imposed pursuant to a development agreement are not subject to the constitutional nexus requirements or otherwise applicable notice and protest provisions.

The rationale for exempting these fees is that, unlike development impact fees imposed via local ordinance in accordance with state law, development agreement impact fees are considered voluntary, negotiated terms of an arms-length agreement between the developer and the city or local agency.

Planners should review their state and local regulations to determine whether such fees are also exempted in their jurisdiction.

CONCLUSION

The use of development impact fees is a powerful tool for local agencies to strategically manage future growth within their jurisdictions.

Among other things, development impact fees help ensure that future development does not outpace the infrastructure necessary to sustain it by providing a source of funding that local agencies can use to construct the necessary facilities and provide the municipal services required to support new development, such as water, sewer, and police and fire protection.

Importantly, however, these fees are subject to constitutional limitations, as well other state and local regulatory requirements, which planners should become familiar with in order to ensure that local impact fee programs are consistently and fairly applied and comply with the *Nollan/Dolan* essential nexus and rough proportionality requirements.

Finally, the American Planning Association's *Policy Guide on Impact Fees* is a helpful resource for planners seeking further information on development impact fees and ways to improve local impact fee programs (planning.org/policy/guides).

Jason Goh/Pixabay (CCo)

Tailoring your impact fees to address the specific impacts of a new development (for instance, needed transportation improvements) can help your community avoid legal challenges.

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Vol. 34, No. 7

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for $95 (U.S.) and $120 (foreign). James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services. Zoning Practice (ISSN 1548–0135) is produced at APA. Joseph DeAngelis and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

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