



Memorandum

To: Planning Commission
From: Alan Goldich, Planner II
Date: September 12, 2019
Subject: Exactions and Development Impact Fees
Attachments:

- Colorado Revised Statute for schools and parks
- Colorado Revised Statute for development impact fees
- Examples of other counties' regulations

This hearing is the initial discussion on fees the County could collect as part of the land use and subdivision approval process. This issue is being raised due to potential shortcomings in section 3.5, Open Space & Public Sites, of the Subdivision Regulations. Instead of focusing on this specific section, this hearing is being used to discuss all manner of development fees that the County could collect. This document includes an explanation of the limits placed on the collection of fees, a basic overview of the different services that development fees could be collected for, and the required background studies, developer rights, and administration process for the collection and distribution of the fees.

Collection Restrictions and Authority

There have been several cases that have been decided upon by the US Supreme Court (SCOTUS) that guide how, and to what extent, local governments can require development fees. The following paragraphs highlight the landmark cases that have been used as a basis for how the State of Colorado has written its laws relating to development fees.

Essential Nexus:

*Nollan v. California Coastal Commission.*¹ SCOTUS reviewed a regulation under which the California Coastal Commission required that a public easement along the Nollans' beachfront lot be recorded as a condition of approval of a permit to demolish an existing bungalow and replace it with a three-bedroom house. The Coastal Commission had asserted that the public-easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house. The Court held that in evaluating such claims, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition. In a 5-4 ruling, the Court held that the requirement by the CCC was a taking in violation of the Takings Clause of the Fifth Amendment because they found that the easement requirement did not bear enough of a connection to preventing blockage of the ocean view. *"The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite*

¹ 483 U.S. 825 (1987)

simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but 'an out-and-out plan of extortion.'"

Going forward, the Planning Commission may consider:

- Is the concern leading to the exaction a legitimate state interest?
- Does the permit condition satisfy the rationale behind the interest?

Rough proportionality:

*Dolan v. City of Tigard*². SCOTUS reviewed a land use requirement that land be donated for a public greenway and bike path. The City asserted that the dedication was required to mitigate flooding and traffic concerns. In a 5-4 decision the Court held the city's dedication requirements constitute an uncompensated taking of property. While the essential nexus test was satisfied, the city's dedication requirement failed to be "roughly proportional" to the expected impacts. 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 proposed development's impact. *"The findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and Dolan's proposed building. The Community Development Code already required that Dolan leave 15% of her property as open space, and the undeveloped floodplain would have nearly satisfied that requirement. However, the city has never said why a public, as opposed to a private, greenway is required in the interest of flood control. The difference to Dolan is the loss of her ability to exclude others from her property, yet the city has not attempted to make any individualized determination to support this part of its request. The city has also not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by Dolan's development reasonably relates to the city's requirement for a dedication of the pathway easement. The city must quantify its finding beyond a conclusory statement that the dedication could offset some of the traffic demand generated by the development."*

- Is the exaction reasonably related to the impacts (nature and extent)?
- How precise is good enough?
- How does the government make its individualized determination or quantification?

Applicability:

In *Koontz v. St. Johns River Water Management District*³, the property owner applied to the water district for a permit to develop 3.7 acres of wetlands under the district's jurisdiction. Koontz offered to mitigate the loss of wetlands by conveying to the district a conservation easement over 11 acres of adjacent land. The district declined Koontz's mitigation offer, instead proposing that Koontz either reduce the size of his development to one acre, or pay for improvements to unrelated property owned by the district several miles away. In another 5-4 decision, the SCOTUS clarified that the standards of *Nollan* and *Dolan* apply even when a permit is denied because the applicant refuses to agree to an exaction, and even when the exaction consists of a payment of money, rather than a dedication of land.

Thus, the local government has the burden of showing that the exaction was:

- Adopted pursuant to a duly adopted law or regulation (Authority);
- Advances a legitimate local government interest; and
- Is roughly proportional to the impact created.

² 512 U.S. 374

³ 570 U.S. 595 (2013)

Authority:

The Local Government Land Use Control Enabling Act of 1974 is the state statute that grants local governments the ability to plan for and regulate the use of land to ensure development is orderly and the environment is protected in a manner consistent with constitutional rights. *“The general assembly further finds and declares that local governments will be better able to properly plan for growth and serve new residents if they are authorized to impose impact fees as a condition of approval of development permits.”* This Act allows for the following:

- Authority to regulate use of land based on impact.⁴
- Authorizes imposition of an impact fee.⁵
- Requires impact fees be:
 - Legislatively adopted;
 - Generally applicable to a broad class of property; and
 - Intended to defray impacts on capital facilities caused by proposed development.
- Requires impact fee be quantified.
- At a level no greater than necessary to defray impacts directly related the development.
- Prohibits fees to fix problems without regard to the proposed development.
- Requires conferral with emergency services provider and developer to assess and determine whether there should be an impact fee.
- Prohibits double-dipping of impact fee and land dedication and double-dipping of payments to the local government and the provider of emergency services.
- Defines “capital facility” as:
 - It is directly related to any service that a local government or a fire and emergency services provider is authorized to provide;
 - Has an estimated useful life of five years or longer; and
 - Is required pursuant to a resolution or ordinance.
- Requires special accounting practices.
- Allows for waiver for affordable housing.
- Prohibits assessment if application occurred before adoption of fees, prohibits collection prior to issuance of the development permit.
- Establishes specific rights of actions for developers challenging impact fees.
- Establishes that these are matters of statewide concern.

The Regulatory Impairment of Property Rights (RIPRA)⁶, is a sub-section of the Local Government Land Use Control Enabling Act of 1974. It states, *“The general assembly hereby finds, determines, and declares that the right to own and use private property is a fundamental right, essential to the continued vitality of a democratic society; governmental regulation of conduct, while equally essential to public order and the preservation of universally held values, must be carried out in a manner that appropriately balances the needs of the public with the rights and legitimate expectations of the individual (A)n individual private property owner should not be required, under the guise of police power regulation of the use and development of property, to bear burdens for the public good that should more properly be borne by the public at large.*

In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local

⁴ § 29-20-104 (1)(g)

⁵ § 29-20-104.5

⁶ § 29-20-201

government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property. This section shall not apply to any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government.

No local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner.

In a challenge to an exaction under RIPRA, “the burden shall be upon the local government to establish, based upon substantial evidence appearing in the record, that such dedication or payment is roughly proportional to the impact of the proposed use of the subject property.” In making its determinations, the court shall include the following considerations:

- Whether the exaction has been accomplished pursuant to a duly adopted law, regulation, policy, or requirement;
- Whether such exaction advances a legitimate local government interest;
- Whether such exaction is roughly proportional to the impact of the proposed use;
- Whether there are adequate legislative standards and criteria to ensure that the local law, regulation, policy, or requirement is rationally and consistently applied.

Remedies include:

- Ordering the local government to modify any required dedication to make it roughly proportional to the impact of the proposed use
- Invalidate the enforcement or application of the law, regulation, policy, or requirement as applied to the subject property
- Award the prevailing party its costs and reasonable attorney fees.

C.R.S. 30-28-133 is another enabling statute that allows counties to collect development fees. It states that county Subdivision Regulations “shall include, as a minimum, provisions governing sites and land areas for schools and parks when such are reasonably necessary to serve the proposed subdivision and the future residents thereof.” Such provisions may include:

- Reservation of such sites and land areas, for acquisition by the county;
- Dedication to the county, to a school district, or to the public or, in lieu thereof, payment of a sum of money
 - not exceeding the fair market value
 - can combine dedication and payment
 - any sums may be paid directly to a school district
 - if land is dedicated, it may be sold
 - subdivider shall have a right of first refusal
 - may not exceed the fair market value at time of dedication
- Dedication of such sites and land areas for the use and benefit of the owners and future owners in the proposed subdivision (including storm water detention facilities)
- After final approval of a subdivision plan or plat and receipt of dedications of sites and land areas or payments in lieu thereof the board of county commissioners shall give written notification to the appropriate school districts and local government entities.
 - school district or local government entity may request such land or moneys
 - requires demonstration of a need for long-range capital plan or evidence of the impact of the subdivision
 - the district or entity shall use the transferred land or moneys only for acquisition of reasonably necessary sites and land areas or for other capital outlay purposes for schools or parks, for the development of the sites and land areas for park purposes, or for growth-related planning functions by school districts for educational purposes

- Any moneys received by the county are not county revenues

There is additional express authority for requiring emergency vehicle lanes.⁷

Fee Administration:

Fees collected through an approval process must be deposited into an interest bearing account. This account must clearly identify the type of capital expenditure that the fee was collected for. Because of this, fees collected for different capital expenses must be help in separate accounts. The monies collected must also be used in the area where the development impact was created. This ensures that these fees are used to offset impacts that are attributable to the development.

Services Other Counties' Collect Fees For

Below is a summarized list of services that other communities collect fees for. Following this list are brief explanations about the intent and purpose of these fee collections. Links to these communities' regulations and studies that support these fees are included in each section.

- Impact Fee for Change of Use
- Fire and Emergency Service Impact Fee
- Road Impact Fee
- Wildfire Mitigation Fee
- Exterior Energy Fee
- Affordable Housing
- Schools
- Library Impact Fee
- Parks and Recreation
- Human Services

City of Steamboat Springs

- Road Impact Fee - Used to offset impacts to roads from development.
- Construction Excise Tax – Helps defray the costs of capital improvements and infrastructure

Pitkin County (access regulations and study [here](#))

- Road Impact Fee - The establishment of a system for the imposition of transportation capital expansion fees is to assure that development contributes its equitable share of the cost of providing, and benefits from, the provision of road capital improvements.
- Employee Housing Impact Fee - The purpose of the employee housing impact fee is to require the applicable development to pay to mitigate the impacts of development and land use to the employee housing stock managed or controlled by Pitkin County or its housing designee, the Aspen/Pitkin County Housing Authority (APCHA).
- Parks /Recreation/Open Space Exaction - Pitkin County established a Parks/ Recreation/Open Space program to insure an ample supply of parks/recreation/open space to satisfy the needs of residents and visitors.
- Trails Exaction - Pitkin County trails standards are based upon consideration of the Pitkin County Comprehensive Plan and adopted open space and trails plans.
- School Land Dedication Standards - School land dedication standards shall be assessed upon all new subdivisions containing residential units within unincorporated Pitkin County that are located within the boundaries of the Aspen School District or the Roaring Fork School District (RE-1).

⁷ § 30-15-401(1)(h)

Boulder County (access regulations and study [here](#))

- Library Impact Fees – Components of the library fee include costs for library buildings and materials included in the library's collection.
- Parks and Recreation Impact Fees - Three main components are included in the fee calculation: Outdoor Park Improvements, Recreation Facilities and Pools, and Administrative/Support Facilities. Additional land for parks is not included in the impact fee calculation because the City has an inventory of parkland on which it intends to make improvements with impact fees.
- Human Services Impact Fees - Components of the Human Services fee include costs for Senior Centers and the Children, Youth and Family Center.
- Municipal Facilities Impact Fees
 - Municipal Facility office buildings: Incremental expansion approach to allow for future expansion in City office space for general government purposes to accommodate growth.
 - Land for Municipal Facilities: Cost recovery approach to capture growth's share of the cost of acquiring the Boulder Community Hospital site for use for future Municipal Facilities.
 - Municipal Court Facility: Plan-based approach to capture growth's share of future facility.
- Police Impact Fees – Components of this fee are incremental facility expansion and communications infrastructure.
- Fire Impact Fees - The Fire impact fee is based on the incremental expansion cost of Fire Services facilities, Fire apparatus, and land for future Fire stations.

Adams County (access regulations and study [here](#))

- Land Dedication - The purpose of this section is to insure adequate land areas and/or funds for the acquisition and development of public sites and open space are made available through the development process. Public sites and open space needs include parks and recreation facilities, aesthetic natural features, historic sites and structures, school sites and sites for other public buildings, such as fire stations.
- Regional Traffic Impact Fee - Adams County imposes a regional traffic impact fee on new development to offset growth related impacts.
- Oil and Gas Road Impact and Maintenance Fee - Operators must pay oil and gas road impact and maintenance fees for all proposed oil and gas wells and pads.
- Fire District Impact Fees (multiple districts) - Based on unit type and residential or nonresidential.

Weld County (access regulations and study [here](#))

- Public Sites and Open Spaces – May include common open space, parks, wildlife preserves, riparian areas, trails or other lands to be preserved.
- School District - A residential subdivision application shall be referred to the applicable school district for review and recommendation regarding school district requirements. The Department of Planning Services, Planning Commission and Board of County Commissioners shall consider the recommendation of the school district.
- Road Impact Fee
- Drainage Impact Fee
- County Facilities Impact Fee - The updated fee will be based on the existing level of service for all existing County facilities, including the jail, courthouse, administration buildings (including sheriff), public works yards, communication center, etc.

Eagle County (access regulations and study [here](#))

- School Land Dedication Standards – Applicant shall allocate and convey sites and land areas for schools, when such are reasonably necessary, to serve the proposed subdivision and the future residents thereof.
- Road Impact Fee – Assure that new development contributes its proportionate share of the cost of providing, and benefits from the provision of, Road Capital Improvements identified as needed to be built in the Road Capital Improvement Plan.
- Emergency Service Impact Fee – System for identifying and mitigating growth-related costs associated with growth and development and the expansion of emergency services and facilities made necessary by land development activities, a growing population and economic activity levels.
- Exterior Energy Use Fee – Assessed on projects with exterior energy uses including snow melt, pools and spas over a certain threshold.
- Wildfire Mitigation Fee - A fixed \$200 fee is due for land parcels classified as moderate, high or extreme wildfire hazard

Issues for Discussion

1. What is the County's appetite for adding additional fees onto the development of new subdivisions/single family homes, thereby increasing the cost of development in the County?
2. Is the County interested in collecting any development fees to offset the impacts from development? If so, which services should be further pursued?
3. Is the County willing to fund studies that would help determine if an impact fee would be feasible and what the fee amount should be?
4. Should the developer be responsible for conducting the study to determine what the impact of the proposed development will be on services?