Navigating the Fee-nal Frontier of Impact Fees for Developments

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In this article, the authors discuss development impact fees, which are levied upon developers in connection with new construction or revitalization projects to offset the costs associated with increased demand for roads, schools, utilities, and other amenities necessitated by development.

Development impact fees are a common tool used by local governments to fund public infrastructure and services, which play a crucial role in the process of urban and suburban growth. These fees are levied upon developers in connection with new construction or revitalization projects to offset the costs associated with increased demand for roads, schools, utilities, and other amenities necessitated by development. In other words, they are used to soften the "impact" that the new development is going to bring to the infrastructure already in place.

While development impact fees may sometimes lead to debates between developers and local governments, there is an argument that they can pose entry barriers for developers and contribute to challenges in maintaining the affordability of housing and commercial properties in expanding areas. On the other hand, proponents of impact fees assert that they are instrumental in promoting fair cost-sharing and ensuring that communities can support new growth in a sustainable manner.

RECENT SUPREME COURT DECISION: *SHEETZ V. COUNTY OF EL DORADO, CALIFORNIA*

A recent U.S. Supreme Court decision, *Sheetz v. County of El Dorado, California*, has brought development impact fees to the forefront of discussion by answering the question of whether the "*Nolan/Dolan*" test (based on U.S. Supreme Court precedent) used to evaluate the potential abuse of the permitting process, also extends to monetary fees imposed by legislative action.

The case arose from a dispute between a real estate developer, Sheetz, and the County of El Dorado, when the county required Sheetz to pay a "traffic impact fee" amounting to $23,420 as a condition to receiving a residential building permit. This fee formed part of a broader "General Plan" established by the county's board of supervisors to address escalating demands for public services spurred by new developments. However, the fee's calculation did not directly correspond to the costs of traffic impacts specifically linked to

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Sheetz's project. Instead, it was determined based on a rate schedule that considered the type of development and its location within the county.

While courts had differing views on whether to apply the *Nolan/Dolan* test to legislatively prescribed monetary fees such as impact fees, the U.S. Supreme Court has now resolved the issue.[1] The Supreme Court held unanimously that the *Nolan/Dolan* test applies uniformly to all impact fees and permits, regardless of whether they were being imposed on a discretionary basis or due to legislative action. Which means that in order for a development impact fee to be constitutional, such fee must have: (i) an "essential nexus" to the government's land use interest, and (ii) a "rough proportionality" between the project's actual impact and the fees being imposed.[2]

It is important to note that local governments commonly use reasonable formulas or general plans that assess the impact of classes of development rather than the specific project for a variety of reasons, such as lack of resources, lack of expertise, or expediency demands. In his concurrence, Justice Kavanaugh, joined by Justices Kagan and Justice Jackson, emphasized that the "decision does not address or prohibit the common government practice of imposing impact fees, on new developments through reasonable formulas or general plans that assess the impact of classes of development rather than the specific parcels of property."[3] The decision left that question open, noting that no prior Supreme Court decision has addressed or prohibited this longstanding government practice.

CRITERIA FOR ASSESSING AND SATISFYING THE *NOLAN/DOLAN* TEST

As a result of the ruling in the *Sheetz* case, local governments and developers must now consider the following elements to assess and satisfy the *Nolan/Dolan* test:

1. *Essential Nexus*: This element requires a clear connection between the fee imposed and the government's interest in land use. Local governments must demonstrate that the fee addresses a specific impact of the development project. For example, a traffic impact fee should directly correlate with the increased traffic generated by the new development.
2. *Rough Proportionality*: The fees imposed must be proportional to the actual impact of the development. This involves a detailed analysis to ensure that the fee amount is not excessive and is directly related to the development's impact. For example, a development project that is expected to increase traffic by 10%, should have an impact fee that reflects the cost of mitigating that 10% increase.

It is worth noting that the application of the *Nolan/Dolan* test will vary greatly depending on the facts of each case and the attributes of the impact fee in question. Courts will examine the methods local governments use to calculate the impact of a development and assess whether the capital improvements funded by the fees share a nexus and are proportional to the development that is going to be built. While there are several factors which courts tend to analyze when reviewing proportionality and nexus of impact fees, it is important to note that no single factor is decisive and that the analysis will be comprehensive. However, the following factors may raise red flags as to whether the impact fees imposed are unconstitutional:

1. *Buy-In Fees*: When the fee imposed by the local government is based solely on anticipated developments or the expectation that future residents and businesses will need better infrastructure, it could be held invalid.[4] For example, if a small county receives a minor development first and anticipates a larger development in the future, it could be argued that it would not be equitable or proportional for the initial developer to bear the upfront costs alone. Under a well structured system, developers would be treated fairly regardless of who got there first or of size. Developers should pay for their fair share based on the actual impact they are projected to have.

2. *Ad-Valorem Fees*: Local governments might impose a charge which they deem an "impact fee," but if the fee is based on the appraised value of the project or if it scales with the value of the project, instead of its specific impact on the existing infrastructure, then it might be a tax disguised as an impact fee.[5] Impact fees, are intended to offset the specific costs generated by a new development, while taxes are generally used to raise revenue for a variety of public purposes. This is relevant because taxes are subject to different legal requirements and constraints which might make them invalid on their face.

3. *Frontage Fees*: It can be problematic for impact fees to be determined by how much public infrastructure borders a facility, such as a street or sewer line.[6] This approach mistakenly correlates a development's impact to its mere proximity to public infrastructure irrespective of actual use or impact. For example, a larger property on a major road may not always draw more traffic than a smaller property with a smaller frontage. In a similar vein, a development next to a sewer line might not add more to the system than a development farther away. This approach fails to account for the actual impact of the development, leading to potential inequities and challenges.

4. *Flat Rates*: When impact fees are applied without consideration of whether the development is commercial, residential, or industrial, it could be considered unfair or unproportional.[7] Different types of developments require different infrastructure, and thus have different impact. For instance, a new apartment complex might increase the demand for schools and parks, while a commercial office building will likely increase traffic and the demand for parking. By applying a one-size-fits-all fee, local governments fail to account for these differences, resulting in disproportionate fees that do not align with the actual impacts.

5. *Illogical*: Fees that are computed using criteria that does not make sense in relation to the development's real effects may be deemed invalid. The impact of a development on traffic infrastructure may not be adequately reflected by a traffic signal fee, for instance, if the local government bases the fee on population size rather than the amount of additional traf-

fic the development is projected to cause. Comparably, if water impact fees are determined solely by parcel size without taking into account the property's intended use (residential, commercial, or industrial), the fees may not reflect the true demand on the water system.

6. *Curing Existing Shortfall or Condition*: Using impact fees to address pre-existing infrastructure or service deficiencies that are unrelated to the additional demands projected to be created by the development is improper.[8] Impact fees are intended to mitigate the direct effects of new developments, not to fix existing problems in the community.

7. *Unrelated Uses*: Another factor which may raise concerns when challenging an impact fee is when the funds collected from such fees are used for purposes unrelated to what the actual impact fee relates to.[9] For instance, if money collected for road traffic improvements is used for water treatment projects, it undermines the purpose of the impact fee. Developers expect that the funds they contribute will be utilized to address the particular effects of their projects. Therefore, improper use of these funds may run afoul of legal requirements and harm the relationship between local governments and developers. The fees that are collected for specific impacts should be placed into different accounts and utilized only for the purposes for which they were intended in order to uphold accountability and transparency.

PRACTICAL STEPS FOR LOCAL GOVERNMENTS

To comply with the *Nolan/Dolan* test, local governments can take the following steps:

1. *Conduct Impact Studies*: Thorough impact studies should be conducted to assess the specific impacts of proposed developments. These studies should detail how the development will affect infrastructure and services and should be completed by experienced independent third parties.

2. *Develop Clear Fee Structures*: Fee structures should be transparent and based on the findings of impact studies. This ensures that fees are justified and proportional to the development's impact.

3. *Engage Stakeholders*: Engage with developers and community stakeholders to explain the rationale behind impact fees and bridge any gaps which can help build consensus, avoid disputes, and likely result in exploring alternatives to the development in hopes of tailoring the impact and consequentially, the impact fee.

4. *Regularly Review and Update Fees*: Periodically review and update fee structures to reflect current conditions and ensure continued compliance with legal standards.

PRACTICAL STEPS FOR DEVELOPERS

Developers can also take proactive measures to navigate the landscape of development impact fees:

1. *Seek Legal Counsel*: Engage legal coun-

sel to review and challenge any impact fees that appear excessive or unjustified. Legal experts can help in presenting arguments based on the *Nolan/Dolan* test.

2. *Participate in Impact Studies*: Provide input during the impact study phase to ensure that the assessment accurately reflects the development's projected impact.

3. *Negotiate Fees*: Where possible, negotiate fee reductions or exemptions by presenting data that demonstrates the actual impact of the development is less than what is assumed in the fee calculation.

CONCLUSION

The *Sheetz v. County of El Dorado* decision has significant implications for the future of development. By applying the *Nolan/Dolan* test to all impact fees, the Supreme Court has provided a clearer framework for evaluating the constitutionality of these fees. Local governments must ensure their fee structures are defensible and proportionate, while developers have a clearer pathway for challenging unjustified fees. Both parties should engage in thorough analysis and open communication to navigate the complexities of development impact fees successfully.

NOTES:

[1] *Sheetz v. County of El Dorado, California*, 601 U.S. 267, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024).

[2] *Sheetz v. County of El Dorado, California*, 601 U.S. 267, 275, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024).

[3] *Sheetz v. County of El Dorado, California*, 601 U.S. 267, 284, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024).

[4] Dennis H. Ross, Impact Fees: Practical Guide For Calculation And Implementation (1992).

[5] *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989); Ross, supra note 4; Development Planning & Financing Group, Inc., Impact Fee Handbook (2016).

[6] *Land/Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817, 824, 379 A.2d 200, 205 (1977); Ross, supra note 4.

[7] Ross, supra note 4.

[8] *Upton v. Town of Hopkinton*, 157 N.H. 115, 120, 945 A.2d 670, 674 (2008); Ross, supra note 4; N.H. Rev. Stat. Ann. § 674:21.

[9] Ross, supra note 4; N.H. Rev. Stat. Ann. § 674:21.