Paying for Growth: Impact Fees under Senate Bill 15

CML Land Use Planning Workshop Land Use Toolbox: Nuts & Bolts, New Laws and Paying for Growth

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I. Introduction

As growth pressures increase, and the cost of infrastructure associated with new development also increases, local governments are considering various alternative sources of revenue to "pay for growth." New development creates a need for new roads, schools, parks, fire and police protection, and sewer and water treatment facilities, to name the most common. In Colorado, this situation is particularly acute because various constitutional and statutory restrictions limit the flexibility of municipalities to increase revenue from taxes, and to spend revenue already collected. Also, levels of federal funding for infrastructure have been gradually reduced over time.

Various methods of financing the costs of growth are available to municipalities, including various types of taxes, exactions and dedication requirements, negotiated developer agreements, and annexation agreements. This publication deals only with impact fees. In considering how to finance needed infrastructure, a municipality should consider all the options available to it.

II. What is an impact fee

Planning literature generally defines an impact fee as a one-time charge assessed against new development that attempts to recover the cost incurred by a local government in providing the public facilities required to serve new development. Impact fees have also been described as a cost-shifting device that contributes to the efforts of local governments to cope with the economic burdens of population growth such as the need for new roads, schools, parks, and sewer and water treatment facilities.[1]

While Colorado statutes do not contain a definition of the term "impact fee," they do have a definition of "land development charge," which is very similar:

> "any fee, charge, or assessment relating to a capital expenditure which is imposed on land development as a condition of approval of such land development, as a prerequisite to obtaining a permit or service. Nothing in this section shall be construed to include sales and use taxes, building or plan review fees, building permit fees, consulting or other professional review charges, or any other regulatory or administrative fee, charge, or assessment."

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[1] John M. Armentano, Esq., Farrell Fritz, P.C., Long Island, NY, *As Local Governments Struggle to Finance Costs Associated with New Construction, More and More Turn to the Option of Requiring Developers to Pay "Impact Fees,"* Zoning and Planning Law Report, (October 1999).

SB01S2-015 (hereinafter "Senate Bill 15"), passed by the Colorado General Assembly in October, 2001, governing "impact fees and other similar development charges," (discussed in more detail later in this report) does not define that term.

Similarly, Colorado case law has not directly determined the validity of "impact fees" *per se* using that term.[2] However, numerous cases have decided the validity of various "service fees," defined as a "charge imposed on property for the purpose of defraying the cost of a particular government service."[3] Other cases have analogized a service fee to a "Plant Improvement Fee."[4]

Colorado municipalities may have the longest history of using development fees.[5] As early as the 1920s, cities in Colorado charged developers for the water rights needed to serve their developments. Today, usage of impact fees in the state has expanded to finance not only water and sewer facilities, but also roads, drainage facilities, police and fire protection, library services, museums, and parks and recreation. (See Appendix A).

Although impact fees do not alter the total costs of new infrastructure, they do affect the distribution of costs, or who pays for the facilities. Each community will need to make a policy decision about whether the cost of each new facility required is charged directly to the new users or spread across the community.

III. What an impact fee is not

A. *An impact fee is not a tax*

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[2] In the only case to address impact fees using that term, the Colorado Supreme Court found the school impact fees at issue invalid based on the county's lack of statutory authority, but did not address the validity of impact fees, *per se*. *Bainbridge v. Douglas County*, 929 P.2d 691, 698 (1996). In *Krupp v. Breckenridge Sanitation District*, 3 P.3d 687 (Colo. 2001), Justice Hobbs noted that the Colorado Supreme Court has used the terms "service fee," "special fee," and "special charge," interchangeably to denote a charge reasonably designed to meet the overall costs of the specific service for which the fee is imposed, *citing City of Littleton v. State*, 855 P.2d 448, 452 (Colo. 1993); *see also Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1984); *Loup-Miller Constr. Co. v. City and County of Denver*, 676 P.2d 1170, 1173 (Colo. 1984). In support of the court's decision, however, Justice Hobbs cited *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), a case in which the court considered the application of a takings analysis to an "impact fee."

[3] *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 24 (Colo. 2000), *quoting Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989).

[4] *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 698 (Colo. 2001).

[5] Jane H. Lillydahl, Associate Professor, Department of Economics, University of Colorado at Boulder, presented at A Symposium on Impact Fees, 1987 Conference of the American Planning Association, New York City, April 26-30, 1987, "Impact Fees in Colorado: Economic, Political, and Legal Overview."

A tax is a general revenue raising mechanism; an impact fee is charged to cover the cost of a specific activity, service or infrastructure.

Authority to impose a tax is derived from the taxing powers of a local government; authority to impose an impact fee is derived from the police power. (In the case of a home rule municipality, power is additionally derived from Article XX of the Colorado Constitution). Under the amendment to the Colorado Constitution known as the Taxpayer's Bill of Rights, or "TABOR," a public vote is required to impose or increase a tax;[6] no public vote is required to establish an impact fee. Also, Colorado statutes require that impact fees be accounted for separately; tax revenues may be commingled with other funds.[7] This is true under Colorado case law as well. When fee revenues become commingled with general funds, the fee begins to look more like a tax in the sense that it is being used to raise general governmental revenues, rather than to offset costs of a specific service or capital expenditure.[8]

An excise tax is a specific type of tax, imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.[9] In order to finance municipal infrastructure, some Colorado municipalities impose an excise tax on the privilege of subdividing or developing property, rather than on the property itself. Statutory cities and towns do not have explicit statutory authority to impose excise taxes; they do, however, have authority to impose business taxes.[10] In only one instance has a Colorado court found a development charge to actually be improper as an excise tax.[11]

Some communities in Colorado impose a development excise tax upon the privilege of developing, calculated on the basis of dollars per square foot, and payable at building permit stage.[12]

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[6] Also known as Amendment 1; Colo. Const. art. X, § 20.

[7] C.R.S. § 29-1-801 *et seq.*

[8] In *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989), the only defect the Colorado Supreme Court found in Fort Collins' transportation utility fee was the portion of the ordinance that allowed excess revenue to be transferred to the general fund of the city. This portion was found severable, and the ordinance upheld. 784 P.2d at 311.

[9] The term excise tax has come to mean and include practically any tax which is not an *ad valorem* tax. An *ad valorem* tax is a tax imposed on the basis of the value of the article or thing taxed. An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege. 16 McQuillin Muni. Corp., §44.190 (3rd ed. 1994).

[10] C.R.S. § 31-15-501(1)(c).

[11] In *Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779 (Colo. 1983), the Colorado Supreme Court found (and the City conceded) that a development fee levied by the city for the stated purpose of paying for the expansion of city services necessitated by new development, was actually an excise tax. The Court upheld the tax, however, as being within the City's authority.

[12] Five Colorado communities currently have development excise taxes: Boulder, Broomfield, Parker, Ridgway and Silverthorne. All of the ordinances earmark the funds primarily for capital improvement projects; Boulder additionally allows the money to be used for transportations development and Silverthorne allows the fund to be used for law enforcement activities. These taxes are payable either at certificate of occupancy or building permit. Source, internal October, 31, 2000 CML telephone survey of municipalities with development excise taxes.

Nor is an impact fee an *ad valorem* tax, which is imposed on the basis of a property's value, the purpose of which is to provide revenues in order to defray the general expenses of government as distinguished from the expense of a specific function or service.[13]

B. *An impact fee is not a special assessment*

A special assessment is a charge imposed for the purpose of financing local improvements.[14] To qualify as a special assessment, a charge must be directed against the users of an improvement, and the revenue derived from the charge must be applied only to the maintenance, operation or development of the improvement.[15] A special assessment is based on the premise that the property assessed is enhanced in value at least to the amount of the levy.[16] The burden of the assessment falls on the property owners because the benefits they receive from the particular improvements are different from the benefits they enjoy in common with other property owners.[17] The funds generated by a special assessment cannot be diverted to other purposes, since the imposition of the assessment upon a particular class of taxpayers can be justified only to the extent that such assessments are equivalent to special benefits conferred upon these taxpayers.[18]

By contrast, an impact fee is intended to offset the impacts of new development on existing and new infrastructure. There is no requirement – either in case law or under the new Senate Bill 15 – that the value of the improvements to each property exactly match the amount contributed by each property. Under traditional legal principles, such a precise mathematical match is explicitly not required.[19] Nor must an impact fee be designated for a specific construction project, such as a street, or library building. Numerous cases have found that "special fees," the definition of which is very similar to impact fees, are not special assessments.[20] Therefore, the facilities funded by impact fees need not import special benefits to the fee payor.

A special assessment may be levied against owners of either developed or undeveloped property, to offset the costs of a specific improvement, such as paving of a street, which benefits only those properties fronting the street. An impact fee, on the other hand, may be levied against all new residential development, to offset costs associated with the increased traffic the new

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[13] *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986); *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989); *Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779 (Colo. 1983).
[14] *Id.*
[15] *Id.*
[16] *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989).
[17] *Id.*
[18] *Id.*
[19] *Id.; also see Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 694 (Colo. 2001). But see discussion of "directly related" requirement of Senate Bill 15.
[20] See, e.g., *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989).

development will generate on all the streets of the city, not just those located directly adjacent to the properties in question.

Special assessments and impact fees do share some common characteristics – for example, both must be accounted for separately and not commingled with the municipality's general revenue stream. However, the purposes for which each may be assessed, and standards governing their validity, are different.

C. *An impact fee is not an administrative fee*

In C.R.S. § 29-1-802(3), the only place in Colorado statute that defines a "land development charge," the definition specifically excludes "building or plan review fees, building permit fees, consulting or other professional review charges, or any other regulatory or administrative fee, charge, or assessment." While there is no definition, and therefore no exclusion, in Senate Bill 15, it is clear from the context of the bill and the legislative history, that the bill is intended to address the situation where a developer is being required to make a contribution towards infrastructure, not the situation where a developer is being asked to pay an administrative fee to cover the costs of reviewing his plans.

Building or plan review fees and similar administrative fees and charges are charged to cover the cost of the specific service the municipality provides to the developer when it reviews the developer's proposal to determine compliance with applicable zoning and other regulations.[21] Other administrative charges might cover consultant fees associated with a specific project, or fees related to the cost of processing a specific application. In these cases, the fee charged is a fee-for-service. The payor of the fee is the direct recipient of the specific service provided; thus the charge is a type of user fee.

Common types of user fees are park and recreation entrance fees; inspection fees; and library fees for special services. There is no requirement of mathematical exactitude; in fact, user fees rarely cover the entire cost of the service provided. Rather, the fee is charged to ensure that at least some portion of the cost of providing the service is borne by the recipient of the service, rather than the taxpayers at large. As with other kinds of fees, however, the amount of revenue generated by user fees cannot exceed the overall direct and indirect costs of the services provided.[22]

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[21] The Colorado Court of Appeals recently held that building permit fees may include both direct and indirect costs, so long as the fees are reasonable. *Bainbridge v. County Com'rs*, Case No. 00CA1435, August 30, 2001. An application for certiorari review by the Colorado Supreme Court is pending, however.
[22] *Bainbridge v. County Com'rs*, Case No. 00CA1435, August 30, 2001.

IV. Why use impact fees?

The principal theory behind the use of impact fees is that development should "pay its own way." New development, which necessitates specific investments in infrastructure, should not be subsidized by existing taxpayers, but should be required to pay for the entire complement of infrastructure it requires.

A. *Arguments against*

- Impact fees raise the price of housing and put homeownership out of the reach of lower- and moderate-income households. Impact fees also provide a windfall gain to existing residents, because by increasing the price of new homes they also increase the value of existing homes.
- Impact fees deter development and create interjurisdictional competition.
- Impact fees are a tax in disguise.
- Impact fees unfairly impose the burden of public facilities on a particular group, namely owners of undeveloped property, though the public at large will receive the benefit of the public facilities. Impact fees subsidize existing residents by paying for improvements that benefit all property owners. In the case of schools, for example, education provides statewide benefits that do not accrue only to specific property owners in a development.
- Impact fees are inequitable because existing development was not similarly charged for its impacts on infrastructure.

B. *Arguments For*

- Impact fees create a conservative "pay as you go" arrangement, and prevent current taxpayers from being forced to subsidize new development and avoid general obligation debt.

- As compared to negotiated development dedications and exactions, there is a general perception that impact fees are more equitable. They are less arbitrary, more predictable and result in more rapid (and thus less costly) public approval for new development.[23]

- Impact fees force local government to plan for future growth. Impact fees are an important growth management tool that allows localities, by setting fees at different levels, to steer growth to areas where infrastructure is underutilized and away from areas where infrastructure is inadequate to accommodate growth

- Impact fees do, and in fact should, increase the price of housing. In the absence of an impact fee, the true cost of an individual house is not reflected in the price because taxpayers at large subsidize the cost of infrastructure necessitated by the house. Impact fees are a market correction device.

- Impact fees actually allow new development to occur that local governments may not otherwise permit.

C. *When should you use an impact fee?*

Though impact fees have been widely touted in the growth debate as the solution to "making growth pay its own way," impact fees are only one tool in the toolbox a municipality can use to achieve this goal. Various other techniques exist, and should be considered as part of a municipality's overall strategy.

In some cases, an infrastructure impact that is exclusively attributable to a specific development is more appropriately offset by an exaction. When a development proposal involves property that will be annexed to the municipality, specific improvements may be negotiated as part of the

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[23] Jane H. Lillydahl, Associate Professor, Department of Economics, University of Colorado at Boulder, presented at A Symposium on Impact Fees, 1987 Conference of the American Planning Association, New York City, April 26-30, 1987, "Impact Fees in Colorado: Economic, Political, and Legal Overview."

annexation agreement process. Because different legal standards and methodologies apply to each of these strategies, a municipality should carefully evaluate its overall infrastructure impacts and the needs created by new development as a whole, then determine the best means to mitigate those impacts. In some cases this will mean using alternative strategies to meet different needs.

V. History of the law of Impact Fees in Colorado

A. *Statutory authority*

Some specific statutory authority for collecting fees from property owners to pay for infrastructure existed in Colorado statutes prior to the enactment of Senate Bill 15. For example, a municipality may require an owner of property to pay for new streets, street paving, curbs, gutters and sidewalks, by means of a special assessment, under the theory that the property is especially benefited by the improvements over and above the general benefit to the public at large.[24] (Despite the fact that the statute refers to a "special assessment," the court did not rule out the possibility of alternative financing methods under this statute.) Municipalities are also specifically authorized to "levy an equitable and just tax upon all consumers of water for the purpose of defraying the expense" of improvements and infrastructure for the water system.[25] Colorado statutes also authorize municipalities to collect fees from property owners and compel them to connect to the city sewer system.[26]

B. *Home Rule Authority*

For home rule municipalities, which derive their authority from Article XX, Section 6 of the Colorado Constitution, specific statutory authority for impact fees has not been necessary. Article XX reads in part as follows:

> **It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and . . . any right or power essential or proper to the full exercise of such right . . . The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.**[27]

[24] C.R.S. §§ 31-15-702; *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981).
[25] C.R.S. § 31-15-708(1)(a).
[26] C.R.S. § 31-15-709(1); § 31-35-402(1)(f).
[27] Colo. Const. art. XX, Section 6.

Under this authority, home rule municipalities can make their own rules when it comes to matters of purely local concern. Both zoning and the financing of local capital improvements have been held to be matters of purely local concern.[28] Thus, through their own legislative enactments, home rule municipalities have long had the authority, independent of the General Assembly, to condition development approval upon payment of a fee designed to offset the costs of infrastructure associated with new development. Of course, the fee must comport with constitutional standards such as due process, equal protection, and the like.

However, home rule authority is not complete carte blanche; the General Assembly may preempt home rule authority when the issue is found to be of "statewide concern," or of "mixed state and local concern." Generally, a declaration by the General Assembly that something is of statewide concern doesn't necessarily make it so. A court will consider several factors in making a determination as to whether a matter is of statewide concern, purely local concern, or of mixed state and local concern: 1) the demonstrated need for statewide uniformity in regulation; 2) the demonstrated impact of municipal regulations on people living outside the municipality; 3) historical considerations of whether the matter has traditionally been regulated at the state or municipal level; 4) the demonstrated need for the state to be involved to resolve intergovernmental conflict at the local level; and 5) specifically delineated home rule authority in Article XX of the Colorado Constitution.[29]

C. *Implied Authority*

Some local governments have argued that, in the absence of specific enabling authority prior to Senate Bill 15, implied authority for impact fees could be found in other Colorado statutes or in case law.

In 1991, the General Assembly enacted a statute which, while not explicitly authorizing impact fees, provided specific requirements for how such fees should be collected and accounted for.[30] This statute, entitled "Land Development Charges," requires that impact fees must be deposited in an interest-bearing account, accounted for separately from other revenues, and not commingled with other government funds.[31]

[28] *Roosevelt v. City of Englewood*, 492 P.2d 65 (Colo. 1971); *Davis v. Pueblo*, 406 P.2d 671 (Colo. 1965).
[29] *City and County of Denver v. Colorado*, 788 P.2d 764, 767 (Colo. 1990).
[30] C.R.S. § 29-1-801 *et seq.*
[31] C.R.S. § 29-1-803

Colorado courts have only once addressed the validity of an "impact fee" *per se*, using that term; that case was decided on other grounds.[32] However, in various circumstances, Colorado courts have addressed the validity of "special fees," and "special service fees," fees by their definition virtually identical to an impact fee.[33] In this line of cases, Colorado courts have found such fees valid so long as they are reasonably related to the objective of defraying the overall cost of providing the service or infrastructure for which the fee is collected.[34]

Prior to the recent case of *Krupp v. Breckenridge Sanitation District*, and prior to the enactment of Senate Bill 15, some observers opined that this line of cases provided implied authority for impact fees, so long as the fees met the "reasonably related" standard.

Also, Colorado courts have generally inferred that local governments (both counties and municipalities) have the ability to require developers to provide for infrastructure necessitated by new development, based on the general police power, and on statutory land use authority for zoning (C.R.S. § 30-28-111-116; §§ 31-23-301 *et seq.*), subdivision (C.R.S. § 30-28-133; §§ 31-23-101 *et seq.*), planned unit development (C.R.S. §§ 24-67-101 *et seq.*) and comprehensive planning (C.R.S. §§ 30-28-106-109; C.R.S. § 31-23-206).[35]

D. *Constitutional Requirements*

Local governments have long debated with the development community, in courts across the nation, about what constitutional standards apply to impact fees. In 1987 and 1994, the U.S. Supreme Court decided two cases that set the standards for exactions, those instances in which, as a condition of development, a local government requires a property owner to dedicate land for public use.[36] In *Nollan v. California Coastal Commission*, the commission attempted to condition approval of a property owners development proposal on dedication of a beach access easement for the public. The court held this was improper, because the requirement to dedicate a beach access easement did not solve any particular problem created by the proposed development, and that an exaction, in order to be constitutional, must have a "rational nexus" with the proposed development. In *Dolan v. City of Tigard*, the city required a property owner proposing to expand an existing hardware store to dedicate a strip of land along the adjacent

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[32] In the only case to address impact fees using that term, the Colorado Supreme Court found the school impact fees at issue invalid based on the county's lack of statutory authority, but did not address the validity of impact fees, as such. *Bainbridge v. Douglas County*, 929 P.2d 691, 698 (1996).

[33] *See e.g. Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989); *Loup-Miller Const. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984); *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986); *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928 (Colo. 1985); *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981); *City of Arvada v. City and County of Denver*, 663 P.2d 611 (Colo. 1983).

[34] *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001).

[35] *See, e.g. Beaver Meadows v. Bd. of County Com'rs*, 709 P.2d 928, 935 (Colo, 1985); *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 671-74 (Colo. 1981).

[36] *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

creek for a bike trail. Again, the Supreme Court held this to be invalid, finding that the bike path requirement did not have a rational nexus with the proposed expansion, nor was it roughly proportional to the impact, reasoning that customers of a hardware store were unlikely to use a bike path.

The development community, in Colorado and nationwide, has long argued that in order to be valid, an impact fee must also have a "rational nexus" with a specific, proposed development, and must be "roughly proportional" to the development's impact on infrastructure. Local government, in response, has argued that an impact fee is not an exaction (or, at least is not the type of exaction to which the Supreme Court intended these standards to apply) and therefore does not have to meet these standards in order to be valid.

The U.S. Supreme Court appeared to come to this conclusion in a 1999 case, in which the court said that the Nol*lan/Dolan* rule only applied to the "special context" of exactions, which it defined as "land-use decisions conditioning the approval of development on the dedications of property to public use."[37]

E. *Krupp v. Breckenridge Sanitation District*

In February, 2001, the Colorado Supreme Court decided a case which directly addressed the question of whether an impact fee must comply with the *Nollan/Dolan* standard of rational nexus and rough proportionality in order to be valid.[38] In *Krupp v. Breckenridge Sanitation District*, the developer plaintiffs challenged the sanitation district's Plant Investment Fee (PIF), a fee charged to all new development, based on a formula, to offset capital costs associated with improvement of sewer facilities necessitated by new development. The Krupps argued that the district should have engaged in an individualized determination of how much the fee should be, based solely on their proposed development, and that the fee had to be roughly proportional to the impact of their particular development.

The Colorado Supreme Court declined to adopt this argument, finding that an impact fee, or special fee, such as the PIF, was not the type of exaction to which the Supreme Court meant the *Nollan/Dolan* test to apply. An impact fee is different from a typical exaction scenario in two important ways. First, an exaction is decided on an individual basis, and imposed solely against an individual development; an impact fee is calculated based on the impact of all new development, and the same fee is charged to all new development in a particular class. Thus an exaction is a discretionary, or adjudicative function of the local government; but an impact fee is a legislative action. Second, an exaction almost always involves real property, a right the framers of the U.S. Constitution saw fit to provide with special protection in the form of the Fifth Amendment. Despite the fact that money is property, the payment of money has not traditionally

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[37] *City of Monterey v. Del Monte Dunes Ltd.*, 119 S.Ct. 1624 (1999).
[38] *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001).

been viewed as entitled to the same special protection as real property. For these reasons, the *Krupp* court found that the takings analysis in the *Nollan* and *Dolan* cases is not implicated with an impact fee.[39]

The Colorado Supreme Court concluded that the PIF was a legislatively determined service fee, and was not, therefore, subject to the takings analysis, or required to meet the *Nollan/Dolan* test; instead, the fee merely needed to be "reasonably related to the overall cost of the service."[40]

Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use. The service fee at issue was neither the result of a discretionary adjudicative decision of this type nor an exaction of property; it was a payment for services necessary to enable development of the project and to comply

Even in the Dolan case, the Supreme Court contemplated that the rule it articulated in that case might not apply to legislatively determined fees such as impact fees, when it said:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.[41]

VI. Senate Bill 15

A. *How Senate Bill 15 passed*

In 2000, CML's Growth Committee adopted a set of Principles on Growth Management, which included recommending that CML pursue legislation to clarify authority for municipalities and counties to impose impact fees on new development. During the summer of 2001, when Governor Owens called two special sessions on growth and growth-related issues were high on

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[39] The Colorado Supreme Court acknowledged that the U.S. Supreme Court's decision in *City of Monterey* left open the possibility that a very narrow class of purely monetary exactions may be subject to heightened scrutiny under the *Nollan/Dolan* test. However, the Colorado Supreme Court went on to conclude that the PIF in question did not fall into that narrow class, and therefore left the issue open. *Krupp*, 19 P.3d at 698.
[40] *Krupp*, 19 P.3d at 693-694.
[41] *Dolan*, 114 S.Ct. at 2316.

the priority list of the public and the General Assembly, the time appeared ripe for such legislation.

CML, along with Colorado Counties, Inc., approached the Coalition for Growth Management, a group representing the development community, and began discussing whether the parties could agree that impact fee authority should be clear and uniform among municipalities and counties, and if so, what language would appropriately describe that authority. Though these discussions ultimately culminated in an impasse among the parties, the legislative process moved forward and the end result was Senate Bill 15.

B. *What does Senate Bill 15 do?*

Senate Bill 15 provides that a local government "may impose an impact fee or other similar development charge" to fund expenditures by such local government on capital facilities needed to serve new development." The bill amends Title 29, the section of Colorado statutes governing both municipalities and counties, and defines "local government," to include "a county, home rule or statutory city, town, territorial charter city, or city and county."

Thus home rule municipalities, which always had the authority to impose impact fees, as well as statutory cities and counties, which historically had unclear, limited authority to impose impact fees, are both ostensibly governed by Senate Bill 15. Of course, home rule municipalities may continue to take the position that this authority is unnecessary in light of their Article XX powers.

C. *What Senate Bill 15 doesn't do.*

As noted above, Senate Bill 15 defines "local government" narrowly, to include municipalities and counties only. The bill does not change the law with respect to other types of governmental and quasi-governmental entities, such as school districts, Title 32 special districts, authorities and other taxing districts.

As originally introduced, Senate Bill 15 contained language that included "school capital facilities" among those items listed as approved uses for impact fees. As the bill finally passed, however this language was omitted. More importantly, the original version of Senate Bill 15 also contained language that would have repealed a portion of current law, contained in the School Finance Act, which expressly prohibits schools from accepting funds generated by

impact fees from local governments.[42] This language was also omitted from the final version, with the result that Senate Bill 15 does not change current law with respect to schools. That is, the School Finance Act still provides that a school may not enter into agreements with local government for funding, construction, mainenance, or capital construction, unless such funding is provided solely from a source of local government revenue other than impact fees.[43] (However, as with other declarations of statewide concern, it is not clear whether the General Assembly has identified an area that a court would find to be of statewide concern under the *Denver v. State* factors enumerated elsewhere in this publication. No case has yet tested whether a home rule municipality may impose an impact fee on behalf of a school or school district.)

D. *Restrictions and limitations*

1. Impact Fees must be "Directly Related" to Proposed Development

Senate Bill 15 requires local governments to "quantify the reasonable impacts of proposed development on existing capital facilities and establish the impact fee or development charge at a level no greater than necessary to defray such impacts directly related to proposed development." The question of what "directly related" means has been the subject of much discussion and debate, which may be answered for certain only by the Colorado Supreme Court.

When the Colorado General Assembly has considered legislation relating to impact fees in the recent past, many of the proposals allowed impact fees only when a local government could demonstrate that there was an "essential nexus" between the fee charged and a particular development proposal, and that the fee charged was "roughly proportional" to that development's impact on the infrastructure for which the fee was being collected. In the post-*Krupp* world, however, the Colorado Supreme Court has made it clear that an impact fee does

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[42] In 1994, the General Assembly passed the Public School Finance Act of 1994, C.R.S. §§ 22-54-101 *et seq*. In 1996, while a case on the subject was pending in Colorado courts, the legislature amended the statute to clarify its intent that local governments may fund school projects, but only to the extent the funding comes from sources other than impact fees. "Nothing in this article shall be construed to prohibit local governments from cooperating with school districts through intergovernmental agreements to fund, construct, maintain or manage capital construction projects . . . so long as funding for such projects is provided solely from a source of local government revenue that is otherwise authorized by law except impact fees or other similar development charges or fees." C.R.S. §§ 22-54-102(3)(a). In the then-pending litigation, in which developers challenged an impact fee levied by Boulder and Douglas Counties, the Colorado Supreme Court found that counties are limited to the land dedication and fee-in-lieu-of provisions in the School Finance Act, and have no statutory authority to impose additional impact fees. *County Comm'rs of Douglas v. Bainbridge, Inc.*, 929 P.2d 691 (Colo. 1996).
Once again, however the question arises as to whether the General Assembly successfully prohibited home rule municipalities from imposing such impact fees.

[43] C.R.S. § 22-54-103(a).

not have to meet what has come to be known as the "*Nollan/Dolan*" test of essential nexus and rough proportionality in order to be valid.

Instead, the court said, an impact fee is valid if it is legislatively adopted, generally applicable to a broad class of property, and intended to defray the projected impacts on capital facilities caused by proposed development. The court also stated that an impact fee must be fair, and rationally differentiate between types of development. Senate Bill 15 attempts to codify some of these requirements in subsection (1):

> **No impact fee or similar development charge shall be imposed except pursuant to a schedule that is:**
> (a) **Legislatively adopted;**
> (b) **Generally applicable to a broad class of property; and**
> (c) **Intended to defray the projected impacts on capital facilities caused by proposed development.**

This test measures the reasonableness of the impact fee against proposed development, not against a particular development. The *Krupp* court did not hold, and Senate Bill 15 does not require, that a local government engage in an individualized assessment of each proposed development to determine the reasonableness of the fee. Rather the reasonableness of the costs to be recovered is determined in relation to the impacts of all proposed development.

Therefore, it appears that an impact fee must be "directly related" to the cumulative impacts of proposed development in general, or ***all*** proposed development in a community, not to a particular, individual development proposal.

Senate Bill 15, in subsection (2), requires that local governments

> **quantify the reasonable impacts of proposed development on existing capital facilities and establish the impact fee or development charge at a level no greater than necessary to defray such impacts directly related to proposed development.**

As a practical matter, an impact fee should be calculated based on all projected development for a specified time frame, such as five, ten, or twenty years, most commonly in conjunction with development of a capital plan. This method, more fully described in Chapter Two, comports both with the law and with principles of good planning.

Practice Pointer: Legislatively establish that fees are "directly related"

Because the impact fee schedule is required to be legislatively adopted, it will be necessary to act by ordinance. Because the courts are reluctant to substitute their judgment for that of a legislative body such as the city council or town board of trustees, this is a good idea anyway. Because an ordinance is being adopted, there is the opportunity to hold a public hearing and solicit testimony, which should be referred to in the ordinance. There are several options, in ascending order of complexity, for the legislative record supporting (and referenced in) the ordinance adopting the impact fee schedule. All or more of the following steps could be taken:

- Simply state in the legislative declaration or "whereas" clauses of the ordinance that in the reasonable judgment of the Council, the fee(s) are "hereby established at levels no greater than necessary to defray the impacts hereby determined by the Council to be directly related to the categories of land development listed."
- Summarize in the ordinance any in-house calculations supporting the classes of impact fees being adopted. This material could be as simple as referring to the staff memorandum or staff testimony, which are expressly made a part of the legislative record.
- Conduct a *Krupp*-style study or analysis of the proposed fees, include the study findings as part of the legislative record, and refer to them in the ordinance.

Practice Pointer: Create a single schedule of fees and charges

Many municipal land use codes have the various amounts for review fees, impact fees, and exactions scattered throughout the volume; some fees and charges may be listed on handouts in the planning department but not in the codebook at all. In light of the "legislatively adopted" requirement of Senate Bill 15, and simply to avoid duplication, errors and omissions, consider moving all of these references to a single appendix at the end of the code book. The appendix is still a part of the code and is adopted legislatively, but since all of the figures are now in the same place, it is easy to amend and also satisfies the Senate Bill 15 requirement that there be a "schedule" of such fees. Some cities bring the fee schedule up for review as a regular matter on an annual basis

2. "Capital Facilities," "Equipment," and Schools

Senate Bill 15 restricts the use of impact fees to "capital facilities" and the impacts upon them. The bill defines "capital facility" as follows:

> **As used in this section, the term "capital facility" means any improvement or facility that:**

(a) **is directly related to any service that a local government is authorized to provide;**
(b) **has an estimated useful life of five years or longer; and**
(c) **is required by the charter or general policy of a local government pursuant to a resolution or ordinance.**

This exact language is found in one other place in Colorado statutes, with one small but significant omission. In section 29-1-802(1) (See "Accounting for Impact Fees," below), Colorado law defines a "capital expenditure as follows:

> **Any expenditure for an improvement, facility or piece of equipment necessitated by land development which is directly related to a local government service, has an estimated useful life of five years or longer, and is required by charter or general policy of a local government pursuant to resolution or ordinance.**

The striking difference between these two definitions is the absence of the words "piece of equipment" from Senate Bill 15. During the legislative debate on Senate Bill 15, legislators, understandably, frequently asked whether Senate Bill 15 allowed local governments to include the costs of equipment in calculating an impact fee. Proponents of the bill, and its sponsors, testified that it was their intent to include equipment within the scope of the bill, and that the word "equipment" was not necessary in the bill to achieve this objective. Rather, equipment was contemplated by the phrase "useful life of five years or longer," and local governments could include equipment in their impact fee calculations so long as the equipment in question meets this test.

This testimony may have created a record of legislative intent that Senate Bill 15 allows local governments to include the cost of equipment in calculating impact fees. However, a court will only inquire into legislative intent if the plain statutory language is not clear. Given the omission of the phrase "piece of equipment" in Senate Bill 15, when compared with the existing language in 29-1-802(1), a court may find that the legislature clearly intended to exclude equipment from impact fee calculations.

As a practical matter, if the infrastructure for which a municipality wants to impose an impact fee includes items that arguably could be considered "equipment," it would be important to ensure that the legislative record contains all the information the municipality considered when determining whether or not the item fits within the definition of "capital facility." That is, the record should contain findings as to the estimated useful life of the item; whether or not the item is directly related to any service that the local government is authorized to provide; and whether the item is required by the charter or general policy of the local government pursuant to resolution or ordinance.

The most common fees are levied for water, sewer, transportation, storm drainage, parks and recreation or open space.[44] Some communities also have fees for affordable housing, library facilities, police and fire protection, and other governmental services.[45]

3. Remedying Past Deficiencies

Senate Bill 15 prohibits the imposition of an impact fee to "remedy any deficiency in capital facilities without regard to the proposed development." The obvious intent of the bill is to prevent a local government from using impact fee funds generated by new development to remedy a previously existing deficiency in the level of service. By definition, an existing deficiency is not an impact of proposed development, but rather an impact of preexisting or built development and therefore should not be remedied with an impact fee imposed on new development.

Depending on the type of infrastructure in question and the methodology used, it would difficult to create an impact fee structure that will not have some incidental benefit on existing infrastructure. League efforts to insert the word "solely" into the bill, to clarify that an impact fee could not be used "solely" to remedy past deficiencies, were unsuccessful.

It is not clear how this provision will be interpreted. The Colorado Supreme Court found it improper and an abuse of discretion when the City of Colorado Springs attempted to require a developer to finance a "currently needed project of general benefit."[46] In that case, development approval was conditioned on payment of money to construct a major drainage channel, which the court found was needed regardless of the proposed development.[47] However, in that case, an individualized determination was made relative to a specific proposed development and thus the court may have been considering an exaction type situation, not a true impact fee. Impact fees, by contrast, are calculated based on a generalized determination relative to all proposed development.

4. Offset or Credit for Exactions and Dedications

Senate Bill 15 provides that all impact fee schedules adopted by local government must include "provisions to ensure that no individual landowner is required to provide any site specific dedication or improvement to meet the same need for capital facilities for which the impact fee or other similar development fee is charged." This provision is intended to protect the developer against so-called "double dipping" by the local government.

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[44] See Appendix A.
[45] See Appendix A.
[46] *Wood Bros. Homes v. City of Colorado Springs*, 568 P.2d 487 (Colo. 1977)
[47] 568 P.2d at 491.

The practical effect of this provision on a municipality's overall plan for providing infrastructure concurrent with development and requiring growth to "pay its own way" will turn on the definition of "capital need." A scenario could arise in which the capital need for which a developer is required to provide a dedication of land as a condition of development is a different capital need from the one for which a fee is being collected.

For example, a municipality that commonly requires road dedications from a developer for all roads proposed within a particular subdivision, and also has a "traffic impact fee" based on a defensible traffic impact study and covering city streets throughout the jurisdiction, probably has two different capital needs. The requirement that the developer dedicate roads within the subdivision is an exaction, which clearly meets standards for individualized analysis, essential nexus and rough proportionality: these roads are primarily for the use of the ultimate residents of the subdivision. Their dedication to the city meets a need that the city own and maintain the roads in the subdivision once construction is complete. The traffic impact fee, however, is based on the impacts new residents will create on all the city's streets, community-wide. The traffic impact fee meets a need to maintain a current level of service on all the city's streets, based on a schedule that seeks to apportion these costs among all new development on a rational basis. These are two different capital needs.

The language of this provision is crucial to understanding the bill. Senate Bill 15 requires that an impact fee ordinance contain provisions to ensure that "double-dipping" does not occur with respect to an individual landowner. Thus a valid impact fee ordinance will contain some provision that provides for an offset or credit against impact fees payable for a particular development where a dedication or exaction is required from the same developer ***for the same capital need.***

Practice Pointer: Protection from "double dipping"

One or both of these approaches could be included in the code, either in association with the specific fee under discussion (if located in the body of the code) or as supplementary sections to the fee schedule (if located at the end of the code as an appendix):

- "In adopting this schedule of fees, the Council intends and has determined that they are designed to and do address needs for capital facilities brought about by development generally, which capital facilities are separate and distinct from the impacts addressed by other requirements of this Code, and in no circumstance do these fees address the same subjects as other requirements of this code for site specific dedications or improvements."
- Insert a procedure in the code for the developer to request credit, reimbursement or offset for the same capital improvements to be funded by the fee. The claim process should obligate the developer to make the claim prior to issuance of the final permit or approval, and certainly prior to issuance of construction permits. Consideration of a request could be processed administratively in the planning

department, with appeal directly to the courts under Rule 106(a)(4) or by the planning commission or city council, with a Rule 106(a)(4) appeal. See Appendix [ ], City of Fort Collins Impact Fee Ordinance.

5. The "Grandfather Clause."

Proponents of Senate Bill 15 have referred to section (8)(b) of the bill as a "grandfather clause." That section provides:

> **This section shall not prohibit any local government from imposing impact fees or other similar development charges pursuant to a schedule that was legislatively adopted before October 1, 2001, so long as the local government complies with subsections (3), (5), (6), and (7) of this section. Any amendment of such schedule adopted after October 1, 2001, shall comply with all of the requirements of this section.**

First, this subsection does not truly "grandfather" existing impact fees, as the term "grandfather" is commonly understood, that is, a provision in a statute that exempts those already involved in a regulated activity or business from the new regulations established by the statute.[48] Subsection (8)(b) of Senate Bill 15 allows local governments to continue using existing impact fee ordinances so long as they comply with subsections (3), (5), (6), and (7) of the bill.

Subsection (3) is the "anti-double dipping" provision, described in section 2, above. Subsection (5) is merely a restatement of existing law (C.R.S. § 29-1-801 *et seq.*), requiring that local governments account for impact fee revenues in a specified manner. Subsection (6) governs the application of Senate Bill 15 to pending development applications and when impact fees may be collected, and is addressed in sections 6 and 7, below. Subsection (7) is the special remedy provision of the bill. It may be that, as the proponents argued before the General Assembly, these requirements are "fair." However, the fact that all existing impact fee schedules must comply with them renders subsection (8)(b) inoperable as a "grandfather" clause.

Also, the meaning of the term "schedule" as used in this subsection is unclear. That term is not defined anywhere in the bill. As a practical matter, a local government may have an ordinance implementing an impact fee, but the actual "schedule," or list of dollar amounts due, or other specific calculations may be in a separate document. It may be a policy or regulation, or it may be incorporated into the ordinance itself.

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[48] American Heritage Dictionary, Fourth Edition, 2000.

The new law provides that, when an "amendment to a schedule" is "adopted" after October 1, 2001, it brings the local government within the operation of all of Senate Bill 15, instead of just the four sections referenced in subsection (8)(b). Does that mean that a city council must henceforth formally adopt the fee "schedule" in addition to, or as part of, its ordinance? Or does amendment of an existing ordinance bring the local government within the province of the bill? Or, does amendment to the schedule, whether such amendment is an official legislative act performed by the governing body of the local government, or is an administrative act performed by staff, trigger Senate Bill 15? How does this affect an existing fee schedule which already contains a built in formula for regular amendments or changes to an existing impact fee, such as a cost of living, or rate of growth calculation?

6. Applicability of an Impact Fee Schedule to Pending Applications

In subsection (6), Senate Bill 15 provides that:

> **No impact fee or other similar development charge shall be imposed on any development permit for which the applicant submitted a complete application before the adoption of a schedule or impact fees or other similar development charges by the local government pursuant to this section.**

The obvious intent of this provision is to require that projects already under consideration not be required to pay a fee that was adopted after the application was "in the pipeline." It is not clear, however, how this provision should be interpreted in light of C.R.S. §24-68-105, the vested rights statute.

This provision could be extremely problematic for a municipality with old subdivision or planned unit development approvals on file, or a municipality with many applications on file, but which is currently working on an impact fee study. Many jurisdictions experienced a surge in annexation petitions, and applications for subdivision or development immediately prior to a cutoff date for filing under Amendment 24, a growth management proposal on the November 2000 ballot. Though the ballot measure failed at the polls, the development proposals, in some cases sketchy and incomplete, remain on the books. Some jurisdictions also redefined what constitutes an "application" for purposes of Amendment 24 in November 2000. This provision of subsection (6) of Senate Bill 15 begs the question of whether an impact fee schedule adopted pursuant to the bill can impose fees on these sometimes hastily filed "applications."

The interpretation of this provision will depend on the point at which an impact fee becomes payable, and what constitutes a "complete application" under each community's regulations.

Although the term "complete application" is not defined in the bill, it seems reasonable to presume that the term "application" refers to the application for the development permit (a term which is defined) that triggers the payment of the impact fee in question. Thus, an impact fee which is payable at final building permit could probably be assessed against projects for which complete subdivision applications were filed before the fee was adopted, but which have not filed complete building permit applications.

Practice Pointer: Define "complete application"

In the definition section of the land use code, insert a definition of "complete application:" *An application shall not be considered complete unless and until (1) all of the required information and submittal materials, in the amounts and dimensions required by this code, have been submitted to and received by the city department or official specified in this code, and (2) the [insert named official] has certified the application as complete. The decision of the [insert named official] with respect to completeness and applicability of submittal requirements shall be final.*

E. *Administrative procedure*

Senate Bill 15 provides a specific procedure for any challenge to a impact fee schedule enacted pursuant to its provisions.

The bill provides that any "person or entity that owns or has an interest in land that is or becomes subject to a schedule of fees or charges," has standing to file a declaratory action to determine whether the fee schedule complies with the requirements of the bill. Such a person or entity becomes "subject to a schedule of fees or charges" when they file an application for a development permit (which term is defined in the bill to include: "any preliminary or final approval of an application for rezoning, planned unit development, conditional or special use permit, subdivision, development or site plan, or similar application for new construction.").

This particular provision does not appear to be a radical departure from current law, because Colorado Rule of Civil Procedure 57 already provides that "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."[49] Because no further specific procedures are provided for the filing of a declaratory judgment

[49] C.R.C.P. 57(b).

action on an impact fee schedule, presumably, such a declaratory judgment action would follow the procedure and requirements already set forth in Rule 57.

The bill also provides that an applicant for a development permit who believes the fee has been improperly applied or imposed in contravention of Senate Bill 15 may pay the fee under protest, and proceed with an action under Colorado Rule of Civil Procedure 106. C.R.C.P. 106(a)(4) provides that a party may file an action for judicial relief where they believe governmental body or officer exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion.[50]

In a Rule 106(a)(4) action, review is limited to the question of whether the governmental body or officer has acted arbitrarily or capriciously, or exceeded its jurisdiction or abused its discretion.[51] The court's decision is on the record; new evidence may not be introduced. Therefore, in a action challenging an impact fee, as with any other Rule 106(a)(4) proceeding, it is extremely important to make sure the legislative record is complete and supports the action taken.

Practice Pointer: Making a record for purposes of Rule 106(a)(4)

SB 15 permits a development landowner/applicant to file a declaratory judgment action to challenge the propriety of the fee. The standard of review is Rule 106 of the Colorado Rules of Civil Procedure. Making a good legislative record to support adoption of the ordinance approving the fee schedule in the first instance is a good first step. When the individual application is processed, however, create an administrative record of the process by which the fee schedule was applied to that application. Consider developing a worksheet showing the essential aspects of the development (size, number of lots, location of uses), which are pertinent to the fees to be assessed. The worksheet should identify the specific fees and the land use code basis for their imposition. Attach calculations or other supporting information. Ensure that the decision on the amount of fee applied is communicated in writing, along with the supporting worksheet. These documents form the heart of the record the court will review when determining whether the city staff acted "arbitrarily, capriciously or in excess or its authority" in claiming the fee applicable and in calculating its amount.

F. *Home rule considerations*

Home rule municipalities derive their authority directly from their citizens by means of Article XX, Section 6 of the Colorado Constitution, which provides:

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[50] C.R.C.P. 106(a)(4).
[51] C.R.C.P. 106(a)(4)(I).

> **It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and . . . any right or power essential or proper to the full exercise of such right . . . The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.**[52]

Thus, in matters of local and municipal concern, a home rule charter governs over a state statute.

In Senate Bill 15, the General Assembly has declared that impact fees are not matters of local and municipal concern, but rather are matters of statewide concern. The bill states:

> **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. However, impact fees and other development charges can affect growth and development patterns outside a local government's jurisdiction, and uniform impact fee authority among local governments will encourage proper growth management.**

Later in the bill, the General Assembly goes on to state, in section (8)(a), that

> **The General Assembly hereby finds and declares that the matters addressed in this section are matters of statewide concern.**

It is fairly clear from this language that the General Assembly intends to declare impact fees a matter of statewide concern. It is not clear, however, whether this effort will be successful in the event of a challenge. The General Assembly's declaration of a matter of statewide concern doesn't necessarily make it so, as the Colorado Supreme Court has pointed out.[53] The factors to consider in determining whether a statewide declaration is sufficient to overcome home rule are: 1) the demonstrated need for statewide uniformity in regulation; 2) the demonstrated impact of municipal regulations on people living outside the municipality; 3) historical considerations of whether the matter has traditionally been regulated at the state or municipal level; 4) the

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[52] Colo. Const. Art. XX, § 6.

[53] *City and County of Denver v. State of Colorado*, 788 P.2d 764 (Colo. 1990).

demonstrated need for the state to be involved to resolve intergovernmental conflict at the local level; and 5) specifically delineated home rule authority in the Constitution Article XX.[54]

Colorado courts have long held that land use generally is a matter of purely local concern. In 1925, the Colorado Supreme Court held that a home rule city's authority to zone property derived from its own charter.[55] In 1972, the court further noted, "The General Assembly has power to legislate zoning regulations applicable to *statutory cities*. Where, however, the Charter of a *home rule city* exercises the power delegated to it by Article XX, Section 6 as to matters of purely local concern, the legislature has no power.[56] [emphasis in original]

Thus it is an open question whether the General Assembly has successfully declared impact fees to be a matter of statewide concern, or whether they remain a matter of local and municipal concern, such that a home rule municipality can make its own rules on this subject.

VII. Accounting for Impact Fees

Prior to Senate Bill 15, the General Assembly made a previous pronouncement on the subject of impact fees, when it enacted C.R.S. §29-20-801 et seq, regarding "Land Development Charges." Though that statute contains no explicit enabling authority, it does contain some specific accounting requirements for development charges.

- Funds must be deposited in an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which such charge was imposed.
- Each such category, account, or fund shall be accounted for separately.
- Any interest or other income earned must be credited to the account.[57]

The local government may decide for itself, however, whether the accounting will be by category, account, or fund, and by aggregate or individual land development.[58]

Senate Bill 15 reinforces these requirements in subsection (5), where it provides: "any impact fee or other similar development charge shall be collected and accounted for in accordance with Part 8 of Article 1 of this title."

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[54] *Id.* at 768-771.
[55] *Averch v. City and County of Denver*, 78 Colo. 246, 242 P.47 (1925).
[56] *Service Oil Company v. Rhodus*, 500 P.2d 807 (Colo. 1972) [*Emphasis in original.*]
[57] C.R.S. § 29-20-803(1).
[58] C.R.S. § 29-1-803(1).

Subsection (5) goes on to provide that "a local government may waive an impact fee or other similar development charge on the development of low-or moderate income housing or affordable employee housing as defined by the local government." Waiver of impact fees for affordable housing projects is fairly common among municipalities that levy impact fees.[59] It is not clear, and the bill does not address, how to make up for the funds lost due to a waiver of impact fees.

[59] See Appendix A.

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