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Land Use & Infrastructure Financing: The Evolving Landscape of Impact Fees and Mobility Fees

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Context: Unconstitutional Conditions Doctrine- Which constitutional rights receive protection?

> Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

—*United States v. Scott,* 450 F.3d 863, 866 (9th Cir. 2005)

See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 Yale L. Rev. 1401 (2024) (liberty interests, such as conditions on plea deals, seem to receive less protection than free speech and property interests)

Unconstitutional Conditions Doctrine - Which constitutional rights receive protection?

"I'm thinking about all of the criminal law rights . . . where a state will condition your . . . getting a lesser recommendation . . . at sentencing, for example, with you giving up your right to a trial, giving up your right to appeal. I mean, those are really significant things. And the Court apparently doesn't ask the question, is an unconstitutional condition happening in that circumstance?"

—Justice Ketanji Brown Jackson (2022) Transcript of Oral Argument at 61, *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023) (No. 21-1168) (concerning the constitutionality of states requiring a company to consent to general personal jurisdiction as a condition of conducting business in the state)

Koontz at 604-05 "[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." Emphasizes benefit to government. But criminal defendants aren't vulnerable?

Unconstitutional Conditions Doctrine - Which constitutional rights receive protection?

- In contexts as diverse as taxation, licensing, federal employment, and funding for reproductive care, the Justices have considered the burdens imposed by conditional offers made by the government by referring to a range of factors that implicate or signal coercion. The factors include the strength of the government's interest, the strength of the individual's interest, the germaneness of the condition, and the degree of proportionality between the condition and the government's interest.
- When considering government tradeoff schemes that implicate the Fourth Amendment right to be free from unreasonable searches, the Fifth Amendment privilege against self-incrimination, the Fifth Amendment right to substantive due process in plea deals, and the Sixth Amendment rights to a jury trial and to confront witnesses, the unconstitutional conditions doctrine is nowhere to be found.

See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 Yale L. Rev. 1401 (2024).

Unconstitutional Conditions Doctrine: Land Use 101

Private Property for Public Infrastructure

- Negotiated Easements for Drainage Pipes, Roads, and Other Public Purposes
- Construction of Off-Site Traffic Improvements, Environmental Mitigation
- Donation of Park Properties and School Sites
- Proportionate Share Mitigation
- NOT about the needs of the site – internal infrastructure and access points
- NOT about PUD agreements or other negotiated approvals

Unconstitutional Conditions Doctrine: Land Use 101

Pennsylvania Coal Co. v. Mahon, 260 U. S. 365 (1926)

- "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.“
- “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”
- “. . . [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

Unconstitutional Conditions Doctrine: Land Use 101

Armstrong v. United States, 364 U. S. 40, 49 (1960): One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Penn Central Transp. Co. v. New York City, 438 U. S. 104.: A State law that merely restricts land use in a way "reasonably necessary to the effectuation of a substantial government purpose" is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations.

Unconstitutional Conditions Doctrine: Land Use 101



Nollan v. California Coastal Comm'n (US 1987)
Coastal easement
Rational Nexus



Dolan v. City of Tigard (US 1994)
Bike path easement
Rough Proportionality



Koontz v. St. Johns River WMD (US 2013)
Wetland mitigation
Nollan/Dolan applies to denials and to monetary conditions

Unconstitutional Conditions Doctrine: Land Use 101

Nollan:

- "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."
- "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."
- "[I]n [the]context [where the actual conveyance of property is made a condition to the lifting of a land-use restriction] there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."

Unconstitutional Conditions Doctrine: Land Use 101

Dolan:

- "Under the well-settled doctrine of *unconstitutional conditions*, the government may not require a person to give up a constitutional right— here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."
- "Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use."
- "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 impact of the proposed development."
- City's burden is demonstrating that "additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."
- "It is beyond dispute that "[t]axes and user fees . . . are not `takings.'"
- "Where a building proposal would substantially increase traffic congestion," the government "might condition permit approval on the owner's agreement to deed over the land needed to widen a public road."
- "The standard set out in *Nollan* and *Dolan* reflects the danger of governmental coercion in this context while accommodating the government's legitimate need to offset the public costs of development through land-use exactions."
- "We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."
- These principles apply to denials because any other rule "would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval."
- "So long as the building permit is more valuable than any just compensation the owner could hope to receive . . ., the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- ". . . [W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. . . . . our cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice."
- "In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action — whether state or federal — on which the landowner relies."

Unconstitutional Conditions Doctrine: Land Use 101

See Section 70.45, FS – the *Koontz* cause of action in Florida:

(1)(d) "Prohibited exaction" means any condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.

(2) In addition to other remedies available in law or equity, a property owner may bring an action in a court of competent jurisdiction under this section to declare a prohibited exaction invalid and recover damages caused by a prohibited exaction. Such action may be brought by a property owner at the property owner's discretion when a prohibited exaction is actually imposed or when it is required in writing as a final condition of approval for the requested use of real property. The right to bring an action under this section may not be waived. This section does not apply to impact fees adopted under s. 163.31801 or non-ad valorem assessments as defined in s. 197.3632.

What are Exactions?

- An exaction is a requirement that a developer dedicate money or property in exchange for a permit, with the justification that the dedication offsets an impact from the development.
- Some are uniformly applicable to all property and development of a certain type. Others are uniquely negotiated on the facts of a particular development/property.

Exactions

For example, to obtain a permit, the property owner must:

- Comply with form-based codes requiring, as part of the development, that the owner build improvements on adjacent roadway (parallel, on-street parking; street lights; wide sidewalks; street trees; benches; etc.)
- Dedicate a portion of property for roadway or sidewalk improvements
- Build, or pay money towards building affordable housing, or contribute to other social programs
- Build offsite mitigation for impacts to wetlands/ environmental lands, or pay a fee to offset impacts
- Pay impact fees per a schedule based on location/use/amount of development (units, square footage).

What Are Impact Fees? Florida Origins Pre-*Nollan*

"The appropriate framework for determining whether an impact fee is a regulation or a tax is one of public policy in which a number of factors should be weighed. The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations. Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is characterized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard."

Juergensmeyer and Blake. *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla.St.U.L.Rev. 415, 440-41 (quoted in 1983 P.B Co. road impact fee case)

Impact Fees: Florida Followed Utah's Factors

Banberry Development Corp. v. South Jordan City, 631 P. 2d 904 (Utah 1981)

(1) cost of existing capital facilities, and (2) manner of financing them (such as user charges, special assessments, bonded indebtedness, general taxes or federal grants);

(3) relative extent to which newly developed properties and other properties in municipality have already contributed to cost of existing capital facilities (by such means as user charges, special assessments, or payment from proceeds of general taxes);

(4) relative extent to which newly developed properties in municipality will contribute to cost of existing capital facilities in future;

Impact Fees

Banberry factors continued :

(5) extent to which newly developed properties are entitled to a credit because municipality is requiring developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by municipality and financed through general taxation or other means (apart from user fees) in other parts of the municipality;

(6) extraordinary costs, if any, in servicing newly developed properties; and

(7) time-price differential inherent in fair comparisons of amounts paid at different times.

Impact Fees

- Impact fees in Florida were home rule creations, validated by caselaw long before *Nollan* and *Dolan*, and before Florida had a statute.
- The cases always required dual rational nexus –

  "The local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents."

  Hollywood, Inc. v. Broward County, 431 So.2d 606, 611-12 (Fla. 4th DCA), *review denied*, 440 So.2d 352 (Fla. 1983)

Impact Fees

- Impact fees pay for growth and expansion of the system, not operation and maintenance, and are based on the choice to develop or connect and thereby create impact. Not for deficiencies.
- Fees for expansion of water and sewer facilities were first upheld: *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (where the growth patterns are such that an existing water or sewer system will have to be expanded in the near future, a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion and is earmarked for that purpose, and necessary restrictions are placed on the use of the fund.)

Impact Fees

- Road and park impact fees were later upheld:
  - *Home Builders & Contractors Ass'n v. Bd. of Co. Comm'rs of Palm Beach Co.*, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fees upheld)
  - *Hollywood, Inc. v. Broward Co.,* 431 So. 2d 606 (Fla. 4th DCA 1983) (park impact fees upheld)
- School impact fees were also upheld later, as long as they apply to substantially all of the county, and allowed exemptions for 55+ housing prohibiting minors: *St. Johns Co. v. NE Fla. Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991); *Volusia Co. v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000); *Bd. of Cty. Comm'rs Santa Rosa Co. v. Home Builders*, 325 So. 3d 981 (Fla. 1st DCA 2021).

Impact Fees are User Fees, Not Taxes

- User fees are fees that are "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society," and "the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." *State v. City of Port Orange,* 650 So. 2d 1 (Fla. 1994)
- Fees determined to be taxes: Transportation utility fee on developed property, for the capital costs of operating, maintaining and improving arterial and collector roads, was a tax, not a valid user fee. *Port Orange*

Sheetz v. El Dorado County

Facts

- El Dorado County's legislation required developers to pay traffic impact fee as condition of receiving building permit, and County used proceeds from these fees to fund improvements to its road system.
- Sheetz paid the $23,420 traffic impact fee to obtain permit to build a home, under protest, and sued in state court, claiming fee was unlawful "exaction" of money in violation of the Takings Clause (*Nollan* and *Dolan*)
- Fee amount was not based on the costs of traffic impacts specifically attributable to Sheetz's particular project, but rather was assessed according to a rate schedule based on type of development and its location within the County

History

- Trial court rejected Sheetz's claim, and the Cal. Court of Appeal affirmed, relying on Cal. Sup. Ct. precedent:
  - *Nollan/Dolan* applies only to permit conditions imposed "on an individual and discretionary basis."
  - *Nollan/Dolan* does not apply to fees imposed on "a broad class of property owners through legislative action."
- The California Supreme Court denied review.
- The U.S. Supreme Court granted certiorari to decide "whether the Takings Clause recognizes a distinction between legislative and administrative conditions in land-use permits," noting a split in state court jurisprudence.
- A variety of amici parties filed briefs.

Issues as framed by the Pacific Legal Foundation

- The government can't hold the right to use your property hostage in order to extract exorbitant fees. That's akin to extortion.
- Permit fees must be proportional to the public costs imposed by new development. Otherwise, the government may leverage the permit process to take property it is not entitled to, skirting the Constitution's Fifth Amendment prohibition against taking private property without just compensation.
- Singling out some property owners to pay a disproportionate share of the cost of public amenities that are used by everyone is unfair, and the Supreme Court has repeatedly said it's unconstitutional.
- California's and some other courts have evaded Supreme Court precedent by allowing legislative bodies, like city councils, to charge excessive permit fees that would be plainly unconstitutional if charged by land use bureaucrats. We're asking the Supreme Court to reaffirm that property rights don't get less protection depending on which branch of government violates them.

Issues as framed by national local gov't interests

- Local governments have broad, elastic police powers to address burdensome community impacts created by new development.
  - Legislatively enacted, generally applicable development impact fees are ubiquitous and necessary tool of responsible land use planning.
  - Impact fees do not require "special application" of the unconstitutional conditions doctrine.
  - State enabling statutes provide an additional, independent check on land use permitting fees.
  - Nexus studies establish the reasonable relationship between impact fees and new development: they are robust objective economic studies that provide substantial evidence of the relationship between new development and the need for new or improved public facilities, and they account for unique local needs and conditions.

Issues as framed by national local govt interests

- Additional procedural safeguards protect new development from excessive fees.
- Expanding the requirements of heightened scrutiny to development impact fees would turn the reasoning of *Nollan* and *Dolan* on its head, and shift the financial burden of development onto local communities.

Issues as framed by California local governments

- Reading *Nollan* and its progeny to limit the contribution of new development to public infrastructure would unfairly burden the taxpayers, who already provide the infrastructure on which real estate developers rely to profit from their development projects
  - In contemporary society, all property owners reap the advantages of significant governmental "givings."
  - Private developers enjoy a disproportionate share of the benefits associated with taxpayer funded givings.
  - Conditioning development approval on payment of legislative impact fees is a critical mechanism for recouping some—though by no means all—of the costs associated with givings
  - Uncompensated givings implicate the exact same fairness concerns that have animated the Court's takings doctrine
  - For much of its history, this Court acknowledged that average reciprocity of advantage, which accounts for both givings and takings, must inform its analysis of regulatory takings to uphold representative democracy

Issues as framed by California local governments

- Legislative development impact fees are not the functional equivalent of eminent domain and, accordingly, cannot constitute regulatory takings under *Nollan* or any other regulatory takings test.
  - A regulation can be deemed a taking only if it is the functional equivalent of eminent domain
  - Legislative development impact fees do not meet the functional equivalency test for takings

Issues, as framed by planners

- Planners, developers, and general public have long relied on legislatively adopted development exactions to provide necessary public goods
- Legislatively adopted exactions vindicate private property rights by making development possible, and provide much-needed certainty in the real-estate development process
- Existing law protects property owners from excessive exactions

Issues, as framed by planners

- If legislatively adopted exactions are subjected to heightened scrutiny, the court should clarify three questions of great practical importance to planners, regulators, and landowners:
  - What must a governmental defendant show to satisfy the evidentiary burden of heightened scrutiny?
  - What does “rough proportionality” actually require?
  - If legislatively adopted development conditions are subject to heightened scrutiny, what types of land-use regulations fall outside the unconstitutional-conditions doctrine?

Sheetz v. El Dorado County 601 U.S. 267 (2024)

So what did the US Supreme Court decide? Not much as to most typical impact fees, such as in Florida.

- The Takings Clause "does not distinguish between legislative and administrative permit conditions" - it "prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits."
- Parties agreed at oral argument that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislative body imposed them.
- Open issue: Whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development is an issue for the state courts to consider in the first instance, if properly preserved by Sheetz.

Sheetz v. El Dorado County

Nollan/Dolan test applies regardless of which branch of government imposed the permit condition.

- Takings Clause focuses on the prohibited act, not the identity of the actor who performs it
- No special exemption for legislatively imposed exactions historically
- Court's physical-takings cases apply a per se rule requiring payment of just compensation to takings effected by legislation and administrative action alike
- Court's regulatory-takings cases do not distinguish between legislative and agency action

Justice Barrett's humor: "The Takings Clause's right to just compensation coexists with the States' police power to engage in land-use planning. (Though at times the two seem more like in-laws than soulmates.)"

Sheetz v. El Dorado County

Justice Barrett's typology of takings

Per se taking: "The right to compensation is triggered if [government] "physically appropriat[es]" property or otherwise interfere[s] with the owner's right to exclude others from it." *Cedar Point Nursery v. Hassid, Loretto*

Use restriction: Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Penn Central, Lucas*

Permit conditions: Whether it is money or a property interest, a condition must bear an essential (rational) nexus to a legitimate police power purpose and be roughly proportional to the impact of the development. *Nollan*, *Dolan*, *Koontz*

Sheetz v. El Dorado County

- California courts wrongly declined to apply *Nollan* and *Dolan* analysis to this legislatively prescribed monetary fee.
- There is "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc. v. Florida DEP.* Precedent and history agree.
- Legislative bodies generally exercise eminent domain and are subject to takings clause, so why not legislative fees?
  - *But by their very nature, condemnations target individual properties in a different manner than impact fees do, which apply to everyone evenhandedly based on average assessments of cost and impact for type and size of use?*

Sheetz v. El Dorado County

Sotomayor/Jackson concurrence:

- Conditions on building permits are "not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them.“
- To be resolved on remand, and not addressed by us: “The question presented in this case did not include that antecedent question: whether the traffic impact fee would be a compensable taking if imposed outside the permitting context and therefore could trigger *Nollan/Dolan* scrutiny.”

Sheetz v. El Dorado County

Gorsuch concurrence:

- County essentially confesses error, and the Court corrects the state courts' mistake
- Fails to see why *Nollan/Dolan* test should operate differently when an alleged taking affects a "class of properties" rather than "a particular development."
  - *Nollan* condition was individualized, but pursuant to a comprehensive program
  - *Dolan* condition was individualized, but resulted from a comprehensive land use plan
- The Takings Clause, the Court stresses, is no "`poor relation' to other constitutional rights."

Sheetz v. El Dorado County

Kavanaugh/Kagan/Jackson concurrence:

- Emphasizing that the Court has not previously decided—and today explicitly declines to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.“
- This opinion does not address/prohibit permit conditions, such as impact fees, that are levied on new developments through reasonable formulas or schedules that assess the impact of classes of development, rather than the impact of specific parcels of property (and no prior decision has done so either).

Sheetz v. El Dorado County – Bottom Line

To withstand Takings Clause scrutiny, all exactions of money or property, must:

- Have an "essential nexus" to a legitimate government interest; and
- Be "roughly proportionate" to the impacts of the proposed development on that government interest.

Sheetz, 601 U.S. at 275-76.

Questions *Sheetz* Left Unanswered

- Whether, for purposes of establishing rough proportionality, "a permit condition imposed on a class of properties[such as an impact fee] must be tailored with the same degree of specificity as a permit condition that targets a specific development." *Sheetz*, 601 U.S. 267, 280 (2024); Id. at 284 (Kavanaugh, J., concurring).
- Whether an impact fee "would be a compensable taking if imposed outside the permitting context" – a necessary pre-requisite to triggering scrutiny under the essential nexus/rough proportionality test. Id. at 280-281 (Sotomayor, J., concurring).

WHAT CHANGED POST-*SHEETZ*

Pre-*Sheetz*

Whether the essential nexus/rough proportionality test was applicable to exactions imposed by laws of general application was still up for argument. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 n. 8 (1994) ("Justice STEVENS' . . . is correct in arguing that in evaluating most **generally applicable** zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . Here, by contrast, the city made an **adjudicative** decision to condition petitioner's application for a building permit on an **individual parcel**. In this situation, the burden properly rests on the city."); *Koontz v. St. John's Water Mngmt. Dist.*, 570 U.S. 595, 619 (2013) (finding that individual permit applicants are particularly vulnerable to "extortionate demands for money")

Post-*Sheetz*

SCOTUS definitively said that laws of general application are not *per se* exempt from the test.

WHAT CHANGED POST-*SHEETZ* (Cont.)

Pre-*Sheetz*

- Impact Fees – most States required proportionality to development impacts, but not *individualized* proportionality. *Dolan*, 512 U.S. 374, 391 (1994) ("[T]he city must make some sort of **individualized** determination that the required dedication is related both in nature and extent to the impact of the proposed development.").
- Other Types of Exactions – uncertainty informing government actions.

Post-*Sheetz*

- Impact Fees - It is unclear whether an individualized proportionality will be required. *Sheetz*, 601 U.S. 267, 280 (2024); *Id. at 284* (Kavanaugh, J., concurring); *but see id.* at 282 (Gorsuch, J., *dissenting*).
- Other Types of Exactions – now we know and can govern ourselves accordingly, in the legislative enactment of exactions.

Sheetz and Florida Impact Fee and Mobility Fee Statutes

- **Impact Fee Statute**: Section 163.31801. Adopted 2006 and amended several times.
- **Mobility Fee Statute**: Language in several sections that was not that clear, adopted over time since 2007. 2024 changes to rectify that, including Sections 163.3164 and 163.3180(5)(h)-(j).

Impact Fee Statute: Section 163.31801(3) (2006)

- Not applicable to water/sewer
- Expenditures limited to capital
- Fee must be based on most recent and localized data
  - 2024: study based on data a max of 4 years old. If increase, study must be adopted within 12 months of starting the study
- Revenues must be segregated and earmarked to benefit new users, must not be used to pay existing debt or any prior projects that fail to meet rational nexus, and the revenues/expenditures properly accounted for
- Administrative charges limited to actual costs
- 90-day notice required for any new or increased impact fee, which may not apply to pending applications unless it will reduce their costs

Impact Fee Statute: Section 163.31801(3) (2006)

- Collection no earlier than issuance of building permit
- Fee must be proportional and reasonably connected to, or has a rational nexus with, need for additional capital facilities and with the increased impact generated by the development
- Impact fee credit must be provided for exactions, proportionate share mitigation, land dedication, site planning and design, and construction of the relevant public facilities or infrastructure - on a dollar for dollar basis at fair market value
  - 2024 – includes monetary contributions, development order requirements

Impact Fee Statute: Section 163.31801(3) (2006)

- Increase in impact fees must be pursuant to a plan for imposing/collecting/using the fee, at maximum percentages per year over time. Not retroactive. Once every 4 years.
  - Higher increase available based on findings/workshops establishing extraordinary circumstances and a 2/3 vote of the governing body
- Attestation as part of the ACFR as to compliance of collection and expenditure with the local ordinance
- In a challenge, government has burden of proving by a preponderance of the evidence that the imposition or amount of the fee or credit meets the requirements of state legal precedent and the statute. Court may not defer to government

Impact Fee Statute: Section 163.31801(3) (2006)

- Credit holders are entitled to the full value of intensity/density prepaid by the credit balance following an increase.
  - 2024: Credits must be similarly honored in a mobility fee system
- Credits (whenever created) are assignable and transferable at any time from one development/parcel to another within same (or adjoining) impact fee zone/district within the jurisdiction, if it receives benefits from the improvement or contribution that generated the credits.
- Can create an exception or waiver for affordable housing without using revenues to offset its impact.
- Reporting required: specific purpose of fee, the fee schedule with the method of calculation, the amount assessed for each purpose and type of dwelling, total amount by type of dwelling, and all exceptions/waivers for affordable housing

Mobility Fees vs Road Impact Fees

Road impact fee: Emphasizes cars.

- Based on incremental impact to roadway network, which is derived from trip generation rates applied to units of development (dwellings/1000 sqft), trip lengths and road capacity, along with cost of road capacity and Vehicle Miles Traveled generated by the project.
- Usually consumption based, but can be plan based.
- Resulting fee revenue is used to construct infrastructure for cars (paved roads) needed to maintain the Level of Service (LOS) in accordance with the Capital Improvements Element.

Mobility Fees vs Road Impact Fees

Mobility fee: Emphasizes people.

- Based on mobility plan adopted in the comprehensive plan, with projects derived from community needs that serve not just drivers, but also all users, including pedestrians, cyclists, and transit users. Includes not just roads, but also complete streets (streetscape and landscape), segregated multimodal paths, transit and microtransit services, bikeways, trails, water taxi, autonomous vehicle, cable cars, etc.
- Development pays based on incremental impact to multimodal network, measured by person trips, person trip lengths, and person miles of capacity of projects funded, along with person miles of travel generated by the project.
- Concept dates back to 2007 in Florida.

Sample Process to Establish Mobility Fees



Mobility Fees: Why It Matters

- Multimodal infrastructure can safely accommodate micromobility devices (i.e., electric bikes, electric scooters, etc.) and microtransit vehicles (i.e., autonomous transit shuttles, golf carts, neighborhood electric vehicles (NEVs))
- Dangerous to mix with regular traffic
- Growing demand – novel, adaptive for older/disabled persons. Improves health and quality of life.
- Along with traditional walking, biking and transit, these mobility options are all far more efficient than single occupancy vehicles in using infrastructure to move people.
- What does it look like in practice?

Efficiency: space consumed by modes of travel



Paris 2020 – 2023







Amsterdam: Back to the Future





Amsterdam: 1971 - 2020

Haarlemmerdijk Street





Rush Hour in Amsterdam

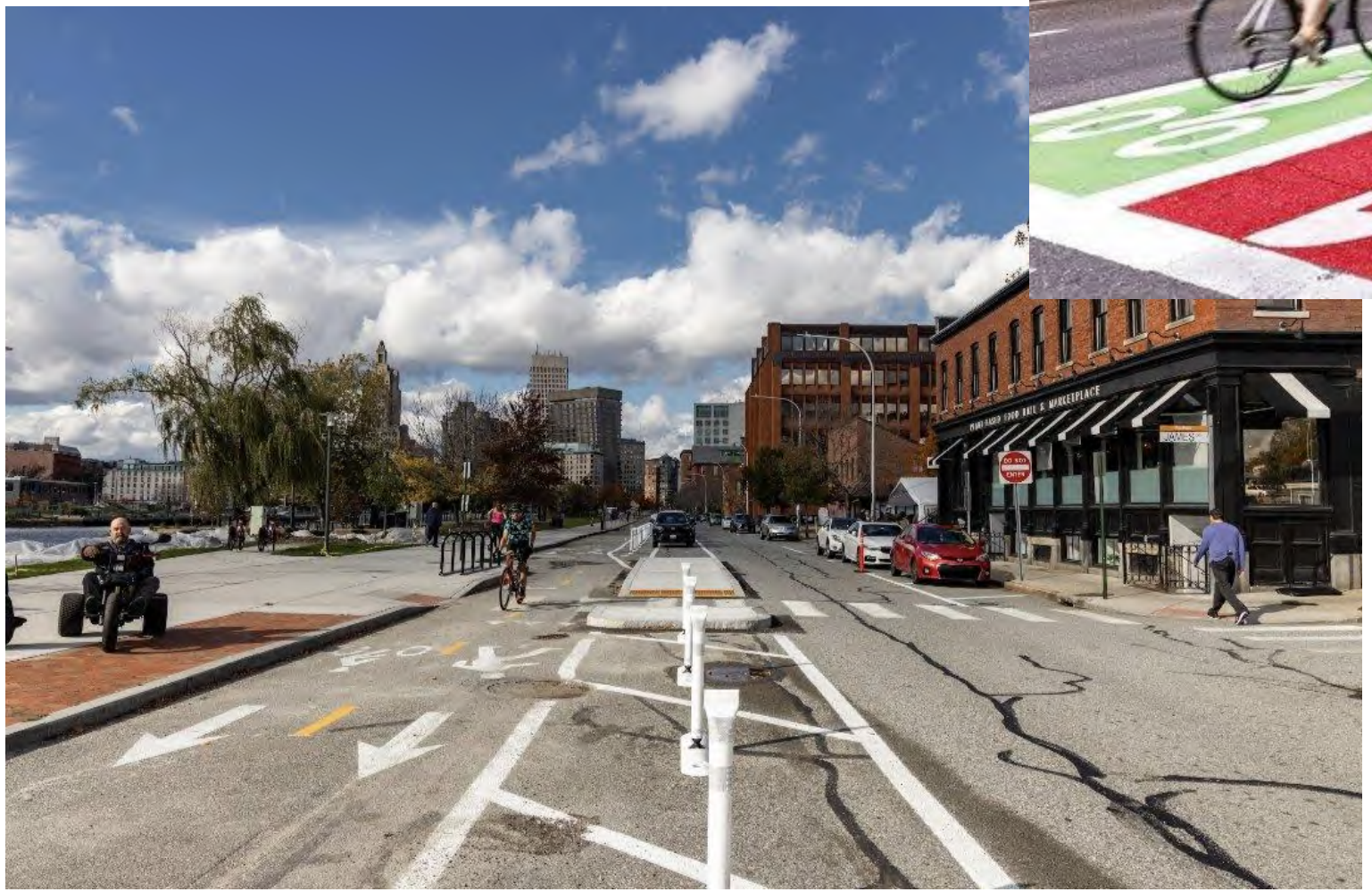


Hollywood Broadwalk



Complete Street





Complete Street



Mobility Fees/Road Impact Fees vs Concurrency

Road Impact Fee and Mobility Fee: Paid no matter when you develop and no matter what the conditions are on the system at that time. “Like death and taxes” – structural support of the system, paid by everyone creating impact.

Concurrency: Timing is the issue. A test of impact at the time you seek to develop. If the system continues to meets the LOS at the time you develop, you pass the test and proceed. If not, you must mitigate your impact by paying, improving, or waiting until the LOS issue is addressed by the government.

Fair Share Mitigation Payments: When there is a failure to meet concurrency, improvements or payments made are eligible to be credited against impact fees or mobility fees.

Mobility Fees/Road Impact Fees vs Concurrency

Road Impact Fee and Mobility Fee: Based on assessment areas and benefit districts.

- Assessment Areas: A geographic area, based on type of development, level of facilities available, or other differences in travel characteristics. The same fee schedule is used for all development in the area, broken down by use and size (DU/square footage). Based on travel patterns including number of trips, trip length, internal capture, existing infrastructure and obligations to build, and credit agreements.
- Benefit Districts: All fees paid in the benefit district are expended in the same benefit district (or an adjoining one per the Impact Fee Act)

Mobility Fees Statute

2024: Section 163.3164

(32) "Mobility fee" means a local government fee schedule established by ordinance and based on the projects included in the local government's adopted mobility plan.

(33) "Mobility plan" means an alternative transportation system mobility study developed by using a plan-based methodology and adopted into a local government comprehensive plan that promotes a compact, mixed use, and interconnected development served by a multimodal transportation system in an area that is urban in character, or designated to be urban in character, as defined in s. 171.031.

Mobility Fees Statute

2024: Section 163.3180(5)(h)

- 1.c.I. Proportionate share mitigation agreements for concurrency must provide that project has mitigated its transportation impacts and may proceed if all other requirements are met.
- 1.c.II. Where multiple applicants contribute to a single improvement, government cannot prevent an applicant from proceeding after it has paid its fair share.
- 4(i) If repeal concurrency, local government may adopt mobility plan and fee or other alternative transportation system, but may not use system to deny or control timing of development. Fees generated must be spent as plan provides. Must comply with Impact Fee Act.

Mobility Fees Statute

2024: Section 163.3180(5)(j)

1. If both county and city charge a fee for transportation, they must have an ILA to coordinate mitigation.
2. ILA must at a minimum:
   - Ensure that development is not charged twice for same impact
   - Establish a plan-based methodology to set a legally permissible fee
   - Require the entity issuing the building permit to collect the fee, unless otherwise agreed
   - Provide a method for proportionate distribution of revenue to address impacts, or a method to assign responsibility for mitigation of impacts by each party

Mobility Fees Statute

2024: Section 163.3180(5)(j)

3. By 10/1/25, if there is no ILA:

- Fee paid to city/county based on applicant's traffic impact study or the government's mobility plan
- Applicant receives a 10% reduction in fee
- Government issuing the building permit must collect the fee and distribute to county/city within 60 days

4. Carve out for Miami-Dade County, and for county/city that already has or has updated an existing ILA as of 10/1/24 to coordinate mitigation. If ILA is terminated/not extended, county/city controlled by 3.

Potential Implications of *Sheetz*

- *Sheetz* has little practical impact on Florida fees because:
  - Florida's statutory and caselaw framework already provides the protections that the USSC is looking for in relation to impact fees and mobility fees
  - Most fee systems in the state were created following these principles
  - Florida already created a cause of action for unconstitutional conditions
- It may have a greater impact under other state fee systems that lack equivalent assurances.
- If Sheetz preserved his rights, litigates the remanded issue in state court, and takes it back up to the USSC, that could result in precedent requiring changes to how legislative fees are enacted, even in Florida

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Thank you.

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