

# Impact and Development Fees



presented to CML by

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## Presentation Goals

- Distinguish **Impact Fees** from other types of fees and conditions on development
- Provide local government and private sector perspectives on the use of this tool
- Describe key issues and special cases arising in use of this tool
- Answer your questions



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## Colorado Impact Fees in the News

- *"High water system costs a drain on housing affordability along northern Front Range: Upfront fees local utilities charge to connect water and sewer lines to homes and other buildings contribute to rising prices,"* **Denver Post**, May 21, 2017
- *"Trust, but verify proper expenditure of impact fees,"* **Colorado Real Estate Journal**, May 17, 2017



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## What is an Impact Fee?

- Prior to 2001, Colorado had only case law definitions. SB01S2-015 ("SB 15"), now codified at C.R.S. §29-20-104 and 104.5.
- Colorado statutes still do not define, but refer to "impact fees and other similar development charges."
- Under SB 15, impact fees must be:
  - Legislatively adopted
  - Generally applicable to a broad class of property
  - Intended to defray the project's proportionate share of capital costs by proposed development.



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## Additional characteristics of an impact fee

- May be imposed to fund any capital facility:
  - Directly related to a service the local government authorized to provide;
  - Estimated life of at least five (5) years; and
  - Required by charter or policy
- Fees must be established at level no greater than necessary to defray impacts *directly related to proposed development*.
  - Cannot use fee to remedy existing deficiencies.

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## A Rose by any Other Name . . . is still an impact fee

- Capital Facilities Fee
- Capital Expansion Fee
- Capital Recovery Fee
- System Development Charge
- Tap Fee
- Facilities Fee
- Development Fee
- Development Impact Fee



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## What Impact Fees are Not



- Exactions (e.g. land dedications)
- Subject to analysis with respect to essential nexus/rough proportionality
  - *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
  - *Dolan v. City of Tigard*, 512 U.S. 374 (1994)
  - C.R.S. §29-20-203; 204
- Taxes
- Special Assessments
- Administrative/permit fees
- Fees in lieu of land dedication
- Site specific conditions of approval

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## *Bloom v. City of Fort Collins*, 784 P.2d 304 (1989)

- **Ad valorem tax** is a "tax upon various classes of real and personal property located within the territorial limits of the taxing authority."
  - "A tax imposed on the basis of the value of the article or thing being taxed."
  - General revenue raising
  - Must be uniform upon each class of property.
- **Excise tax** is a tax imposed on a particular act, or occurrence; "has come to mean any tax which is not an ad valorem tax."
  - "a tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege."

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## *Bloom v. City of Fort Collins*, 784 P.2d 304 (1989)

- A **Special Assessment** must confer some special benefit to the property assessed.
  - The authority to levy special assessments is "based on the premise that the property assessed is enhanced in value at least to the amount of the levy."
  - Funds may not be used for other purposes because the imposition of a special assessment is justified only to the extent the taxes are equivalent to special benefits conveyed upon the taxpayer.
  - Not designed for general governmental revenue raising; rather, only to defray the cost of a particular governmental service.
  - Amount of fee must be reasonably related to overall cost of service; but mathematical exactitude is not required.

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### *Bloom v. City of Fort Collins*, 784 P.2d 304 (1989)

- A **Service Fee** is a charge imposed on persons or property and is reasonably designed to meet the overall cost of the service for which the fee is imposed.
- Court ultimately found the fee in *Bloom* to be a service fee, BUT invalidated the portion of the ordinance allowing excess funds to be transferred to any other City fund.

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### Exactions

- Regulatory Impairment of Property Rights Act (RIPRA), C.R.S. §§29-20-201 through 205
- Analysis applies to site-specific conditions imposed on individual land use applications/approvals; a.k.a. "*ad hoc* discretionary decisions"
- Requires essential nexus and rough proportionality
- Provides procedure for applicant to challenge
- Once challenged, burden is on local government to establish nexus and proportionality (substantial evidence)

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- Of course, the difficulty lies not in creating these categories, but in determining where, exactly, generally applicable legislatively formed fees end and adjudicatively imposed development exactions begin. *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559, 565 (2009)

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## Local Government Perspective – Why is this an important tool for municipalities?

- Mechanism to require that costs of new development are paid by the developer or ultimate homeowner
- Growth “pays its own way”
- BUT, future homeowners not being asked to pay more than fair share
- Existing residents are not being asked to pay for new growth
- Allay concern that “hidden” costs manifesting after developer is gone will not burden the municipality and/or its residents

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## Private Sector Perspective

- Fairness
  - Rules as written when application submitted stay the same as application progresses
  - My project not paying for infrastructure to serve someone else's project
  - No “double dipping”
- Predictability/Certainty
  - Ability to effectively underwrite, finance, borrow funds to construct and properly price project
- Partnership with Municipality
  - Being seen as partner with local government, rather than adversary

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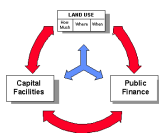
## Key Issues

- Calculation
- Legislative Record
- Implementation – Timing and Phasing
- Administration and Record Keeping

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## Calculation

- What is a “capital facility” for which an impact fee may be imposed?
- “... any improvement or facility that:
  - is directly related to any service that a local government is authorized to provide;
  - has estimated life of five (5) years;
  - is required by charter or general policy
- Sources for calculation
  - Capital Improvement Plans
  - Comprehensive Plans
  - Census Data



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## Legislative Record

- Legislative findings
  - that the fees are “directly related to” new development
  - that all impact fee eligible expenditures are for “capital facilities”
  - that facilities for which impact fees are collected are required by the charter or general policy
  - Not for existing deficiencies



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## Legislative Record

- Ordinance should also address:
  - Procedural Issues
    - How will new schedule of fees be updated; new improvements added to list?
    - How will offsets be calculated?
    - How are developers protected from double-dipping?

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## Implementation - Timing



- At what point in the development process should fees be imposed?
  - Statute allows imposition as a condition of **issuance of a development permit**... C.R.S. §29-20-104.5
  - **Development Permit**: "any preliminary or final approval of an application for rezoning, PUD, conditional or special use permit, subdivision, development or site plan, or similar application for new construction." C.R.S. §29-20-103.
- Selection of which of these is the trigger is a strategic decision for a municipality
  - What constitutes a "complete" application?

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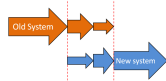
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## Implementation - Phasing

- Studies frequently reveal dramatic underfunding/large projected needs/shortfalls
- Immediate implementation can create market "shock"
  - Consider phasing in increased fees over time
  - Creates incentive for applicants to file sooner
- Application to existing/pending projects
- Application to multi-phase projects



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## Administration and Record Keeping

- Impact fee funds must be kept in "... an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which such charge was imposed." C.R.S. §29-1-803(1)
- Impact fees must be accounted for pursuant to accounting standards to ensure "fairness in the use" of land development charges. C.R.S. §29-1-801



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## Special Cases – School Impact Fees

- Counties required to include in subdivision regulations a provision for dedication of land to school districts, or payment of fees in lieu thereof. C.R.S. 30-28-133(4)(9a)(I) and (II).
- "Counties are not free to enlarge on this exaction by legislation of their own design imposing additional fees to benefit the school district payable at the time a building permit or certificate of occupancy is sought." *Board of County Commissioners of Douglas v. Bainbridge*, 929 P.2d 691 (1996), as modified on rehearing 1997.
- Decision was based on lack of county authority – not decision by General Assembly to occupy the field.
- 1996 statutory amendment allows "voluntary contributions."

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## Special Cases - Annexation

- Annexation is discretionary on the part of both the municipality and the annexor
  - See, for example, Colo. Const. Art. II, Section 30; C.R.S. §31-12-101 *et seq.*;
- Both parties have freedom to negotiate custom solution with respect to impact fees



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### Special Cases – Special Districts



- SB 15 specifically excluded special districts from the definition of local governments authorized to impose impact fees.
- In 2016, SDA proposed HB 16-1088, “Public Safety Fairness Act,” which specifically authorized Title 32 fire protection districts or fire authorities established pursuant to C.R.S. §29-1-203.5 to require local governments to confer with such districts regarding the potential need for an impact fee for fire and rescue capital facilities.
- HB 1088 leaves decision in “sole discretion” of municipality.
- Authority for other districts not specifically granted.

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### Special Cases – Affordable Housing

- “... may waive an impact fee ... on the development of **low- or moderate-income housing or affordable employee housing...**” CRS 29-20-104.5(5)
- Denver recently enacted impact fees specifically for affordable housing – Council Bill 16-0625, effective January 1, 2017




Affordable Housing





Impact Fees



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### Questions?

- Resources
- [www.impactfees.com](http://www.impactfees.com)

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