Testimony of Vermont Chamber of Commerce - H.740
Michael Zahner, March 19, 2014

Transportation Impact Fees - H.740

Recommended Standards and Considerations:

I. Rational Nexus and Proportionality

In order to impose a rational impact fee, there needs to be a strong nexus or direct connection between the traffic impacts of a development or subdivision and the need for new transportation infrastructure improvements in the area pursuant to the findings of fact and conclusions of law issued by a district environmental commission. If there are undue adverse impacts under either of these criteria justifying the imposition of an impact fee, the cost of the capital improvement will need to be identified and the fee must be tailored to the proportional degree to which the project creates that unreasonable or undue impact. The applicant must also benefit from the use of the capitol improvement within a reasonable period of time. We do not believe that 15 years is a reasonable amount of time. If the capital improvement is not constructed in a timely manner, it is quite possible that those who have paid the impact fee will be adversely affected through the growth of background traffic, will certainly not be able to benefit from the capital improvement and other projects within the TID may not be allowed to proceed. If the traffic situation is critical enough to justify the imposition of impact fees, a 15 year period without the required capital improvement will only allow those conditions to seriously worsen in a manner that may: "*unnecessarily or unreasonably endanger.....the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands [roadway]."* See Criterion 9(K) - 10 V.S.A. Section 6086(9)(K). Therefore, we believe that it is critical to see capital improvements completed in a reasonable time frame, perhaps six to eight years, while allowing those developments paying an impact fee to go forward unless there are safety issues that need to be addressed.

II. "Specifically and Uniquely Attributable" Standard

Some courts have ruled that transportation impact fees can be imposed to fund necessary construction of capital improvements only if they are ***"specifically and uniquely attributable"*** to the development. *(Illinois Supreme Court: Pioneer Trust & Savings Bank v. Mount Prospect, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961)and Northern Illinois Home Builders Association, Inc. v. County of DuPage, 165 Ill. 2d 25 (1995)). The U.S. Supreme Court has not adopted this standard.* [1]

[1] *Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in Pioneer Trust & Savings Bank v. Mount Prospect, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961).* [n.7] *Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled*

Discussion: *This is a policy question for the Committee. We prefer the more stringent test as outlined in U.S. Supreme Court caselaw. See discussion of Nolan and Dolan U.S. Supreme Court decisions starting on page 6 of this document. As previously discussed, there is no Vermont Supreme Court caselaw regarding these various standards and we would prefer to have the legislature adopt the more stringent standard that has been adequately tested in other jurisdictions. This will provide important protections to applicants and there is sufficient caselaw to provide guidance to the district environmental commissions.*

III. Imposition of a Traffic Impact Fee

§ 6104. TRANSPORTATION IMPACT FEE; DISTRICT COMMISSION

(a) A District Commission may require payment of a transportation impact fee in accordance with section 6106 of this title to fund, in whole or in part, capital improvements that are necessary to mitigate the transportation impacts of a proposed development or subdivision or that benefit the proposed development or subdivision. The Agency shall review the application and recommend to the District Commission whether to require mitigation of the transportation impacts of the development or subdivision. The District Commission may require an applicant to pay the entire cost of a capital transportation project **and may provide for reimbursement of the applicant by developments and subdivisions subsequently receiving permits or amended permits under this chapter that benefit from the capital transportation project.**

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exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." Id., at 381, 176 N.E. 2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.
U.S. Supreme Court: Dolan v. City of Tigard, 512 U.S. 374 (1994)

Discussion: *There are two rationales for imposing an impact fee in Section 6104 above (page 6 of the current draft): 1) payment of a fee for capital improvements that serve to mitigate the unreasonable impacts of a development or subdivision; and, 2) payment of a fee if certain projects will benefit in some way by the capital improvements. It is unclear whether all proposed developments or subdivisions benefitting in some way would be required pay fees (without the required rational nexus). Would de minimus projects be required to pay a fee and how would proportionality be determined. Finally, we appreciate the proposed change in the current draft to allow the applicant, when required to pay the entire cost of the capital improvement, to be reimbursed in a proportional manner by subsequent developers that use or benefit from the improvement similar to provisions in the bill that will allow VTRANS to recoup its investment. There are no parameters to suggest when it might be appropriate to require the applicant to pay the "entire cost of a capital transportation project" which is defined in the Purpose Section as the problem being addressed by the bill. Earlier in this draft, the applicant may unilaterally agree to pay the entire cost - See subdivision (d) on page 13, line 3.*

IV. Payment of Transportation Impact Fees

§ 6108. PAYMENT OF FEES

(a) An applicant shall pay a transportation impact fee assessed under this subchapter to the Agency, except that a District Commission may direct an applicant to pay a transportation impact fee to a municipality if the impacts of the applicant's development or subdivision are limited to municipal highways and rights-of-way or other municipal transportation facilities. The Agency may require payment of a transportation impact fee prior to issuance of a State highway access permit under 19 V.S.A. § 1111. A District Commission may require payment of a transportation impact fee prior to issuance of a land use permit under this chapter.

Discussion: *The discretion to require the payment of an "transportation impact fee" before the issuance of a land use permit is rather broad and, in some situations, would require an extraordinary payment of money before the issuance of a permit which could be delayed for any number of reasons or appealed. Thus the money could potentially be tied up in the Fund for years. Under Criterion 9(B) Primary*

Agricultural Soils, the district environmental commissions require payment of any off-site mitigation fee prior to the commencement of construction which is more than adequate to address the impacts. The commissions will also allow the phasing of the payments to coincide with the phasing of the project. Similar provisions should be available here to allow for the phasing of payments as the project proceeds. This is particularly true for large scale residential housing projects that will be completed over a number of years depending on market conditions and other factors. The impacts will only be experienced as each phase is completed.

V. Refunds from the Transportation Impact Fee Fund

§ 6109. UNSPENT FEE AMOUNTS; REFUNDS

Within 15 years from the date of payment, a fee assessed under this subchapter shall be spent on the capital transportation project or projects in the appropriate TID or on the appropriate capital transportation project for which the fee was paid. If the Agency or municipality to which the fee was paid does not spend all or portion of the fee collected on the appropriate capital transportation project or projects, the applicant or its successors may apply to the Agency or municipality for a refund of the proportionate share of that fee within one year of the date on which the applicant's right to claim the refund accrued.

Discussion: *As previously mentioned, it is our position that the 15 year period is too long - the capital transportation project should be completed within 6 to 8 years, and that time frame certainly should not exceed 10 years (if deemed necessary for extraordinary reasons). The above section allows the applicant to apply for a refund but does not require any specific action by the Agency or a municipality when an application for refund has been submitted. There is specific language in the Act 250 statute (10 V.S.A. Chapter 151, Section* 6083a(e)*) which requires the Board to take very specific actions when presented with a permit application fee refund - this resulted from a Vermont Supreme Court decision. Similar provisions should be provided here to provide for equitable refunds with interest and could be modeled on the following language from the* Cape Cod Commission Model Bylaws and Regulations, Model Impact Fee Bylaw with Administrative Procedure Provisions. (*Cape Cod Commission's* ***Model Bylaws and Regulations***)

010.0 Refund of Fee Paid:

010.1 Revocation or Voluntary Suspension of Permit: If a building permit or certificate of occupancy is revoked or is voluntarily surrendered and is, therefore, voided, and no construction or improvement of land or change of use has been commenced, ***then the fee payer shall be entitled to a refund of the [SPECIFIC] impact fee paid*** as a condition for its issuance, except that up to three percent (3%) of the fee paid shall be retained as an administrative fee to offset the cost of processing the refund. The fee payer is entitled to seek a refund equal to the impact fee paid less administrative costs. No interest shall be paid to the fee payer on refunds due to non commencement.

010.2 Expiration: ***Any funds not expended or encumbered by the end of ten years from the date the [SPECIFIC] impact fee was paid shall, upon application of the fee payer, or the party legally entitled to it as a result of an assignment, within one hundred eighty (180) days of that date, be returned to the fee payer with interest at the rate equal to the prevailing savings passbook interest rate per annum.*** (emphasis added)

Commentary: The refund period is specified in Section 3(d) of the County Ordinance. ***Fee Payers are entitled to expect the construction of capital facilities within a reasonable time of paying their impact fee. The ten-year limit provides the town with the incentive to provide the facilities during those ten years so as not to lose the benefit of the impact fees.*** (emphasis added)

010.3 Errors and Misrepresentations: ***If the [SPECIFIC] impact fee has been calculated and paid based on error or misrepresentation, it shall be recalculated and, if found to be less, the difference shall be refunded to the original Fee Payer. If [SPECIFIC] impact fees are owed, the Fee Payer shall immediately pay the fees owed to the TOWN.*** No municipal permits of any type may be issued for the building or structure in question, or for any other part of a development of which the building or structure is a part, while the fees remain unpaid unless said fee is secured consistent with Section 5 of this bylaw. The Impact Fee Administrator, other official or municipal agency may bring any action permitted by law or equity to collect unpaid fees. (emphasis added)

VI. THE UNITED STATES SUPREME COURT ADDRESSES EXACTIONS [IMPACT FEES][2]

Two United States Supreme Court cases articulate the current federal tests for determining whether conditions that require the dedication of land, and possibly all exactions, constitute a taking under the Fifth Amendment.[3] The first, Nollan, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land, and (2) the projected impact of the proposed development. In Nollan, the Supreme Court required that in cases involving permanent dedication of title, an "essential nexus" must exist between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. Id., 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level of scrutiny, differentiating the ad hoc, factual inquiry balancing test of an economic take as enunciated in Penn Central.

Following Nollan, there was uncertainty regarding the degree of nexus that a municipality was required to establish in order for a land dedication condition to pass constitutional muster. In Dolan, the Supreme Court clarified Nollan by adopting the "rough proportionality" test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development. In Dolan, the Court addressed the question of a second nexus required between the city's conditions of title transfer and the projected impact caused by the proposed development. Id., 512 U.S. at 388.

To evaluate this question, the Dolan Court articulated a two-pronged test. First, as determined in Nollan, there must exist an essential nexus between legitimate state interests and the permit conditions. Id. at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. Id. at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. Id. The Supreme Court intended this two-prong test to function as a higher standard of review. The Supreme Court noted, however, that traditional land use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. Id. at 395.

Nollan Facts

An exaction is an example of the "unconstitutional conditions" doctrine which prohibits the government from "requir[ing] a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005).

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[2] *Texas City Attorneys Association, Terrence S. Welch, Brown & Hofmeister, L.L.P. , 740 E. Campbell Road, Suite 800, Richardson, Texas 75081. 2007 Summer Conference, Radisson Resort Hotel, June 13—15, 2007, South Padre Island, Texas.*

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As a condition to granting the Nollans a permit for their house, the California Coastal Commission required the Nollans to give the public an easement across their beachfront property. The Commission recited the usual "health, safety and welfare" justifications which have traditionally supported land use regulation, and declared that the easement was necessary because the new building "would increase blockage of the view of the ocean" from the street; might reduce the public's perception that a public beach existed in the other side of the house; and would "burden the public's ability to traverse to and along the shorefront." The Commission refused the permit to build unless the couple granted an easement across the shorefront part of their land for public use.

The United States Supreme Court recognized the general police power of the Commission, but found that there was no "essential nexus" between the exaction (a public easement across the beach front of the Nollans' land) and the state impact created or exacerbated by the construction of a new house (ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches). Nollan, 483 U.S. at 835. ***The Court held that the absence of any "nexus" between the exaction and the state interest asserted by the Commission resulted in taking without just compensation in violation of the U.S. Constitution. Id. (emphasis added)***

Dolan Facts

This "essential nexus" requirement of Nollan was refined by the Court in Dolan. Mrs. Dolan operated a store which had a gravel parking lot. A creek traversed part of her property. Mrs. Dolan applied for a permit to increase the size of her store and pave the parking lot. The city conditioned the permit upon a dedication by Mrs. Dolan of a portion of her land for use as a flood control area and upon the dedication of an additional 15-foot strip of land adjacent to the creek as a bicycle path. Dolan, 512 U.S. at 385-86. The city claimed that the creek land was necessary to control flooding and the bicycle path might alleviate congestion on the streets and was necessary for the health, welfare and safety of the public. Mrs. Dolan complained on appeal that the city had not identified any "special quantifiable burdens" created by her new parking lot or building that would justify the particular exactions from her.

After concluding that there was a "nexus" between the exactions and the claimed state interest, the United States Supreme Court framed the following additional question: ***"What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." Dolan, 512 U.S. at 375.*** The Court answered as follows:

We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. 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. Dolan, 512 U.S. at 391 ***(emphasis added).***

The exactions were stricken because less invasive measures than taking Mrs. Dolan's land would have accomplished the same stated goals. ***Read together, Nollan and Dolan appear to inquire first whether the government imposition of the exaction would constitute a taking if done without the corresponding application for a permit by the landowner. If the question is answered affirmatively, the Court then applies the two part "rough proportionality" test which asks whether the exaction demanded is roughly proportional both in nature (nexus) and extent***

(proportionality) to the impact of the proposed development. Dolan appears to place the burden of proof squarely upon the governmental entity to show compliance with the rough proportionality test. Dolan, 512 U.S. at 391.
(emphasis added)

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