AUTHORITY OF LOCAL GOVERNMENTS TO IMPOSE REQUIREMENTS ON DEVELOPMENT TO ADDRESS THE NEED FOR AFFORDABLE HOUSING

Prepared for: Ouray County Multi-Jurisdictional Housing Authority

PREPARED BY:
BARBARA J.B. GREEN
SULLIVAN GREEN SEAVY
2969 BASELINE RD.
BOULDER, CO 80303
303 355 4405
lawgreen@earthlink.net

March 4, 2009

AUTHORITY OF LOCAL GOVERNMENTS TO IMPOSE REQUIREMENTS ON DEVELOPMENT FOR AFFORDABLE HOUSING

I. **Introduction.**

Several communities in Colorado have developed affordable housing programs that include inclusionary zoning and fee requirements. Inclusionary zoning is a requirement imposed on new residential development that mandates that a certain portion of the units constructed be "affordable" to some segment of the local population. Some communities give the developer the option to satisfy this obligation by dedicating land to the local government for the construction of affordable housing or by paying fees in lieu of constructing new units. Fees often consist of a charge that is levied per square foot of new construction and are referred to as linkage fees. Under Colorado law, there is no express statutory authority to implement a program which imposes requirements that are designed to address the need for affordable housing caused by new construction. Nor are there any Colorado cases that directly address the authority of local governments to implement such programs. Such authority, however, arguably falls within the scope of local government land use and zoning powers. In addition, some linkage fees may be authorized under the Impact Fee Statute. Each member of the Ouray County Multi-Jurisdictional Housing Authority should consult with its attorney prior to enacting any affordable housing requirements.

II. **Authority Derived from General Land Use Authority**

A. **Inclusionary Zoning**.

No Colorado statute directly confers express authority on local governments to impose requirements on new development to address the need for affordable housing. Arguably, however, that authority is implied by the General Assembly's grant of authority to regulate the use and development of land. Under this point of view, inclusionary zoning, and fees assessed in lieu of inclusionary zoning, are efforts to reverse the impact of exclusionary land use policies that have diminished the supply of affordable housing and created an imbalance between jobs and housing availability. (These policies have come to be called "exclusionary zoning" because they have effectively excluded affordable housing, exacerbating patterns of racial and economic segregation.) Inclusionary zoning and the fees assessed in lieu of such zoning thus are an exercise of zoning and land use power in furtherance of the general welfare.

Although Colorado courts have never considered whether local government authority extends to programs designed to mitigate the impact of new development on the need for affordable housing, such programs have been upheld in other jurisdictions as a proper exercise of land use authority. For example, a court found that a requirement that developers pay into an affordable housing fund was authorized by the same land use authority that allows local

governments to enact “inclusionary” zoning ordinances.[1] The United States Supreme Court has takes an expansive view of zoning and land use power so long as it serves the general welfare.[2] And housing needs are related to the general welfare under zoning laws.[3]

B. **Local Government Planning and Zoning Powers**

The General Assembly has delegated broad land use and zoning authority to local governments. The County Planning and Building Codes empower counties to plan and zone all or any part of the unincorporated territory within its jurisdiction to provide for its physical development.[4] Similarly, the governing body of each municipality is empowered to regulate and restrict the use of land.[5] Local governments also have broad authority to address growth-related impacts. For example, the General Assembly enacted the Land Use Enabling Act in recognition that "rapid growth and uncontrolled development may destroy Colorado's great resource of natural scenic and recreational wealth." [6] Further, “the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions." [7] Colorado's Land Use Act contains a finding and declaration that "the rapid growth and development of the state and the resulting demands on its land resources make new and innovative measures necessary to encourage planned and orderly land use development" and "to provide for the needs of . . . residential communities.[8] Finally, the legislature also promotes the policy of having development help pay its own way. [9]

The provision of affordable housing is clearly among the areas of concern delegated to local governments. For example, counties may plan for the “general character, location, and extent of community centers, townsites, housing developments, whether public or private, the existing, proposed, or projected location of residential neighborhoods and sufficient land for future housing development for the existing and projected economic and other needs of all

---

[1] See *Holmdel Builders 11 Association v. Township of Holmdel*, 121 N.J. 550 (N.J. 1990) (development fees for housing are the “functional equivalent of mandatory set-asides” for affordable housing under zoning authority).

[2] See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed. 2d 797 (1974).

[3] Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98,102, 99 L.Ed. 27, 28 (1954).

[4] C.R.S. § 30--28--101 to ---209

[5] C.R.S. § 31--23--301 et seq.

[6] *Theobald v. Bd. of County Comm'rs,* 644 P.2d 942, 947 (Colo.1982).

[7] C.R.S. § 29--20—102.

[8] C.R.S. § 24-65-102.

[9] *See Board of County Comm'rs v. Bainbridge, Inc.,* 929 P.2d 691, 698 (Colo.1996); *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & County of Denver,* 928 P.2d 1254, 1268 (Colo.1996).

current and anticipated residents of the county or region. . ."[10] Statutes also require that a municipality's land use plan address the "harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development, including . . . affordable housing."[11] Given the broad scope of land use authority granted to local governments, it is reasonable to assume that local governments have the power to use their zoning authority to enact inclusionary zoning requirements and linkage fees to provide affordable housing necessitated by development.[12]

C. Methodology

1. Reasonable relationship to a legitimate governmental purpose.

Assuming that an affordable housing requirement is legislatively-adopted as an exercise of local government zoning and land use authority, the requirement should be upheld if it is reasonably related to a legitimate governmental purpose. Even where the reasonableness of a land use ordinance is fairly debatable, it will be upheld by the court.[13] The general purpose of a valid housing requirement would be to protect the general welfare by providing for affordable housing.

2. Methodology

a. The Rough Proportionality Test does not apply to a legislatively adopted housing fee. The so-called "rough proportionality test" is a reference to a test first established by the United States Supreme Court in *Nollan v. California Coastal Commission*[14] and *Dolan v. City of Tigard*[15] to address development exactions. Exactions are conditions of approval on land use permits that require the dedication of land to the public. Such "development exactions will be deemed takings requiring just compensation unless they satisfy a two part test: there must be an `essential nexus' between the

---

[10] C.R.S. § 30-28-106(3)(a)(VII)..

[11] C.R.S. § 31-23-207.

[12] See e.g. *Droste v. Board of County Commissioners,* 159 P.3d 601 (Colo. 2007)(General Assembly's grant of land use authority necessarily implies authority to impose moratorium).

[13] See *Nopro Co. v. Town of Cherry Hills Village,* 180 Colo. 217, 504 P.2d 344 (1972).

[14] 483 U.S. 825 (1987).

[15] 512 U.S. 374 (1994).

legitimate government interest and the exaction demanded; and there must be `rough proportionality' between the governmental interest and the required dedication." [16]

In 1999, the General Assembly enacted the Takings Act which addresses regulatory takings associated with exactions as described in *Nollan* and *Dolan.* The Act requires a local government when imposing "conditions upon the granting of land-use approvals" that require the dedication of real property or payment of money "in an amount that is determined on an individual and discretionary basis" to demonstrate that "there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property."[17] The Act does not apply " to any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government."[18] Colorado courts are clear that legislatively-adopted fee is not the kind of land use decision that would obligate the local government to perform the type of individualized impact assessment imposed by the rough proportionality test.[19]

b. <u>The Housing Fee should be reasonable.</u> There are no cases in Colorado that dictate how the amount of inclusionary requirements or linkage fees should be determined. For charges that are intended to defray the cost of providing services, the court has held that "the amount of the fee must be reasonably related to the overall cost of the service."[20] and "[m]athematical exactitude is not required, however, and the particular mode adopted by the governmental entity in assessing the fee is generally a matter of legislative discretion.[21] This type of test probably would apply to any affordable housing requirement.

II. <u>The Impact Fee Statute</u>

In addition to being authorized by general land use and zoning authority, certain linkage fees may be authorized under the Colorado Impact Fee Statute.[22] (Currently, Gunnison

---

[16] See *Krupp v. Breckenridge Sanitation Dist.,* 19 P.3d 687, 695 (Colo. 2001); *Wolf Ranch, LLC v. City of Colorado Springs*, ___ P.3d___ (Case No. 07CA2184).

[17] § 29-20-203(1), C.R.S. 2008.

[18] Id.

[19] See *Krupp* and *Wolf Ranches*, supra, at note 16.

[20] *Krupp* at 693-694.

[21] Id.

[22] C.R.S. 29-20-104.5

County's workforce housing fee is being challenged under this statute. The issues in that case is whether Gunnison County's fee was properly calculated and whether the fee is an unlawful tax.) The Impact Fee Statute authorizes local governments to adopt impact fees to defray impacts on capital facilities. A capital facility is defined as 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.[23]

A. Summary of the Impact Fee Statute

The Impact Fee Statute sets forth the requirements for a valid fee:

(1) The impact fees must be "[l]egislatively adopted" C.R.S. § 29-20-104.5(1)(a);
(2) They must be "[g]enerally applicable to a broad class of property" C.R.S. § 29-20-104.5(1)(b);
(3) They must be " [i]ntended to defray the projected impacts on capital facilities caused by proposed development" C.R.S. § 29-20-104.5(1)(c);
(4)) The "reasonable impacts of the proposed development on existing capital facilities" must be quantified and established "at a level no greater than necessary to defray such impacts directly related to proposed development" and not imposed fee "to remedy any deficiency in capital facilities that exists without regard to the proposed development." C.R.S. § 29-20-104.5(2) and
(5) The impact fees 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 charge is imposed." C.R.S. § 29-20-104.5(3).

B. Supporting Rationale for a Housing Fee under the Impact Fee Statute

Where a local government relies on the Impact Fee Statute to authorize a linkage fee, the amount of the legislatively-adopted fee should be supported by a study that quantifies the projected impacts of development on the need for affordable housing. The study must ensure that the local government sets the fee "at a level no greater than necessary to defray such impacts [on the availability of affordable housing] directly related to proposed development."[24]

1. No individualized determination required.

The Impact Fee Statute does not require the local government to perform an individualized determination of the impacts of any particular development proposal, it simply requires quantification of the impacts of development in general. An individualized determination would be required only when the amount of the fee is "determined on an

---

[23] C.R.S. § 29-20-104.5(4)

[24] Id at -104.5(2)

individual and discretionary basis. . ." [25] In other words, the local government would not be required to analyze the impacts of a particular development on the availability of affordable housing unless the fee were being imposed on an *ad hoc* basis to a particular development rather than through a legislatively formulated assessment that is imposed on a broad class of property owners by a local government.[26] The reasonableness of the costs to be recovered through the housing fee should be evaluated in relation to the impacts of all development on the availability of affordable housing.[27]

2. **Methodology.**

The Impact Fee Statute does not dictate a particular methodology which the local government must apply in support of any impact fee. However, in the case of a linkage fee, a reasonable approach would be to determine the number of workers that would be generated by new development, calculate the demand for affordable housing units associated with those workers, and then set the fee on the basis of the cost to provide those units. The local government must be careful that the fee is not used to address the need for affordable housing that already may exist in the community without regard to proposed development. Thus, the local government should set the amount of the fee to meet some portion of the need for housing generated by new development so that there is no argument that it is using the fee to make up for existing deficiencies in the supply of affordable housing.

III. **Conclusion**

Although there is no express statutory authority for a local government to impose requirements on new development that are designed to address the need for affordable housing, such authority arguably can be found within the zoning and land use powers that have been granted to local governments. Under this analysis, the inclusionary requirement would be a simple exercise of zoning power and the linkage fee would be characterized as a few in lieu of inclusionary zoning. This approach has been upheld in other jurisdictions. The Impact Fee Statute may also provide authority to impose a linkage fee. As an exercise of zoning authority, a housing requirement should be reasonable and bear a reasonable relationship to the cost of providing affordable housing caused by new development. Under the Impact Fee Statute, the local government must quantify the reasonable impacts of proposed development and the linkage fee can be no greater than the amount necessary to defray the impacts of proposed development on the availability of affordable housing.

---

[25] C.R.S. § 29-20-203 (1)

[26] *See Wolf Ranch, LLC v. City of Colorado Springs,* __ P.3d __,(Colo. App. 2008) (imposition of legislatively-adopted fees not the type of land use decision that would trigger an individualized impact assessment).

[27] Carolynne White, *A Municipal Perspective on Senate Bill 15: Impact Fees,* 31 Colo. Law. 93 (May 2002).

The County and each municipality enacting an affordable housing requirement should be sure to cite to all of the various authorities in state statute when it adopts the resolution or ordinance enacting the housing program. In addition, a study that draws the link between new development and the need for affordable housing should be conducted. At a minimum, the study should satisfy the requirements of the Impact Fee Statute if there will be a linkage fee. To be conservative, the study should be designed to satisfy the "rough proportionality" test even though that test applies only to exactions and the payment of money demanded on an *ad hoc* basis. By satisfying this more stringent test, the housing requirements should withstand judicial scrutiny. We will be preparing this type of study for the Ouray County Multi-Jurisdictional Housing Authority.