Smith: Okay, there are a few people drifting in still, but we’re going to go ahead and get started. We’ve got a lot to cover in the next hour or so. Let me start off by introducing our panelists for the “Exactions and Impact Fee” session of the “Paying for Growth” track. NEXT SLIDE #2

To my immediate right, we have Professor David Callies. David is the Benjamin A. Kudo Professor of Law at the University of Hawaii School of Law in Honolulu. David teaches land use and property, state and local government law. David has lectured all over the world on these issues and authored numerous books and articles. One of his first notable ones, of course, was *The Quiet Revolution in Land Use Control*, which is a study of state land use legislation back in the early ‘70s, which was something of a new thing back then -- or an emerging thing. David is also the co-editor of the casebook on land use law and is the co-editor of *Land Use and Environmental Law Review*. In 2002, David was elected to the College of Fellows of the AICP.
To his right is Julian Juergensmeyer, another professor. Julian is from Georgia State University College of Law, and he also teaches land use and growth management at Georgia State. Julian is the Co-director of the Center for Comparative Study of Metropolitan Growth and the Advisor for the Georgia State and Georgia Tech Joint Degree program. Julian has also lectured internationally on these topics and he is the co-author of the APA’s *Practitioner’s Guide to Impact Fees*, and also for the law students out there, *The Hornbook*, and recently, *The Practitioner’s Treatise on Land Use Law*. And Julian is a pioneer by any description, I think, in the impact fee world.

I am Tyson Smith. I’m with the law and planning firm of White and Smith. My firm does land use law and planning services. We practice around the country. About 75% of the work that I do happens to be impact fee work. On top of that, I do APF and concurrency type of work and then the whole gamut of land use types of programs.

I need to announce that you will get AICP credit for this session because we’ve got at least two very smart people on the panel. So you need not worry about that.

Let me see who we have here today. If you are a local government planner, raise your hand. All right, if you work for private-side development, raise your hand. Okay, if you are an attorney? Some attorneys -- okay, good. How many of you have attended a session on exactions and impact fees before? Okay, how many of you have impact fees in the state you’re in? Okay, that gives us some idea of where we’re going here.

I’m going to start things off by giving some background information and going over some of the legal standards associated with exactions and with impact fees. Professor Callies then is going to touch on some of the constitutional issues. What we’re trying to do is tailor most of our comments not just to inform you, but also to give you practical ideas of what you should be aware of as planners for the most part in your practice. And then Professor Juergensmeyer is going to wrap things up by identifying some of the emerging trends in this area and also a proposal he has for solving some of the problems we’re facing -- some of the uncertainties in particular. NEXT SLIDE #3
When we think about financing public facilities, particularly pursuant to the planning process or the development review process, we’re typically talking about impact fees, and impact fees are considered generally to be exactions, but other exactions as well. Sometimes we call these required dedications or ad hoc dedications, fees in lieu. Taxes we’re not going to talk about today, although we’ll talk about that on a session on Wednesday -- the “Soup to Nuts” session. Voluntary contributions and development agreements are a whole different animals as well and different standards apply there. We’re not going to cover that in this session. Professor Callies will be in a session immediately after this one that will talk about development agreements and voluntary contributions. So for this session, we’re talking impact fees basically and required exactions.

The Utah Supreme Court in the B.A.M. case in 2006 was analyzing the applicability of the Dolan case, which I’m sure some of you are familiar with, to certain types of exactions. And it characterized the court’s treatment of this topic as an “unruly judicial course that it was about to join.” And I think that’s an accurate description. What I see in my practice -- all of my clients are local governments. I’m always advising attorneys, local government attorneys and local government planners. What I see is a lot of confusion and a lot of uncertainty out there, and it’s for two different reasons, really. One is, one issue you’re going to have to deal with on exactions is the taking issue. The other big one is the authority issue, and we’re going to talk about both.

But taking issues are always very, very fact-sensitive. Where was the thing you exacted? How far from the development? What type of development? At what point in the process was it exacted? -- etc. The other thing of course for a session like this is that these things vary state to state. So my comments at least -- what I’m going to try to familiarize you with is this spectrum of things you can be on the lookout for that I think could be an issue in any state and things I
think you ought to be triggering or concerned in your mind as you move forward on the planning side. NEXT SLIDE #4

So to set the context, what we’re talking about is a development that comes in, and it has some amount of demand for a public facility, whether it’s roads or parks or schools. If you’re an impact fee state, you may cover some of those costs or require the developer to cover some of those costs through impact fees. And the question is, how do you cover the rest? Can you do it through voluntary contributions or exactions? If you’re in a state that doesn’t have impact fees, of course the question is, can we get it all through exactions or through voluntary contributions.

I think one interesting question, of course, is what’s the difference between an exaction and a voluntary contribution? If you have a developer that’s willing to come in and negotiate a development agreement, it’s probably going to be voluntary. But the courts have found that other things have been voluntary or that the right to challenge has been waived. If they went through the entire development review process talking about a certain exaction, never complained about it, benefited from the approval and then come and complain later, they’ve been found to say, you conceded to that. You can’t raise the claim now. NEXT SLIDE #5

<table>
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<th>What Is An Impact Fee?</th>
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<tr>
<td>• monies collected through a set schedule</td>
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<td>• spelled out in a local ordinance</td>
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<td>• levied only against new development</td>
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<td>• as a condition of building permit approval</td>
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<td>• to support infrastructure needed to serve new development</td>
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<td>• to cover not more than proportionate share of an identified portion of the infrastructure</td>
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What’s an impact fee? Impact fees are moneys collected through a set schedule and an ordinance. They apply only to new development as a condition typically of building permit approval. They’re used to pay for infrastructure for that new development only and they cover not more than a proportionate share of that development’s demand for infrastructure. And I added this phrase into the last bullet here -- “not covering more than a proportionate share.” I think we often get to thinking about impact fees covering the entirety of a developer’s proportionate share, and they don’t typically. They’re often adopted at levels below what is justifiable or below 100% of their impact, and they’re often outdated. It’s the nature of impact fees. When you calculate them this year, within a year or two the costs have gone up, particularly in recent years. NEXT SLIDE #6

Where did Impact Fees Come From?

- Required Dedications & Conditional Approvals, via Subdivision Authority
- Fees “in lieu of” Required Dedications
- Shifting from “on-site” and “site-related” needs to mitigation of “off-site” impacts

Where do impact fees come from? Initially we had required ad hoc exactions pursuant typically for subdivision authority, and we had cases that upheld these types of exactions in the early ‘60s. And then eventually we started looking at fee in lieu cases. So these are situations where instead of dedicating a park in a subdivision, you pay a fee and the government then goes and builds the park somewhere else. And each of these types of things have been upheld.

And then with impact fees, we started moving in a sense further from the development site and away from onsite and near site or site-related types of improvements to improvements that are required and impacts that occur jurisdiction-wide. And that’s really what I think distinguishes in a lot of ways impact fees from other types of exactions. NEXT SLIDE #7
Sample Fee Schedule

<table>
<thead>
<tr>
<th>Parks &amp; Police Fire &amp; TOT AL</th>
<th>Recreation EMS</th>
<th>Residential</th>
<th>Nonresidential</th>
<th>Per Housing Unit</th>
<th>Per thousand Square Feet of Floor Area</th>
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<tbody>
<tr>
<td>Million Residing in Area</td>
<td></td>
<td></td>
<td></td>
<td>Single Family Detached $1,298 $1,750 $2,880 $1,761</td>
<td>Townhouse/Duplex $1,151 $1,550 $2,550 $1,561</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Other Residential $895 $1,215 $1,995 $1,215</td>
<td></td>
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<td></td>
<td>Com / Shop Ctr 50,000 SF or less $487 $370 $857</td>
<td>Office / Inst 25,000 SF or less $506 $522 $1,028</td>
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<td></td>
<td>Com / Shop Ctr 50,001-100,000 SF $429 $323 $752</td>
<td>Office / Inst 25,001-50,000 SF $319 $490 $809</td>
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<td></td>
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<td></td>
<td></td>
<td>Com / Shop Ctr 100,001-200,000 SF $374 $287 $661</td>
<td>Office / Inst 50,001-100,000 SF $225 $462 $687</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Com / Shop Ctr over 200,000 SF $323 $258 $581</td>
<td>Office / Inst over 100,000 SF $179 $433 $612</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>Business Park $152 $408 $560</td>
<td>Light Industrial $127 $2,980 $4,250</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Warehousing $71 $1,650 $2,360</td>
<td>Manufacturing $88 $2,350 $3,230</td>
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</table>

Most of you are familiar with this -- here’s an impact fee schedule. You typically have residential and commercial listed, how much they are. In this case, parks, fire and police are added up for the total impact fee due. And I show you this -- I know for some of you, this is very common -- but there is a case I’m going to talk about at the end here where someone alleges that something else is an impact fee and looks nothing like this. NEXT SLIDE #8

Impact Fee Authority

Home Rule Power
- Ohio
- Florida
- Kansas
- Wyoming

Statutes
- Florida
- Alabama (1 county)
- Georgia
- Arkansas
- Nevada
- South Carolina
- Texas
- Utah
- Massachusetts (CCCA)

The impact fee authority originally came out of the Home Rule idea. It did for Florida in the 1990s. It did for Ohio -- cases supporting that concept in Kansas and Wyoming. But typically impact fees come from statutes. So most of you are probably in states that have an impact fee statute, and that’s going to outline what you can do and you can’t do with impact fees. NEXT SLIDE #9

How Close a Nexus?
- Specifically & Uniquely Attributable “Need” and Direct “Benefit”
- “Reasonable Relationship” between required exaction and Development’s Demand
- Dual Rational Nexus Test
Here’s the first spectrum question we’re going to talk about. When exactions were first upheld, one of the first tests that was applied was called the “specifically and uniquely attributable test.” And this test said that any exaction you make or the government requires has to be the result of the demand that is specifically and uniquely attributable to that development and that the benefit that arises from the expenditure of the moneys, let’s say, that are collected have to create a direct benefit to that development -- a very strict test. So that’s one end of the spectrum.

At the other end of the spectrum, we have some cases, as you might expect, out of California -- a more liberal point of view -- that said as long as there is a reasonable relationship between what you’ve exacted as a government and the impact the development creates, that’s sufficient -- a much more relaxed standard at the other end of the spectrum. NEXT SLIDE #10

**Dual Rational Nexus Test**

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; and
- the expenditures of the funds collected and the benefits accruing to the subdivision

Hollywood, Inc. v. Brevard County, 431 So.2d 606 (Fla. 4th DCA 1983)

Then we have the “dual rational nexus test.” And this is the test that is effectively applied to impact fees, I would think at least as a general matter you can say, in each case. The question becomes, where along the line do you fall when you make a certain exaction? And it’s typically viewed that the dual rational nexus test falls somewhere between these two standards -- not quite as lenient as a reasonable relationship, not quite as demanding as specifically and uniquely attributable.

The test reads something like this: there has to be a rational nexus or reasonable connection between the need of additional capital facilities and the new development, and there has to be that same rational connection between the benefits that accrue to that development and the impacts of that development in the fee.
The question is going to come up, for example, when you’re doing your impact fees, how big of a benefit area do we need? Or do we need a service area? Or can we collect a park impact fee, for example, and assess the same fee throughout the entire jurisdiction? Well, that’s a nexus question. That’s a geographical nexus. So it’s one you need to be thinking about right when you start calculating your fees, or your consultants should be. If you’ve got a 100-square mile community, is it appropriate to have a community-wide park fee? It might depend on what kind of parks you’re using as your basis, etc. NEXT SLIDE #11

How stated?

- Georgia - “reasonably related to”
- Nevada - “necessitated by and attributable to”
- Florida - “necessitated by”
- Arizona - “reasonable relationship”
- Montana - “reasonably related to and reasonably attributable to”
- Cape Cod - “a rational nexus” & “reasonable benefit”

This looks different in every community. The dual rational nexus test -- again, I think this is different ways of saying the same thing. So I just put up here some of the language we see in some of the statutes. NEXT SLIDE #12

Impact Fees Are:

- Traditionally Considered Regulatory technique, not a financing mechanism
- Based on “impact” on facilities, NOT, e.g., on building value, frontage
- NOT to be used for existing needs or to increase LOS to existing development
- Should be based on rational planning process and adopted CIP/capital budget

Impact fees traditionally have been a regulatory technique, vs. a financing mechanism or being primarily revenue-raising. I mean, that’s what I was taught. Now the reality is, what we’re seeing is some court cases recently that treat impact fees as something different. And Florida, (inaudible) was sort of the origination of impact fees in many ways -- they’re in California -- and that’s where we first saw, hey, these are regulatory techniques in the Hollywood Inc. case in 1983. But there’s another Florida case where it points out, well, you don’t have to
do land use types of notice when you adopt an impact fee ordinance because it’s really a revenue mechanism. And I’m going to talk about a case in Nebraska that called it a tax, and it was okay. So my point is simply this -- it’s a weird thing in the courts right now, I think, that some of the things we understood as sort of ground work with impact fees is being treated a little differently in some of the cases. And I think that’s because we’ve had so much development in the last five to ten years. We’ve had so much more litigation on these things in courts that haven’t dealt with them before. So we’re starting to see a lot of different sorts of things emerge.

Impact fees are always based on the measured impact of the development on the facility. So you’re not going to base it on the value of the building, for example, how big the building is typically, although sometimes that’s done typically for commercial, or the amount of frontage that’s on the properties. That’s what makes it different than a tax or a special assessment. You can’t increase the level of service with impact fees for existing development. And you always should base your impact fee ordinance on a rational comprehensive planning profile, and also a capital improvement program. And again, the capital improvement program is what ensures that that benefit nexus is made, that you get the benefit back to the people who paid the fee.

Practice tip -- what I see as a problem in this regard is that too often we don’t think about the CIP, particularly if you’ve never done impact fees before, until we’re three weeks before the hearing and we’re drafting the ordinance. So that’s one thing I would say is when you start your impact fee study, whether you’re doing it in-house with a consultant, start thinking about the CIP early on. NEXT SLIDE #13

Impact Fees Are Not:

- “Adequate Public Facilities” or “Concurrency” Programs
- A Growth-Management Mechanism
- Funding Mechanisms for “On-Site” or “Site-Related” Improvements
- Effected through Development Agreements or ad hoc Exactions

Now what are impact fees not? What are we not talking about today? I’m not talking about an adequate public facilities program. I’m not talking about a concurrency program. And
each of these cases, these are capacity assessments. This matters in some states like North Carolina, where we’ve got a decision that says local governments can’t do impact fees pursuant to the Home Rule or planning authorities. But a lot of communities in North Carolina use APFO, for example. Florida, Maryland, Washington, some other states have both APFO or concurrency and impact fees. So if an APFO -- adequate public facilities ordinance -- you’re saying, do we have the capacity to serve this development? And if you don’t, then the development is denied. And then typically the developer may then mitigate his or her own impacts in order to move forward. And that was one of the principal reasons the Ramapo case was upheld. So that’s a distinction.

Typically we don’t see people managing growth with impact fees -- often alleged, but typically not the case that when impact fees come in, growth all of a sudden stops. Never seen that as an anecdotal situation in my practice anyway. **NEXT SLIDE #14**

**ad hoc Exactions**

- May be authorized by statute, police power, or Home Rule Powers
- Typically applied as a discretionary condition of Development Approval
- Subject to Heightened Scrutiny under:
  - Nollan’s Essential Nexus Standard; and
  - Dolan’s Rough Proportionality Standard

We’re not talking about exactions that are facilitated through ad hoc negotiations and/or requirements associated with development approval. Ad hoc exactions, on the other hand, are typically authorized by statute or through the police power or Home Rule powers. They typically apply as a discretionary condition of approval, and that’s an important distinction that I suspect David will get into some. Ad hoc exactions are subject to heightened scrutiny or intermediate scrutiny under the Nollan or Dolan standard. Are impact fees? Well, it depends on who you ask. It depends on which court you’re in. **NEXT SLIDE #15**
I mentioned earlier that the two sort of key things you need to look at with all of these things -- all exactions, whether impact fees or other -- are the authority question and the taking question, although other ones can come up. On the authority question, I think it matters -- there are bigger differences. On the proportionality question related to takings, I don’t know if we call it a *Dolan* analysis or a dual rational nexus test -- most people equate the two, or a lot of people do now. I think the test for proportionality is about the same, but the burden shifting can be an issue. Some states, I thought I’d point out, have actually adopted *Dolan* and *Nollan* into their statutes -- Arizona and Utah are two of them. Arizona has -- literally after *Dolan* was passed, they wrote a paragraph in the statutes that say, “Local governments must follow *Nollan*, *Dolan* and *First English*.” That’s what it says in the statute. And in the next section requires an administrative appeal process if you’re going to challenge a *Dolan* type exaction in Arizona. And these types of things are helpful because what do they do? They tell planners, they tell local government attorneys what you can do and what you can’t do. That’s awfully nice to know. **NEXT SLIDE #16**

I had a case a couple years ago -- in fact, Julian and I wrote up an article on this, among some other things -- this case came out of Lincoln, Nebraska, where they adopted an impact fee, didn’t have express statutory authority. And the court upheld it under constitutional Home Rule,
in what they call in Nebraska the “Limitation of Powers Home Rule Charter.” They said they had the power to exercise -- that the local government could exercise the power to tax without express delegation of authority from the state legislature. And this is unusual. In Home Rule states, you can usually do anything that’s not expressly prohibited, and one of the things that’s always expressly prohibited are taxes that aren’t expressly authorized. But in this case they’re very -- you know, the spectrum, again -- local governments that are like Lincoln, Nebraska -- so this may affect one person in here -- they can even do taxes. Now the court went on and didn’t actually decide whether this impact fee was a tax or not under the normal standard. This is sort of an extreme case, but a unique one, where we usually see impact fees being regulatory devices. **NEXT SLIDE #17**

This is a case out of Mississippi. It also came down in 2006. A maddening case -- I was involved in this case with the City of Ocean Springs. For about two or three decades now, I think in the early ‘80s, Mississippi adopted a Home Rule statute, and it was extraordinarily broad. This is an excerpt from it, where it clearly says basically, local governments have the power to adopt any order, resolution or ordinance not inconsistent with any other Mississippi law. **NEXT SLIDE #18**
And it goes on to say, these powers are complete without reference to any specific authority. But then like all Home Rule statutes, it goes on later to say it doesn’t include the power to tax. That has to be express. **NEXT SLIDE #19**

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<th>Plaintiffs’ Position</th>
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<td>• Impact fees are “per se” illegal taxes</td>
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<tr>
<td>• Reasonableness, rough proportionality does not irrelevant</td>
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<tr>
<td>• Must have statutory, constitutional, or common law basis for authority</td>
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Now the plaintiff’s position in this case was all impact fees are illegal taxes in Mississippi. And the theory was that it was unauthorized and therefore was a tax. The analysis should be, is it a tax or a fee, and if it’s a tax, it’s unauthorized. But this was the Home Builders Association’s argument. They said we don’t care how roughly proportionate it is. We don’t care how reasonably related it is. You have to have common law or statutory authority to do it. **NEXT SLIDE #20**

**HBA of Miss. v. City of Madison**

City moved for dismissal in Federal Court under “Tax Injunction Act,” which provides that:

> “If the district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

Background -- a few years before Ocean Springs adopted impact fees, a number of other jurisdictions had -- ten or twelve, I believe. One of them was the City of Madison, pursuant to its Home Rule powers. Madison got sued in federal court for its impact fee ordinance. It got sued in federal court, and there is this little provision in the Federal Code called the Tax Injunction Act, and you can read what it says on the screen, but what it basically -- it deprives federal courts of jurisdiction basically to rule on state tax issues if the plaintiff has a remedy at law at state level. In other words, if they can get into state court, Congress is trying to keep the federal courts
out of local government financing issues. So in Madison, they got sued in federal court. The city actually argued, this is a tax. And the Tax Injunction Act applies. The federal court doesn’t have subject matter jurisdiction. NEXT SLIDE #21

**Cases Interpreting the TIA**

- Is a legislative function
- Imposed generally on all citizens
- To the benefit of the entire community
- Proceeds contribute to general fund
- May be arbitrary and disregard benefits to tax payer
- May be based solely on ability to pay
- Based on property income

*e.g., Nat’l Cable Television Ass’n v. U.S.
San Juan Cell. Tele. Co. v. Publ. Serv. Comm. of Puerto Rico*

So the federal court in Madison looked at, what is a tax and what is a fee? And they looked at some of these federal cases. None of these are impact fee cases. And they said, well, this is what a tax is. It’s legislated. It’s applied to all citizens, benefit to the entire community. It’s contributed to the general fund. It can be arbitrary. A tax can be any amount. It doesn’t matter how benefits from it. NEXT SLIDE #22

**City of Madison’s Fee**

- Failed to Earmark Fee Revenues for New Development’s Benefit
- Spent fees for General Revenue Purposes

Madison’s fee was not earmarked for specific improvements and the funds were going into the general fund. So the court concluded, this is a tax and they kicked them out of federal court. So the city and the plaintiffs in the Madison case went on to settle. There was a case, if you’re keeping notes at home, called the *Twin Cities* case that followed up on this, which was about the city’s insurance, but it also covered this issue to some degree. NEXT SLIDE #23
Cases Interpreting the TIA

Fees:
- Incident to a Voluntary Act (e.g. to construct a house)
- Raises money for a special fund
- Results in a benefit to a Fee Payor, “not shared by other members of society.”


Also in the Madison case, they said, what’s a fee? It’s something that’s incident to a voluntary act. For example, the court said, constructing a house is a voluntary act. It’s a piece of land that’s raw. It’s not impacting the schools. You choose to develop it, it creates an impact. That’s different than a tax. It raises money for a special fund. It results in a benefit to the fee payer that’s different than other people. Does it benefit everyone? Exactly what Ocean Springs’ impact fees did. Of course, it doesn’t matter. The circuit court said if it walks like a duck and talks like a duck, this duck is a tax. NEXT SLIDE #24

Ocean Springs’ Impact Fees

- Paid only by New Development
- Earmarked Special Fund for Fees
- Expenditures limited to benefit New Development Paying the Fee
- Consistent with the Comprehensive Plan

So we go into this case, it’s a perfect impact fee. It did walk like a duck, actually. The duck just happened to be an impact fee. The court didn’t buy it. It’s illegal, so it’s a tax, instead of it’s a tax and therefore it’s illegal. If anybody can explain that case to me, I’ll buy you a drink tonight. NEXT SLIDE #25

Cases Applying the TIA

- Herron v. Annapolis (Impact Fees)
- Jefferson Development v. Georgetown Muni. Water/Sewer (Tap Fees)
- NW Arkansas HBA v. Rogers (access and hook up fees)
Now we’ve had some other cases recently that have dealt with the Tax Injunction Act, dealing with impact fees, so I thought I’d bring it up. I think it’s one that’s interesting. Now these cases have recognized the awkward position that local government is in to be sitting there arguing that what they’ve adopted is a tax and not a fee. And they’ve said specifically, the city here is arguing for purposes of jurisdiction that this is a tax, and they’ve also recognized that for this jurisdictional issue, taxes should be read very broadly. The definition of a tax should be very broad when you’re looking at the Tax Injunction Act. The mistake I think we had in Mississippi was they applied that for the state level legal question.

But look at these cases. The Herron one out of Maryland was an impact fee case. They got kicked out of federal court, or at least the federal court ruled that that was a tax under the federal Tax Injunction Act. NEXT SLIDE #26

This is a case out of Utah -- again, treatment by the Utah Supreme Court. They had a history in this situation in Wasatch County of soil stability problems. The county put in a temporary prohibition on development unless the developer could come in and show by doing a special study that it was appropriate to develop on the site. The developer said, this is an impact fee. Huh. NEXT SLIDE #27
So we go look at the statute, and it says, “Impact fee means a payment of money imposed upon development activity as a condition of development approval.” Okay, doing a study costs money. You do it at the time of development. **NEXT SLIDE #28**

**Gardner v. Wasatch County,** 2008 WL 268968 (Utah Sup. Ct.)

“...the option to establish, on a case-by-case, voluntary basis, whether an individual’s land is suitable for construction does not equate to the imposition of an impact fee.”

But the court said the option to establish on a case-by-case, voluntary basis where an individual’s land is suitable for construction does not equate it to the imposition of an impact fee.

So why do I bring this case up? Well, it was a creative argument by the developer that didn’t succeed. But in some of these cases where the authority question is still an open one with impact fees or with exactions, I think it’s an important distinction that this court saw between and impact fee, which may or may not be authorized where you live, or an exaction or a requirement that’s associated with the development of a piece of property. **NEXT SLIDE #29**

**National Impact Fee Roundtable**

**Orlando, Florida**

**October 8-10, 2008**

[www.impactfee.org](http://www.impactfee.org)

The last thing I’ll pitch is, believe it or not, there’s an organization called the National Impact Fee Round Table. I chair the board of that organization. And we are having our twelfth annual meeting in Orlando this year -- about 120 of us get together each year and talk impact fees. So if you’ve got any more money in your travel budget, check us out. We’re at impactfee.org.
Callies: Thank you. It’s a great pleasure to be here. It’s always nice to be speaking within the Continental United States or in Hawaii. When I speak elsewhere, I am often asked how I like living in the Caribbean. I have been asked what the ferry service is like between Los Angeles and Hawaii, since we’re usually that little inset map. We do have a ferry. You all know about that. It’s a whole different story. Different conference. This isn’t in that impact statement.

I’d like to chat with you a little bit about the constitutional issues, taking a lot of what Tyson told you and putting about the same interpretation on it, for all practical purposes. The dual rational nexus test, dealing with nexus and proportionality, are in fact now constitutional standards. I take the U.S. Supreme Court in the two cases of Dolan v. City of Tigard and Nollan vs. California Coastal Council to apply generally to all manner of what a number of us prefer to call land development conditions. That means impact fees, exactions, in lieu fees, subdivision exactions -- the whole smear. I do that in part because in a recent -- well, not so recent any more
-- California Supreme Court case, which is one of the most cited supreme courts in the country with respect to propositions of law in other jurisdictions -- in fact, it is the most cited in the country -- the California Supreme Court in *Ehrlich vs. Culver City* basically said they could not make a meaningful distinction between the kinds of exactions that require dedications -- and both the *Nollan* and *Dolan* cases were dedications cases -- and other kinds -- and I add, before mitigation fees. I cannot make a reasonable distinction fees between mitigation fees and other kinds of exactions like impact fees. They are all -- to come a little bit full circle on this -- they are all fees that are development driven. **NEXT SLIDE #32**

Tyson said a number of important things, but from a practical standpoint, the most important two things he told you are as follows -- the impact fee, land development condition -- whatever you call it -- is an exercise of the police power. It is not the power to tax. Yes, there are a couple of odd cases -- and he gave the jurisdictions -- where the court have got, with all respect, confused. These are not revenue raising matter. These are not special assessments. For special assessments and taxes, a local government needs specific enabling authority. Most local governments, even Home Rule local governments, do not have the authority to levy development taxes. They may have the law on property tax. They may add sales and use tax. But there aren’t a handful of states in the union that have authorized their local governments to levy development taxes. So once the court gets the notion that what you’ve done by means of an impact fee is a tax, you’re dead in the water. The court doesn’t have to resort to the Constitution. It simply has to resort to the obvious fact that you don’t have the authority to levy it. You’re a local government. And the U.S. Supreme Court thinks very little of local government and even less of Home Rule. Whenever it gets there, you lose. The Supreme Court, in a very early case, says that local governments are entirely the creatures of the state. They can be abolished, combined, destroyed, and there is no federal remedy. There is no right to live in a local government. So
you want to stay away from the notion that a land development condition is anything but an exercise of the police power. **NEXT SLIDE #33**

The second thing he told you, which is very important -- and Tyson covered a lot of ground, so you’ll pardon me if I’m emphasizing a couple of things a bit more strongly -- and that is as they are an exercise of the police power, they are development-driven. They are not like zoning ordinances. The rationale to do a rational nexus test and the Supreme Court’s adoption, as I see it, of those tests in the *Nollan* case and the *Dolan* case make it crystal clear that the only place you can levy an impact fee -- and I use the term “levy” because I haven’t been able to figure out another term -- I know “levy” sounds like “tax”, but I don’t mean “tax” -- you can only levy an impact fee at some point in the land development process because it is the need for whatever facility that the development is causing gives you the basis to levy the impact fee or exaction in the first place.

Now I make the point because there are jurisdictions all over the country that levy the fee at the zoning stage. Zoning may be a precursor to a development permit, like a preliminary or final subdivision plat. In my state as well as other coastal states, you have of course the infamous, notorious and famous shoreline management permit. We call them sometimes SMPs, sometimes SMAPs, whatever. Those are in fact land development permits. You can levy them at the building permit stage too, as far as that goes. But if it is not development-driven, you can’t levy it. Land can stay rezoned for a decade. Zoning does not drive the need for any kind of public facility whatsoever. It is the development that drives the need. You can’t do it. In most jurisdictions, if you try and go to court, you lose for the same reason.
This goes to another portion of the important thing about a land development condition, whether you call it an impact fee or an exaction or something else -- or a dedication -- and that is that the funds don’t go into the general fund. Again, that begins to trigger in the judge’s mind -- “Aha! Tax!” If you don’t need it for the specific purpose that you’ve levied it, you’ve stuck it in the general fund. Proposition #2 in that same general area -- it is not only a development-driven fee, if you will, and not only it doesn’t go in the general fund, but you need to expend it in a reasonable time. Florida requires such spending by statute, and I don’t remember exactly what the time period is, but I thought it was somewhere around two to five years. And there are a number of other states that indicate -- we have a model statute -- we have a statute in Hawaii, by the way, that is honored the breach. To the best of my knowledge, none of my four counties has ever levied a fee under the impact fee statute. I always say “counties” because as my Hawaiian colleagues here in the audience know, and the rest of you probably do not, we don’t have any cities and villages. We don’t have any special districts. We don’t even have school districts. We have a statewide school system and four counties. That’s it. And if you think that solves all your problems, talk to the folks up front here. They’ll tell you that they’ve still got problems. Just because there are no cities and villages doesn’t solve everything. But the use, the fees have to be used within a reasonable period of time, and again, some states put that in their statutes. Obviously, if you’ve kept them for ten years, you didn’t really need it, did you? In which case, the court is going to say, whatever it was, it ain’t a legal land development condition, and so, A, pay it back, usually with interest, and B, you can’t levy it any more because you’ve made it crystal clear that you don’t need it, didn’t need it and so it’s not going to work.

NEXT SLIDE #34

Reviewing ever so briefly what the courts did -- and I expect a good number of you know what that is in California in the *Nollan* case and the *Dolan* case -- they were both land
development dedication cases. In California, the California Coastal Commission was requiring the dedication of a lateral, as opposed to a vertical, easement along the beach as a condition to redo a beach cottage. And the California Coastal Commission said we are doing this so that people on the other side of the cottages -- and there’s a street up there -- can see that that’s a public beach down there. And if they can’t see it’s a public beach, why, that’s not good. Well, the Supreme Court had a lot of fun with that. Justice Scalia, in his usual calm, collected and non-sarcastic manner, said, let’s assume for the sake of argument that it is possible for the State of California through the Coastal Commission to require such a dedication. When you look at the purpose, which is to make sure that people can see that you can walk back and forth, that there are people on the beach, and the alleged dedication, a lateral easement along the ocean, then as the court put it, the constitutional propriety disappears. And the Court said, you could have fooled around with the size of the house -- the bulk regulations -- and required bigger side yards so people could see. You could have required a height limitation so that people could see over the top, even -- leaving the cartoonists with a field day drawing pictures of towers like this -- but the Commission could have required a viewing spot on the property so that people could climb up and say, “Ah, beach! Public! I can go there.” Even that would pass muster. But the Court said there has to be this connection. There has to be a connection between -- the rational nexus test -- there has to be a connection between what it is the entity upon which you are levying the exaction is doing and what you are trying to accomplish.

And I want to set aside just for a moment and go briefly into the Dolan case, which sets out the proportionality standard. And note -- and I hope I have time to return to it, but I might not -- that assumes that there is a legitimate state interest in whatever it is -- public interest -- in what it is you’re trying to accomplish. Thus, for example, it can’t be the mayor needs another $50,000 in his campaign fund. That is not okay. And we did have a case from Hawaii -- I will depart for a moment, if I may -- we did have a case in Hawaii that got to the U.S. Supreme Court called Lingle vs. Chevron Corporation -- Lingle being the name of our governor. And in that case, the court did say that the issue of furthering a legitimate state interest is no longer a part of a Fifth Amendment taking issue investigation. Fifth Amendment taking issue usually comes up with a landowner’s property is reclassified to such a degree that there is no use left of the property or its value has been substantially diminished. This is not the time or the place to get
into that particular set of tests. But the court said in those situations, what the challenge is, you’re looking for compensation for a regulatory taking under the Fifth Amendment. We screwed up 20-some years before and said that whether or not the regulation for this legitimate state interest is an issue. Note that the court went on then to say, “And the rest of our jurisprudence is the same.” It’s still part of a Fourteenth Amendment challenge -- due process -- and specifically it is still part of a Nollan/Dolan analysis, which is what they call unconstitutional condition. So basically a three-parts test -- legitimate state interest, which is usually assumed -- most exactions are for roads, streets, housing, so forth -- there has to be a nexus, and then there has to be proportionality.

What the Court said in the Dolan case is, we are not bean-counters -- what Tyson referred to as “specifically and uniquely attributable test,” which last I heard was only applied in Illinois and Rhode Island and maybe one or two other rogue states that are doing the same kind of thing. We don’t require that degree of precision. But what we do require is some rough proportionality, once we’ve established nexus, between what you are requiring and what the developer/landowner is doing. In that case, the landowner was wanting to expand an A Boy Hardware Store. And as a condition of that expansion, which was also going to pave a large portion of what was a gravel parking lot, the local planning and land use authority said, you can do it, but we want two things from you. We want a public bike path dedicated and we want a floodway dedicated -- not controlled, but dedicated. We want that to be ours.

So the Supreme Court gets it, goes through its holding in Nollan, deals with rational nexus again, deals with public purpose -- legitimate state interest -- and says, okay, we can see that enlarging a hardware store, or any commercial interest, for that matter, is going to cause more traffic, and bikeways is a rational way to relieve that traffic -- leaving Justice Scalia to come up with one of his usual consensus building comments to the effect that “he had never seen anybody take a kitchen sink home on a bicycle.” Well, that’s true, but there are a lot of other things you can buy at a hardware store that you can take home on a bicycle. And the Court said, also if you increase the impervious surface, not only by the footprint of your building, but the footprint of your parking lot, which is now paved, we can see that a floodway dedicated in back so that the nearby Funnel Creek -- which if you see it, looks more like a drainage ditch -- sorry if
there are folks from Oregon out here -- that’s what it looked like to me when I saw it -- we can see that there is a connection there as well. You are going to reduce the runoff.

However, says the Court, your requirement is disproportional. You can’t, from what you have shown us, require the dedication of a bikeway because you haven’t shown us there is enough increase in traffic to warrant that dedication of a bikeway. And you can’t require the dedication of the floodway because you haven’t shown that there is enough water coming off the property that wasn’t coming off before to warrant that level of requirement.

Now as you see, these were both land dedication requirements, which leads me to the final portion of the remarks that I would like to make here, and then I will pass it over to Julian. Julian and I are more or less doppelgangers. We’ve done the same thing forever. We teach the same subjects. We used to teach -- still do at state universities. We’ve been out about the same time, and aside from the fact that we have reached occasionally different conclusions, we agree on almost everything. So I can say to him that he knows all there is to be known, and I know the rest. It’s easy. So he will cover everything that I don’t cover. NEXT SLIDE #35

What I wanted to make clear, based on what is required here, is this issue of what is unresolved. I take it from the Ehrlich case, which I just mentioned to you, that no one any more -- there are a few retrograde courts that are still in that category -- but no jurisdiction still really thinks that Nollan and Dolan only apply to dedications. The fact that the Supreme Court did apply it to dedications is irrelevant. Anybody want to bet me that they apply it to a situation like the Ehrlich court in California, if they ever get one and take it, I will be glad to buy you dinner anywhere you want in your jurisdiction. It’s just not going to happen. The Court is, if anything, more likely than the previous court to hold that Nollan/Dolan applies to all manner of exactions
except perhaps -- but if the Court gets it, I’m willing to be again they will probably agree --
except perhaps legislative decisions.

And here it takes just a little bit of a minute on *Ehrlich vs. Culver City*. This is also one
of my OIC cases -- Only In California. A private club -- not making any money -- the owner
goes in and says, I want to be reclassified and I want permission to build something that will
make money -- in this case, some multi-family condominium form of ownership. And Culver
City said, yep, that’s fine, except we want $200,000 as a mitigation fee for the loss of the
community benefit. You understand, this is a private facility, right? Talk about chutzpah.
Private facility -- community benefit though. So California says, we’re losing your tennis club,
so you need to pay us for that as a mitigation fee. Secondly, we want a few thousand dollars as
an art fee. The art fee was imposed legislatively. The mitigation fee was imposed
administratively.

The California court comes down with what was probably the biggest bombshell for
California, and that is, again, we can make no meaningful distinction between land development
conditions that are monetary and land development conditions that are dedications. So away
with the notion that *Nollan/Dolan* only applies to dedications. That leaves us with the art fee.
And the court said, we do this, by the way, on this other fee because it’s ad hoc. There is a
danger of overweening pushing on the side of government, leading to the statement which the
court made, and that is if the fee is legislatively imposed, *Nollan/Dolan* doesn’t apply. We apply
only the lightest scrutiny, and thereby hangs a continuing tale. The majority of the courts by a
little bit that have had legislatively imposed fees, as opposed to administratively imposed fees,
have not applied *Nollan/Dolan*. There are still some that have and do. They say the legislature
can take property under unconstitutional conditions just as easily as a zoning administrator can.
That makes the most sense to me, but it’s going to be a jurisdiction-by-jurisdiction matter.

The ludicrousness of the “fee applied legislatively, no matter what” came in the art fee.
Of course, this was imposed on everybody -- X percentage -- so we’re going to prove that.
Okay, think about that for a minute. Can anybody find me even a rational connection between
building a building and the need for community art? And my reaction is, a resounding no, of
Juergensmeyer: Thank you very much, David, and thank you, Tyson. I’m going to concentrate almost exclusively -- I’m just skipping some things that Tyson and David covered and I’m going to concentrate exclusively then on making some predictions.

Now I first started doing impact fee work in the early 1970s, and back then I was much wiser because I always refrained from making predictions. And the reason I did was that I was afraid -- you know, I would say “X is going to happen within 20 years from now” and it didn’t happen and then I’d get laughed at. But recently I realized that if I put something like a 20-year time frame on my prediction, I won’t have to worry about hearing the laughter, and so that has given me new courage to make some predictions. And so here they come.

I guess I should give you a little warning -- they are predictions, but really almost 100% of them are also things that I hope will happen and want to happen. So the three -- the hope, the want, the think will happen are quite combined -- as I just give you that warning. NEXT SLIDE #37
First prediction -- I think that we’re going to raise the issue more and more -- and Tyson and David really have covered this a bit -- of what is an impact fee? When is an impact fee not an impact fee, to phrase it another way? One of the reasons that I think we’re going to get over into this more and are already there in some jurisdictions is that the courts in some jurisdictions -- and we’ve had some discussion of that -- have put some stupid rules and limitations on what you can do with the impact fee. Some state legislatures have put some even more stupid limitations on what you can do with impact fees.

And let me just give my own jurisdiction -- my current jurisdiction -- Georgia. The Georgia statute, although it’s really very good compared to most other statutes, has one very, very weak spot, and that is, it has a list of the types of infrastructure that you can have as the basis for an impact fee. And as I’m sure you know if you’re from Georgia, guess what they left off -- schools. What these days do you need impact fees probably for the most? Schools. So we have a question here. Could you have a requirement of development condition, as David and Tyson have referred to it, for schools and simply not call it an impact fee? I’m just saying, we don’t operate under the state statute for this. We’re going to operate just under police power or just under general principles of land use regulation. So could you have what in most states be an impact fee and simply not call it that and still get Tyson to defend it’s validity? (off-mike response) Good, I thought that would be the answer. Yes, was his answer, in case you couldn’t hear it.

So I think we’re finding that we’re getting very creative, and maybe a little bit tricky -- but then, that’s what law is all about, isn’t it? -- in our use of descriptive terms for “revenue,” “raising,” “development conditions.” And I imagine you could all, or many of you at least, give
an example of something in your jurisdiction that isn’t called an impact fee, but really serves the same purpose. And I think we’re going to see more and more of that.

Second prediction -- I think we’re going to extend the types of infrastructure for which impact fees can be used to a broader and broader range of infrastructure items -- one, social infrastructure. What do I mean by social infrastructure? Well, two very common examples are childcare facilities -- another very common example -- affordable housing. And there is a session this afternoon later that I believe David is on, and Jim Nicholas and a couple of other people, that are going to talk about affordable housing, impact fees and related development conditions. But I think we’re going to see -- and we’re already seeing -- you know, we’re leaving the hard physical infrastructure things such as schools, roads, parks, jails, and we’re going to extend more to things like child care, affordable housing, and maybe even, David, art in public places, if we can give that a social function.

Another area of infrastructure I think we’re going to extend impact fees to more is so-called green infrastructure. Now we have done a little bit of green infrastructure in many park impact fee programs. Of course, many park impact fee programs have an open space element, for example, or a passive recreation lands element. But I think we’re going to extend them much more, and are already starting in that direction, to have environmentally sensitive areas of open space, aquifer recharge areas, habitat areas recognized as the type of infrastructure that new development creates a need for because new development has an impact on the need for protecting environmentally sensitive lands. New development has an impact on the need to protect and preserve habitat. Even if you’re development a “raped and scraped” piece of land where nothing but perhaps a few cockroaches are living, bringing new residents into the area are going to have an impact on nearby habitats -- the increased traffic, pollution and of course, our favorite friends, cats and dogs. And so new development does have very serious impact and creates a need for habitat preservation as well as environmentally sensitive area preservation. And I predict that we’re going to see more and more impact fees and related development conditions or regulations, whatever you prefer to call them, based on the need for preserving and protecting green infrastructure.
Another prediction -- I think we’re going to broaden the base for the applicability of many impact fees. For example, in most jurisdictions, who is charged a school impact fee? It’s usually only residential development. There are exceptions, but I’m predicting there will be many more exceptions because it’s not just residential development that creates a need or demand for school facilities. Schools are used these days for so many things beyond just sending K-through-12 children to be educated. They’re used for community education programs, vocational training programs for adults. They’re used for rec facilities for adult entertainment pre-school aged children. They’re used for voting, for community meetings, for hurricane and tornado shelters. So that any development these days creates a demand for the use of school facilities, and yet residential development is generally the only type of development that gets required to pay school impact fees.

Another thing -- the parks -- the same thing is normally true with parks. Only residential development are required to pay parks impact fees. And yet the use of parks by businesses, by office park developments for picnics, recreation, Little League-sponsored teams, competitive athletic events -- again, many jurisdictions already apportion the demand for park services between business development, residential development. But I think that trend will definitely continue.

Another thing I predict is that we’re going to combine many of the developer funding requirements that Tyson and David have already talked about. They’ve mentioned required dedications, in lieu fees, many of these -- and I think we’re going to sort of go back to a reassembly of these. NEXT SLIDE #38
And in the panel that I’ve already mentioned on affordable housing, I think this is going to be discussed some, but I just would like to put it in the context of my presentation. This is an example from an affordable housing ordinance that’s been proposed, and also one that’s been adopted, in Florida where the developer is given all of these choices in terms of how to make the contribution for the social infrastructure/affordable housing. On site construction -- don’t want to build it on site? Build it off site. Don’t want to build any new affordable housing? Buy market housing and convert it to workforce housing. Don’t want to do any of those first three? Call up Habitat for Humanity, cut a deal with them, give them the money and get them to assume the obligation to build it. And if you don’t want to do any of these first four, then cut us a check, and we’ll build the affordable housing. So I think we’ll see more of this. NEXT SLIDE #39

Next thing I think we’ll see more of is state and certainly regional impact fees. I’m from Atlanta right now, and I never know what number to use. Everybody has their own number. I’ve seen it for 160, I’ve seen it 220. But let’s just take 200 -- we have 200 units of government in the Atlanta metropolitan area. In Hawaii, you’ve got only five -- one state and four counties. In Atlanta, we have around 200 different units of local government. So a lot of them impose impact fees. Not many do, as a matter of fact, at the current time. But even if a whole lot of them did, can you see how little good can be done with that when they’re not coordinated programs, when they don’t cover regional demands and needs? I think in a metropolitan area such as Atlanta, impact fees are never going to make any great headway into our infrastructure needs or scenario unless regional fees are imposed. And I think the basic planning principle -- most of you held up your hands as regional planners. Maybe you’re aware of the Mount Laurel case in New Jersey in regard to exclusionary and inclusionary zoning requirements. Remember, the Supreme Court of New Jersey came up with the concept of defining the public welfare in terms of regional needs and said that all local governments have the responsibility of bearing
their fair share of regional needs. And I think in terms of infrastructure needs, only regional or perhaps even state impact fees can accomplish the fulfillment of those regional needs.

**NEXT SLIDE #40**

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**Proposal For A Unified Developer Funding of Infrastructure Act**

- Time has come for a unified and comprehensive statutory approach to Developer provided/funded infrastructure requirements

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Now I’ve spent a long time opposing impact fee statutes. The reason I did is because even though they are called enabling acts, most of them are really disenabling acts because they limit the types of impact fees that you can have or have amounts that can be collected or things of that type. But I think I’m going to change in my old age and advocate statutes for this area of the law if they can be comprehensive. And so I would suggest to you that the time has come for a unified Developer Funding of Infrastructure act. **NEXT SLIDE #41**

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**Proposal Cont.**

- Including:
  - Dedication and Construction Requirements
  - Mitigation Requirements
  - Required Contributions
  - Concurrency Requirements
  - Consistency Standards

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The things that I think should be included in it are listed here -- dedication of infrastructure requirements, mitigation requirement, required contributions, concurrency requirements -- if you have them in your jurisdiction -- consistency standards. All of these now are a bit of a mishmash in many jurisdictions.

And I am normally on the side of local government. That’s no secret, so I won’t try to hide it from you. But I think the development community often really gets a bad deal out of this
because they can end up having to pay twice when these are not properly coordinated or if proper and adequate credits are not given against, say, an impact fee for required dedications that have been made or something of that type. And so I think that if and only if we can combine these so that it is a unified demand that is placed on the development community, only then can we really be sure that we’re going to be fair and equitable and only require the proportionate share payment that Tyson started out by talking about. NEXT SLIDE #42

Furthermore, I think that the dual rational nexus test that both of my colleagues have talked about is essential here, as they have pointed out to you, for the constitutional validity of these developer funding requirements. And I think that if the dual rational nexus test that both prongs are embodied in the unified statute, then I think that will give greater protection to the development community, to those who pay them and greater protection against challenges to the local governments or regional authorities that impose them. I think one way of making sure that the dual rational nexus test is properly respected would be to include it in such a statute. NEXT SLIDE #43

Another prediction -- and this, I guess, in some way is more of a plea than a prediction -- I’ve become convinced that we’ve got to have a federal role in this area. In fact, I think one of
the reasons that we’re in such a sorry state in regard to infrastructure in this country is that the federal government withdrew from the area. Not too long ago, how was most local government infrastructure paid for -- or at least a major portion of it? Chris Nelson took his suitcase and went to Washington, filled it up with cash from the federal government and brought it back to the local government. And the federal government stopped doing that, by and large. And I think that unless it gets into the picture, at least in terms of trying to afford the funding of the unfunded deficit, the deficiency that we’ve built up in infrastructure that we can’t pass to the development community -- they’re not responsible for it, it’s previous development that we did not make pay adequately their proportionate share that caused our infrastructure deficiency, or our own lack of planning or capital programming or whatever. And I don’t think that local governments are ever going to be able to find the money to do this. So I think there has to be a federal funding role. A long time ago, the old Hart proposal -- Senator Gary Hart of Colorado came up with in 1985 a national infrastructure funding program that I think had a really great idea, a great process. Of course, it got nowhere. **NEXT SLIDE #44**

We had before the current Congress, or have had recently, some other national infrastructure funding proposals -- I don’t think frankly any of them are as good as the Hart proposal, but any of them I think would be better than what we’ve got now, which is basically nothing in most areas. **NEXT SLIDE #45**
Also, I think there has got to be a state role more than there is in most states, because in most states, the state government is basically saying to local governments, this is your problem. Fix it. And at the same time in many states, as you’re aware, they are coming up with constitutional amendments or whatever limiting the power of local governments to raise revenue. And yet the infrastructure deficit increases dramatically every day, or in fact, every minute. So I think that the state role has to be in terms of the type of statute that I have suggested. There also has to be money appropriated for solving the billions and billions of infrastructure deficits that we’ve built up. And only with the state role paralleling the federal role paralleling the local government role can we ever hope to even start digging ourselves out of the infrastructure hole.

So I’d just like to end with a cheery note. This is courtesy of Chris Nelson. This shows you what I think the future will really be like. Developments will be presenting the bouquet of infrastructure to local government any time they want to develop. And that’s what I see for the future. And also, I see it is the cover for the new version of the impact fee book that Chris Nelson, Jim Nicholas and I are having published by the APA, coming out some time either later this year or early next year. So I believe you can look for this happy view of the future on the book cover. Thank you. NEXT SLIDE #46
(Applause)

**Smith:** We have some time for questions, if you have any. If you do have a question, would you step to the microphone over here on this side of the room? Yes, sir?

**Questioner:** Thank you for your comments. I’m working on graduate-level stuff on impact fees and the future of that, where they’re going. I’m from California. And one of the issues that we come up with in the city I work for is we do all these impact fees to build this infrastructure, and then obviously there’s nothing to maintain them afterwards, even though they’re still doing that. We’re very limited in taxing people for the long term, but is there any approach or future hope for the impact fee field to get some of that maintenance money? Because we have a public facilities fee now for these social costs to build community centers, police department -- buildings -- but you can’t use them to pay your policemen or things like that -- actually use them. So where does that money come from? We can’t tax them. What do we do?

**Callies:** Did I understand that you’re from California?

**Questioner:** Yes.

**Callies:** Come to the next session. You can settle that all by means of a development agreement. Lots of developers often bind themselves or their successors to continue to keep up their infrastructure and indeed to do other things, as we’ll try to make clear in that section. You don’t have to worry about nexus proportionality if you’re doing a development agreement. And I defer to Julian on whether you can get operation and maintenance and so forth out of an impact fee.

**Juergensmeyer:** First, I’d say that David is correct, that certainly if you have a development agreement act or you can do it without an act, but that is the best way to go. There is a longer version of my presentation, so you know how lucky you are that I used the shorter one. And in the longer version, one of my predictions is that impact fees will be expanded to include operation and maintenance money.
Callies: But they probably do not quite make it yet. At least there is nothing on the books.

Smith: Yes, sir.

Questioner: Julian mentioned broadening the base of the impact fee by, for example, parks and schools because non-residents use them -- non-residential businesses use the facilities. But is there no validity to the argument that the commercial establishments, the industrial establishments provide the jobs that attracted the people there in the first place, and therefore they have a justifiable responsibility for supporting those activities?

Juergensmeyer: I think there is definitely that argument. I don’t necessarily buy it. Also I think you often have situations where, in the metropolitan areas where the businesses and so forth, none of their people actually live in the community. They all commute to the workplace, and yet they make use of the local facilities. But again, I think you’re correct -- there is that argument and how the courts will eventually resolve it, I don’t know. But you have a good point, of course.

Questioner: I would like you to say a few more words about the operations and maintenance fee. I’m from California and many jurisdictions are starting to impose those. They’re not allowed under the Mitigation Fee Act, as you know because they’re not infrastructure. But what essentially they do is a projection of the fiscal operations and maintenance of the fiscal operations and maintenance difference. And then they’ll discount it back over some time period -- let’s say 20 years -- or sometimes they’re tied to the life of a redevelopment area or the property tax isn’t going to the government, and they’ll make up for that with some capitalized value and then they’ll do it through the development agreement. And you just made a prediction that you see that possibly coming into the law. Could you talk a little bit more about that? Thanks.

Juergensmeyer: I’d really prefer that David answer this in terms of how you can do it now, because I think we’re just beginning to try to work it in to traditional impact fee methodology. But I think it would have to be, as you suggest, the sort of capital funds that I know the income
from those is used for the maintenance obligations in the future. Now Chris Nelson has actually written some things on this and the new book, for which we have the cover, does have a chapter on that. But I did not write that chapter and Chris is going to be kind enough to go to the microphone right now, I believe, and give you a better answer than I can.

**Nelson:** I’m Chris Nelson. O&M impact fees are certainly plausible in some states. They’re certainly legal. We think there’s a better way to go. The real difficulty local government has is it has a pool of money called the general fund that has multiple obligations and multiple demands to spend. One copout solution that could be a nifty solution is to download pieces of an obligation to enterprise accounts, enterprise funds, much as we’ve done for centuries, it seems — well, decades anyway — with water and sewer and now maybe storm water funds. So take, for example, transportation — you can use an impact fee methodology and actually calculate an annual transportation maintenance fee by land use. And then you charge that as an enterprise fund account — a fund-to-fund charge — to all land uses. And you’ll offload from the general fund obligations this burden and you’ll have a separate accounting system, and you’ve already got your machinery in place because you’ve got the property tax records already set up for the annual assessments. All you do is you have one more line added to the code on the property tax assessment that’s keyed into the proportionate share O&M assessment by land use. Oh, and if you do it for that, maybe fire, police, parks — there is a lot of facilities that you could offload from a general fund to enterprise account-like arrangements, but use the impact fee methodology for O&M, and you call those utility funds, not impact fees. And under many statutes — most, maybe — I don’t know — but utility charges have a whole different statutory foundation that may allow us to do this on particular facilities.

**Callies:** I would expect that would work as well, and I think probably better than most. One thing that one can do without going through a development agreement is to use incentives. Incentives won’t necessarily keep you from violating the Constitution, but it will prevent you from being sued by anybody who’s claiming you’re violating the Constitution, because if the incentive are large enough, it makes a whole lot more sense for a landowner or developer to pay the fee and take the incentives than it would be to file a lawsuit and everybody is in court for a year, two, three or four or five. So that’s always another way of approaching the same thing.
Smith: And I think one thing to look at when you’re putting together fees sometimes is whether you can include, for example, the equipment in a police cruiser or the furnishings in an office or a school, let’s say. And the argument is, well, those things are needed to put the more traditional infrastructure into place for it to exist. And I think in Florida, some people are looking at the idea that maintenance is required for it to be there. It can’t just be put there and left. But I think that’s an evolving area, certainly.

Questioner: I know you’re kind of at the end, so I can always ask this later. But we have a concept that we’ve been working on I wanted to throw out, and I think it kind of goes off of what Chris is saying. I’m from Alaska. I’m with the Mat-Su Borough. And we have service areas that we use to tax for fire service areas in particular because that’s a use that not all areas, because we’re so rural, choose to exercise. So they tax themselves a certain mill rate. And one of the arguments we’re getting from residential developers is that they’re not benefiting from, or their community is not necessarily having a direct benefit from things like schools. So they’re saying the residents who are living in that subdivision are the real beneficiaries and they shouldn’t be paying for that impact.

We’ve been kind of playing with something where we think we should still address some type of impact fee, but maybe put some type of school zone -- school impact zone -- over that community or that subdivision for an additional five years or three years, with just kind of that maintenance piece. So yes, here’s your direct impact. That helps us get some up front capital to maybe add classrooms, and then here the zone gets placed and those residents will have a maintenance fee for the next five years while we make additional upgrades to standardize that. That’s something we’ve been playing with. Is that legal? Does that sound like we’re going down the right road, or are we just totally off?

Juergensmeyer: You can answer it. She’ll have to retain the answer to that one. It sounds like from what you’re saying, you’re getting beyond an impact fee scenario here because now you can charge at the same time as the impact fee. But I -- certainly an interesting idea.

Questioner: Everything up in Alaska gets a little interesting. (laughs)
Juergensmeyer: Right, and that’s where local governments are finding themselves in the position of, is then they have to do something, and they are getting creative, not for any other reason than they have to do something.

Questioner: Thanks.

Smith: Okay, and we are out of time. Thank you.

(Applause)

(END OF SESSION)