Impact Fees in New York City? Legal Authority, Constraints, and Potential Options

Adalene Minelli [1]

New York City, like many other cities, faces numerous practical, political, and legal challenges in raising the revenue it needs to support its growing population. Against this backdrop are ongoing concerns about how the City will finance the additional public services and infrastructure necessitated by new development, as well as the costs it incurs in mitigating adverse impacts on existing communities and the environment. In this context, some have called for the City to explore whether to adopt a local impact fee program.

Broadly defined, impact fees are one-time charges imposed on new development as a condition of approval to offset its impact on local infrastructure, services, and the environment. Employed widely in other major U.S. cities, New York City is a notable outlier in that it does not have an official impact fee policy. However, unlike many other cities, New York State law is unclear as to whether local governments have the requisite authority to adopt one.

This article fills a notable gap in the legal literature by providing analysis on the question of whether New York City has the legal authority to impose impact fees on new development. It argues that should the City wish to adopt impact fees, it could do so through either its constitutional home rule authority or through its mitigation authority under state environmental review laws. This article also identifies a number of constitutional and statutory constraints that would likely restrict the design and scope of a local fee program, including limitations under the state's doctrines on preemption and local taxation, and under the federal exactions jurisprudence.

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Introduction

Defying projections of population decline,[2] New York City's population rose nearly eight percent in the decade leading up to 2020,[3] representing more than three-quarters of the entire state's population growth over the same period.[4] At the same time, the City also gained close to a quarter of a million housing units.[5] However, this new development has not been enough to stave off the City's ongoing affordable housing crisis,[6] and rents have reached record highs in some areas. Despite pandemic-related population losses beginning in 2020, some forecast that the City is on the path to quickly recovering its population,[7] and that its

[2] Annie Correal, New York City adds 629,000 people, defying predictions of its decline, N.Y. Times (Aug. 12, 2021).

[3] Eric Kober, Can't Keep a Great City Down: What the 2020 Census Tells Us About New York 1-3, Manhattan Institute (2021). With a population of 8,804,190, New York City is the most populous city in the United States, and the second most populous city in North America, second only to Mexico City, Mexico. U.S. Census Bureau, 2020 Census of Population and Housing, Quick Facts: New York City, New York. Population growth between 2010 and 2020 was greatest in the outer boroughs, specifically Brooklyn (9.2%) and Queens (7.8%). Eric Kober, Can't Keep a Great City Down at 1-3 *citing* U.S. Census Bureau, 2010, 2020 U.S. Census.

[4] "New York City alone accounts for 76.4% of New York State's population growth of 823,147 between 2010 and 2020." Eric Kober, Can't Keep a Great City Down, at 7.

[5] Geography of New Housing Development, Furman Center, *available at* https://furmancenter.org/stateofthecity/view/the-geography-of-new-housing.

[6] Eric Kober, Can't Keep a Great City Down at 7 (stating that housing growth was "not sufficient to alleviate the city's chronic housing shortage because the population continues to grow"). Notably, the construction of housing fell drastically during the pandemic, potentially offsetting any relief for the City's chronic housing shortage. *See* N.Y.C. Dep't of City Planning, Office of Management and Budget, Ten-Year Capital Strategy Fiscal Years 2022-2031 (2022) ("The COVID-19 pandemic and the associated temporary construction pause resulted in a short-term slowdown in housing production. In 2020, housing completions were down 19% and construction permits were down 28% compared to 2019.")

[7] Jake Offenhartz, NYC Has Regained Three-Quarters Of Residents Who Fled During COVID, Data Suggests, Gothamist (Nov. 16, 2021) *citing* N.Y.C. Comptroller, The Pandemic's Impact on NYC Migration Patterns (Nov. 15, 2021); *see also* N.Y.C. Dep't of City Planning, Population Estimates For New York City and Boroughs as of July 1, 2021 (n.d.) (noting that "the estimated large decline in the population after the [2020 Census] is a result of temporary, pandemic-related phenomena" and that "[m]any of the trends contributing to the decline have attenuated or reversed."). Some, however, have been less optimistic about New York City's post-Covid recovery. See Sarah Holder, More People Are Moving to Manhattan Than Before the Pandemic, Bloomberg (Jun. 8, 2022) ("Experts warn that based on the current status of New York City's recovery, some of the bruises to the population inflicted by Covid will likely endure.").

population will continue to rise in the coming decades,[8] in which case the demand for new development can be expected to continue.

This new development offers a variety of potential social and economic benefits for the City, including promoting housing affordability, generating new jobs, expanding the tax base, and reducing segregation. Increasing development in transit-friendly New York City could also benefit the climate by displacing growth that would otherwise occur in the surrounding suburbs, where transportation is almost entirely dependent on private cars and per capita greenhouse gas emissions are much higher than in the City.[9]

At the same time, new development also imposes certain costs, including imposing new pressures on critical physical and social infrastructure. Much of this infrastructure is already overburdened and in need of upgrades.[10] In 2021, the City released its most-recent Ten-Year Capital Planning Strategy, which detailed the City's plan for investing more than $133.7 billion in infrastructure improvements in areas such as roads, stormwater and wastewater management, water supply and treatment, community facilities, and open space.[11] Paying for this will not be easy as raising revenue to pay for public infrastructure and services can be both legally and politically challenging for cities.[12] As a legal matter, cities, including New York, have quite limited authority to adopt new taxes to raise revenues.[13] As a political matter, local governments are also particularly susceptible to inter-local

[8] "New York City's population is at a record high and is projected to surpass 9 million by 2050[.] This is true across the metropolitan region as well: The current regional population of 23 million is expected to swell to over 26 million by 2050." City of New York, OneNYC 2050: Building a Strong and Fair City, Vol. 1, p. 18 (2019).

[9] Katrina Wyman et al., Valuing Density: An Evaluation of the Extent to which American, Australian, and Canadian Cities Account for the Climate Benefits of Density through Environmental Review, Lincoln Institute of Land Policy, Working Paper WP22KW1 (2022).

[10] City of New York, OneNYC 2050: Building a Strong and Fair City, Vol. 9, p. 6 (2019). ("Much of the city's infrastructure was built a century ago and has suffered from historic disinvestment, neglect, and poor maintenance. … To meet the needs of a growing population and economy, and to prepare for a changing climate, we must fortify and upgrade our infrastructure."); N.Y.C. Dep't of Design & Construction, A Strategic Blueprint for Construction Excellence 16 (2019) ("While population and job growth are clear signs of a healthy city, they place an increasing burden on … critical infrastructure … including streets and the water and sewer systems. Growth and a strong economy also create increased demand for important public safety services, waste management, and opportunities for culture and recreation.")

[11] N.Y.C. Dep't of City Planning and Office of Management and Budget, Ten-Year Capital Strategy Fiscal Years 2022-2031 (2021).

[12] Presently, the City "finances its capital program primarily through the issuance of bonds." *Id,* at I-4.

[13] *See infra* Part III.B.3.

migration, as residents exit a high-tax jurisdiction for a neighboring locale with lower rates. [14]

In this context, some have called upon the City to impose new types of charges on development projects themselves that would help pay for the impacts on incumbent communities and the infrastructure and services the new communities require. One option in particular that has been put forward is for the City to make greater use of impact fees in its approval processes for new developments. Broadly defined, impact fees are one-time charges imposed on new development as a condition of approval to offset the development's impact on local infrastructure, services, and the environment. They are based on the idea that new development should be responsible for paying for a proportionate share of the new or additional public infrastructure and services needed to support the development, and for mitigating its adverse impacts on the environment.

Setting aside questions about the merits of impact fees—about which there is a longstanding debate—there is considerable uncertainty about whether the City has the legal authority to adopt a local fee program, as well as how a program might be structured to pass legal muster. Other legal scholars have lamented the lack of clarity about this issue. [15] This article examines these legal questions in order to cast new light on the policy debate surrounding impact fees. It is the only recent paper offering an in-depth legal analysis of the City's authority to implement such fees.

After reviewing the relevant legal precedents, we posit that there is space in the legal landscape for New York City to adopt an impact fee program if it wanted to do so. We see two potential legal avenues for adopting such a program: the City could use its home rule authority to establish a new legislative fee program or it could create a new fee program under the auspices of the City Environmental Quality Review (CEQR) procedure. Both routes seem possible, albeit constrained by certain constitutional and statutory limits. Imposing fees under CEQR might be procedurally easier than creating a new legislative fee program, but it may also, depending on how it's structured, cover a narrower class of projects.

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[14] Andrew Haughwout et al, Local Revenue Hills: Evidence from Four U.S. Cities, 86(2) The Rev. of Econ. & Stat. 570 (2004).

[15] *See, e.g.,* Noah Kazis, Furman Center, Ending Exclusionary Zoning in New York's Suburbs 19 (2020) ("[New York courts] have left ambiguous whether and when local governments have the authority to impose impact fees."); Sydney Céspedes, Laura Wolf-Powers, Elena Conte, Public Action Public Value: Investing in a just and equitable Gowanus neighborhood rezoning, Pratt Center for Community Development (2019) ("[The use of impact fees] is subject to debate, with some experts who see insurmountable legal barriers while others cite lack of political will. … Further investigation required.").

Importantly, the analysis in this paper focuses on New York City but its findings are also potentially relevant to the authority of other local governments in New York State to implement impact fees, though certain rules may vary based on the type of municipal corporation. Moreover, the analytical framework that we offer for analyzing local governments' authority to adopt impact fees could be used to assess the authority of local governments in other states, where the underlying law differs, but the same issues of local authority are likely to be relevant.

I. Why Consider New Impact Fees in NYC?

Impact fees are one of many types of 'value capture tools' that governments can use to raise funds for addressing the impacts of new development[16] and New York City already has a number of charges in place. Thus, before we can evaluate which types of legal structures may be available, we have to first isolate the ways in which a new fee program might differ from those charges that are already in place today. With this objective in mind, the following section maps out the suite of existing development impact fees in New York City. From here, we describe what proponents believe are the deficiencies in the current regime that a new impact fee should address.

A. Existing development impact charges in New York City

New York City currently imposes both formal and informal fees on development to mitigate social and environmental impacts from new projects. These fees are designed to address a range of impacts, including the risk that the new development may raise localized housing costs, increase the burden on local infrastructure (such as roads and schools), or alter the physical environment. However, as will be described, these charges do not apply to a wide enough range of projects and/or address the full suite of development impacts that some proponents believe should be addressed.

The City's experience with impact fees goes back several decades. In the 1980s, the City adopted a zoning law creating a narrow type of impact fee program for the purpose of mitigating the risk that new development would displace local

[16] 'Value capture tools' refer to the various public financing strategies that recover a share of the value from development. Lourdes Germán & Allison Ehrich Bernstein, Land Value Capture: Tools to Finance our Urban Future, Lincoln Institute of Land Policy (2018). Other tools include property taxes; transferable development rights, betterment contributions, public land leasing, inclusionary housing and zoning, linkage or impact fees, and business improvement districts. *Id*.

"manufacturing, warehouse and related business[es]."[17] Specifically, under the City's now-retired Industrial Retention and Relocation Program, fees were collected from landlords who converted commercial properties into residential space, which were then used to provide relocation assistance to businesses that were displaced from the converted sites.[18]

In more recent years, the City has sought to stimulate the private market to produce affordable housing through a narrow type of in-lieu fee.[19] Enacted in 2016, the City's Mandatory Inclusionary Housing (MIH) Law requires developers to include a certain number of permanently affordable units in new residential multifamily buildings in any part of the City that has been rezoned to allow for the construction of more residential units.[20] The law applies to developers where the City initiated a rezoning, as well as in private rezoning applications where the developer can receive a "density bonus"[21] on the condition that they set aside affordable units.[22] In certain scenarios, however, the law also permits the developers to pay into an affordable housing fund—which is then used by the City to develop and preserve affordable housing in the local community—rather than setting aside affordable units on site.[23]

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[17] Shawn G. Kennedy, About Real Estate: Businesses offered aid if they relocate within the city, N.Y. Times (Oct. 24, 1984).

[18] *Id.* The fees were collected and managed by a quasi-public agency, known as the Business Relocation Assistance Corporation. *See* Making it in New York: The Manufacturing Land Use and Zoning Initiative, Pratt Institute for Community Development (2001). The program was allowed to sunset in 1997 by the zoning resolution which established the program.

[19] "When a developer is required to build units onsite but allowed to pay a fee as an alternative the fee is called an 'in-lieu fee.' When a program is structured to require fees instead of requiring onsite units, the fee is called an 'impact fee' or 'linkage fee.'" In-Lieu Fees, Inclusionary Housing. A linkage fee is a specific type of impact fee that "attempt[s] to link the production of market rate real estate to the production of affordable housing." Linkage Fee Programs, Inclusionary Housing. "While the name is similar, linkage fees should not be confused with in-lieu fees," such as those utilized in the City's MIH laws. *Id.*

[20] N.Y.C. Council, Mandatory Inclusionary Housing.

[21] "A density bonus is an incentive-based tool that permits a developer to increase the maximum allowable development on a site in exchange for either funds or in-kind support for specified public policy goals." Density Bonus, World Bank.

[22] N.Y.C. Council, Zoning Resolution 23-154: Inclusionary Housing (last amended Feb. 14, 2018).

[23] Only new buildings with between 11 and 25 units have the option of paying in lieu fees instead of building affordable units, while buildings with 10 or less units are exempt from MIH's requirements altogether. N.Y.C. Council, Mandatory Inclusionary Housing. Notably, these funds must be used "in the local community district or within a half mile radius" of the project. *Id.* Funds are freed for use anywhere in any community district in the same borough if they are not used within ten years. N.Y.C. Council, Zoning Resolution 23-154: Inclusionary Housing (last amended Feb. 14, 2018).

The City also regularly imposes charges via its environmental review procedure, the City Environmental Quality Review (CEQR).[24] CEQR is the process by which City agencies evaluate the environmental impacts[25] of their discretionary actions.[26] Private development projects are subject to CEQR review where they require discretionary approvals—such as a zoning change—by the City. CEQR's authorizing legislation, SEQRA, differs from some other environmental review laws, including the National Environmental Policy Act, in that it obligates the agency reviewing a land use change to mitigate identified significant adverse impacts "to the maximum extent practicable."[27] City agencies are typically the parties that undertake the requisite mitigating actions.[28] However, sometimes—especially where a developer has proposed a given land use change—approval may be contingent on the developer taking some action to mitigate harms identified through the CEQR process. For example, a developer whose proposed project

[24] As a point of clarification, mitigation fees issued under CEQR should not be confused with fees paid by a private applicant for the filing or modification of a land use application. *See* DCP, Filing an Application & Paying Fees (describing and distinguishing "land use fees" and "CEQR filing fees").

[25] The CEQR Technical Manual, which provides guidance to city agencies on how to conduct their environmental reviews of proposed projects, identifies nineteen categories of environmental impacts that agencies should assess: land use, zoning and public policy; socioeconomic conditions; community facilities and services; open space; shadows; historic and cultural resources; urban design and visual resources; natural resources; hazardous materials; water and sewer infrastructure; solid waste and sanitation services; energy; transportation; air quality; greenhouse gas emissions and climate change; noise; public health; neighborhood character; and construction. N.Y.C. Mayor's Off. of Envtl. Coordination, CEQR Technical Manual (2021 Update). Though not legally binding, it is the city's policy to analyze every proposal against each of these technical areas when conducting environmental review under CEQR. *See* Ordonez v. City of New York, 110 N.Y.S.3d 222 (2018); N.Y.C. Mayor's Off. of Envtl. Coordination, CEQR Technical Manual (2021 Update).

[26] There are three types of agency actions that trigger CEQR: (1) actions that are directly undertaken by agencies; (2) actions that are funded by agencies; and (3) private actions that require discretionary approvals by agencies. N.Y. Envtl. Conserv. Law § 8-0105(4)(i) [hereinafter SEQRA].

[27] SEQRA § 8-0109(1). The law also requires agencies to "shall make an explicit finding that … to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided" before the agency may proceed with the action in question. *Id* at § 8-0109(8). See also Gerrard et al., Environmental Impact Review in New York § 6.01 (2019) ("Although the mitigation and findings aspects of the statute are often collectively referred to as the 'mitigation' requirement, it should be kept in mind that SEQRA requires both that the agency take measures to mitigate and that it make a finding that adverse environmental effects have in fact been mitigated.") (emphasis in original). Adalene Minelli, Reforming CEQR: Improving Mitigation under the City Environmental Quality Review Process, Guarini Center on Environmental, Energy and Land Use Law (2020).

[28] Minelli, Reforming CEQR.

would reduce open space in a given area could be required to dedicate open space on the project site.

On occasion, the City has permitted developers to pay a *mitigation fee* in lieu of undertaking a specific act to mitigate the project's impact.[29] The critical thing to note about *in-lieu mitigation fees* under CEQR is that they are not regularly used.[30] This is because, as the law is applied today, in-lieu fees are only used where the developer would otherwise be able to undertake the mitigation action itself; an in-lieu fee would not be used where the developer does not have the jurisdiction or ability to undertake the needed action. For example, a developer would not be given the option to pay an in-lieu fee for impacts on sewer lines or wastewater management because the developer never had the ability to mitigate these impacts in the first place. Only a government agency could address these types of impacts, which means taxpayers would be required to provide the funding for the needed improvements through the agency's budget. If such funds were unavailable, the harms might go unmitigated.

The City has also, on occasion, come to informal agreements with developers outside of the CEQR process that condition a project's approval on the developer making certain financial contributions. For example, in exchange for special permissions for a controversial mixed-use building project in Manhattan's coveted South Street Seaport,[31] developers agreed to pay $40 million to the South Street Seaport Museum, in addition to $9.8 million toward climate resiliency infrastructure and capital improvements at Titanic Park and $3.75 million towards vessel docking improvements at an adjacent pier.[32] These payments, which are not formally required by any particular law, could be considered *de facto* impact fees. However, given the informal process through which such charges are conjured, it is difficult to predict when they will be applied and what types of impacts they will mitigate. This presumably makes these informal fees of relatively little comfort to those seeking comprehensive land use reforms. In addition to informal agreements with the City, some developers have also entered into "Community Benefits

[29] Minelli, Reforming CEQR.

[30] Minelli, Reforming CEQR.

[31] Because the applicants sought discretionary approvals (including zoning text amendments), the project was required to undergo CEQR review and a final environmental impact statement was issued in 2021. Notably, the financial contributions procured by the City from the developer were not cited in the Final Environmental Review Statement. NYC Dept. of City Planning, Final Environmental Impact Statement for 250 Water Street, (issued October 8, 2021); NYC Dept. of Environmental Coordination, 250 Water Street, CEQR Access (last accessed Feb. 4, 2022).

[32] Sebastian Morris, Howard Hughes Corporation Awarded Final Approvals To Construct 250 Water Street In South Street Seaport, Manhattan, YIMBY (Dec. 31, 2021).

Agreements" (CBAs), pursuant to which the developer pledges to provide certain benefits to the community such as additional affordable housing or environmental improvements in exchange for the community's pledge not to oppose the project.[33] CBAs, however, suffer the same deficiency as ad hoc fees—they are not formally required.[34]

B. Calls for new fees

Against this backdrop, some proponents are calling for the City to explore imposing new types of fees on development. There are two main reasons that these proponents believe new fees are needed. First, they hope that new fees would provide a convenient means of financing infrastructure improvements and public services throughout the City, which is generally quite fiscally constrained. Second, they believe the current suite of fee programs have failed to adequately mitigate or offset the adverse effects that new developments routinely have on existing communities, such as increases in local rents,[35] diminished open space, and school overcrowding. Below, we summarize the arguments that have been presented for adopting new impact fees for these two purposes. We first address the arguments for using fees to protect incumbent communities and then turn to discuss the arguments for using fees to supplement the City's other efforts to raise revenue for infrastructure.

1. Fees as a means of supporting new populations

Some community groups have called for the City to adopt impact fees to address funding gaps for capital improvements necessitated by new growth.[36] The crux of the problem here is that many types of new development are not subject to either MIH or CEQR—because, for instance, they are commercial projects or they don't require zoning changes—which means that there is no vehicle for the City to

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[33] *See* New York City Bar Association, The Role of Community Benefit Agreements in New York City's Land Use Process (Mar. 8, 2010).

[34] For a critical assessment of CBAs, see Vicki Been, Community Benefit Agreements: A New Local Government Tool or Another Variation on the Exactions Theme? 77 U. Chicago L. Rev. 5 (2005).

[35] Note that some scholars dispute the idea that upzonings regularly lead to increases in neighborhood rents and displacement. See, e.g., Ingrid Gould Ellen, Katherine O'Regan & Vicki Been, Supply Skepticism: Housing Supply and Affordability, Furman Center for Real Estate and Urban Policy (2018).

[36] Notably, Manhattan Community Board 1 has advocated for state enabling legislation for impact fees, and has issued resolutions in support of state bills that would create impact fees for schools (which ultimately did not pass). Matthew Fenton, Could Anybody Use a Quarter of a Billion Dollars Worth of Infrastructure?, The Broadsheet (May 8, 2018).

impose a development fee on the new project if it wanted to do so. And if the growth these projects produce was not anticipated during the City's budgeting process, there may not be funds available to make the necessary infrastructure upgrades as it occurs.

Manhattan Community Board 1, which represents neighborhoods in lower Manhattan and Governor's Island,[37] has been a vocal critic in this regard. Pointing to impact fee programs in other major cities, including San Francisco, Seattle, Phoenix, and Portland, the Board has called on the City to consider whether it might benefit from adopting fees to fund improvements across a wide range of areas, including: water and sanitation; waste management; transportation; open space; public facilities; and public health and safety.[38] Other groups have expressed support for new impact fee programs as well. For example, in response to a City proposal to rezone the Brooklyn neighborhood of Gowanus, the Pratt Institute for Community Development—a community-oriented research center in New York City[39]—put forward the idea of using value capture mechanisms, including impact fees, to leverage publicly created value to address the capital needs of three public housing developments in the neighborhood.[40] The Department of Environmental Protection (DEP), which is responsible for maintaining the City's sewers and drinking water system, has also floated the idea of using development impact fees to "recover a portion of the amount of infrastructure investment made to support growth."[41] More recently, the New York City Independent Budget Office (IBO)

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[37] Manhattan Community Board 1 is one of 59 community boards across New York City. It serves as an advisory board to the City on land use and zoning, budget, and municipal services in neighborhoods across lower Manhattan. NYC Manhattan Community Board 1, About CB1.

[38] Rajiv Kumar Myana & Sarita Rupan, Presentation: Developmental Impact Fees, NYC Manhattan Community Board 1 (n.d.); Sarita Rupan, Development Impact Fees, NYC Manhattan Community Board 1 (2018).

[39] The Pratt Center for Community Development is a research center within the Pratt Institute in New York City. The Center works closely with community-based organizations on sustainable development issues. *See* Pratt Center for Community Development, Mission.

[40] Sydney Céspedes, Laura Wolf-Powers, Elena Conte, Public Action Public Value: Investing in a just and equitable Gowanus neighborhood rezoning, Pratt Center for Community Development (2019). They noted, however, that further investigation into the legality of a potential local fee program would be needed. *Id. See also* Regional Plan Association, The Fourth Regional Plan, Executive Summary, 20 (2021) ("Recommending value capture from real estate to fund new transit stations or line extensions, as well as more affordable housing near transit"). After a decade of negotiations with local community groups, the City approved the Gowanus rezoning in 2021 and agreed to commit $200 million to upgrade public housing and an additional $250 million to parks, drainage infrastructure, and community amenities. N.Y.C. Office of the Mayor, Press Release: Mayor de Blasio Celebrates Council Passage of Gowanus Neighborhood Plan (Nov. 23, 2021).

[41] NYC Dep't of Env. Protection, Presentation: Water and Sewer Rate Study (2010).

put forward the idea of using impact fees on construction projects to generate revenue for the City to fund new public services and infrastructure projects.[42]

2. Fees as a means of protecting incumbent communities

For a second camp of proponents, impact fees offer a promising vehicle for New York City to better protect, or at least compensate, incumbent communities from the adverse impacts of new development. These proponents have also been particularly focused on expanding the use of fees for projects that go through CEQR to compensate communities for the adverse impacts identified through the environmental review process. They feel that CEQR's current approach to mitigation is often inadequate and have suggested that it could be bolstered through broader recourse to fees in prior research that we conducted on mitigation under CEQR, a number of stakeholder groups expressed support for the idea of incorporating a mandatory fee program into CEQR.[43] Proponents of this camp have proposed using development fees to preserve communities' access to open public spaces throughout the City. The Municipal Art Society of New York (MAS) and New Yorkers for Parks, for example, have noted that "open space access and sunlight availability continue to be undervalued," and that many development impacts on open spaces tend to go unmitigated in the City's environmental review of new projects. To this end, they have recommended that the City develop a pilot impact fee program for projects that reduce sunlight.[44] Another community group, Class Size Matters, has proposed using impact fees to fund the construction of new schools as a means of addressing school overcrowding caused by residential rezonings.[45]

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[42] New York City Independent Budget Office, Budget Options for New York City (2022). IBO notes that "[t]here would likely be legal restrictions on how and where the city can spend the proceeds, but in general, the revenue could be spent on anything that is reasonably connected to the impacts of the project in question." *Id.* at 89.

[43] Minelli, Reforming CEQR, at 36. Notably, however, support for mandatory impact fees was more divided among different stakeholder groups.

[44] The Municipal Art Society of New York & New Yorkers for Parks, A Public Champion for the Public Realm 17 (2020). The MAS proposal does not provide details on how an impact fee for sunlight might be structured, leaving open the possibility that the group would support accounting for sunlight impacts through a new legislative fee or expansion of the existing CEQR mitigation program.

[45] Space Crunch in NYC Public Schools: Failures in policy and planning leading to overcrowding in the city's schools, Class Size Matters (2014).

3. Link with capital planning

Importantly, the idea that impact fees could be used to plug holes in the City's operating budget is part of a broader coalition of voices that seek to reform the City's budgeting and planning frameworks. Corey Johnson, former Speaker of the New York City Council, was a powerful member of this coalition. Indeed, in 2020, Johnson's office published a report that stated that the City's "budget process fails to sufficiently…fund the infrastructure needed to accommodate projected growth."[46] To remedy this problem, the Speaker's office introduced legislation that would create a new comprehensive planning framework for New York City. This comprehensive planning framework would streamline the City's existing processes for strategic, budget, and land use planning into "a single process"[47] that budget allocations could be more closely aligned with needs of new growth.

While the comprehensive planning proposal does not directly call for impact fees, the concerns about the lack of dedicated funding for managing growth that inspired the legislation have been echoed among advocacy groups across the City calling for new fees. Outside of City Council, community groups have also signaled their support for using impact fees to manage the adverse consequences of growth in combination with a comprehensive planning framework. In particular, MAS has recommended that the City "evaluate how a development impact fee program could be structured to generate funding for development mitigation" for impacts identified through the environmental review process.[48]

The idea that impact fees could be used as a source of revenue for major capital projects is consistent with the academic literature that frames impact fees as a potential tool for local governments to finance growth. There is little dispute that as cities' populations grow, their need for public infrastructure—from roads to schools—grows as well. Yet cities face a number of constraints in paying for such new infrastructure, especially in advance of the new residents' arrival.[49] Looking

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[46] Annie Levers & Louis Cholden-Brown, Planning Together: A New Comprehensive Planning Framework for New York City, New York City Council's Office of Strategic Initiatives (2020).

[47] NYC Council, Press Release: Speaker Corey Johnson Unveils Legislation to Create A New Ten-Year Comprehensive Planning Cycle for New York City (Dec. 16, 2020) ("The legislation requires the city to streamline its planning mandates into a single process. The City's strategic planning, budget, and land use planning process is now currently spread out over a dozen documents, reports, and plans already required by local law.")

[48] Alia Soomro & Spencer Williams, Towards Comprehensive Planning: Moving Beyond our Comfort Zone, The Municipal Art Society of New York (2021).

[49] The increase in tax revenues that comes from an influx of new residents can be expected to lag the need for capital to finance new infrastructure.

at New York State specifically, Article XVI of the State Constitution expressly limits local governments' authority to issue new taxes.[50] The State Constitution also limits cities' ability to take on new debt, which further constrains their ability to finance new infrastructure. Given these fiscal constraints, impact fees might be a valuable source of funding for new infrastructure projects.

In summary, we interpret the proponents of new impact fees as seeking to fix two distinct problems with New York City's current framework for imposing fees on development. First, the existing frameworks only apply to a limited number of projects. The vast majority of development projects do not need special discretionary approvals from the City[51] and therefore do not undergo CEQR review through which they might have compensatory mitigation requirements imposed on them. Many development projects (including all commercial projects) also are not subject to the City's MIH laws and therefore would not be required to pay affordable housing fees.[52] Thus, many development projects could bypass fee requirements under both CEQR and MIH. Second, even in the instances in which developers are made to pay fees under CEQR or MIH, these fees only cover limited types of impacts or are not imposed in a comprehensive or transparent manner. Fees issued under the City's MIH law only address affordable housing, and the City lacks laws requiring fees for other types of impacts that might be revealed under CEQR. There are also no official city policies or guidelines on how or when fees for impacts other than affordable housing might be issued to new development—whether under CEQR or on an ad hoc basis—nor are there official mechanisms for reporting funds that have been collected or tracking how the funds are ultimately spent.

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[50] *See infra,* note [fn citing N.Y. Const. Art. XVI, § 1].

[51] At present, around 80 percent of New York City's development projects are permitted "as of right." This means that development projects that conform to all relevant zoning regulations are not subject to discretionary agency approval. And while non-conforming projects are subject to environmental review before they can be approved, the City's current environmental review laws do not mandate that developers pay non-processing fees as a condition of approval. *See* Minelli, Reforming CEQR, at 7 ("As-of-right development projects, which constitute 80 percent of new development in New York City, would not typically be subject to CEQR, and therefore its mitigation requirement, because such projects do not require discretionary approval by the City."); *see also* SEQRA Rules § 617.5(b)(25) (excluding "ministerial decisions," such as permit approvals, from SEQRA requirements).

[52] As an alternative to "traditional inclusionary housing programs," some states have turned to a specific type of impact fee known as "linkage fees" in which "communities … charge developers a fee for … new market-rate construction and use the funds to pay for affordable housing." Linkage Fees, Inclusionary Housing. Interestingly, "linkage fees were [initially] developed to apply to commercial projects where an on-site requirement would be impractical or even undesirable." *Id.*

C. Criticisms of impact fees

Before moving on, it is important to emphasize that there is substantial debate among scholars and stakeholders as to whether impact fees are desirable. Here, there are two main lines of criticism. First, some housing economists and others argue against impact fees on the grounds that they increase housing costs, thus aggravating the affordable housing crunch.[53] This concern may be especially pertinent in New York City where the combined effects of new impact fees and other pre-existing costs that the City imposes on development, such as MIH obligations or environmental review costs, might make otherwise viable projects uneconomic. In this case, impact fees might be blamed for aggravating the affordable housing crisis by constraining supply.[54]

A second but related strand of criticism questions impact fees from the perspective of distributional fairness. According to this view, the very factors that make impact fees appealing to a neighborhood's current residents, also make them unfair. In particular, this perspective argues that impact fees are inequitable because they disproportionately burden new community entrants, such as first-time homeowners, with the cost of maintaining public infrastructure while shielding incumbent residents from these costs.[55] This fairness-oriented critique is not new. In fact, writing in 1957 as Chief Justice of the New Jersey Supreme Court, Arthur Vanderbilt wrote:

> The philosophy of this ordinance is that the tax rate of the borough should remain the same and the new people coming into the

[53] *See, e.g.,* Vicki Been, Impact Fees and Housing Affordability, 8(1) Cityscape: A Journal of Policy Development & Research 139 (2005); Shishir Mathur, Paul Waddell, Hilda Blanco, The Effect of Impact Fees on the Price of New Single-Family Housing, 41(7) Urban Studies 1303 (2004); Marla Dresch & Steven M. Sheffrin, The Role of Development Fees and Exactions in Public Finance, 90 Annual Conferences on Taxation and Minutes of the Annual Meeting of the National Tax Association 363 (1997); Larry D. Singell & Jane H. Lillydahl, An Empirical Examination of the Effect of Impact Fees on the Housing Market, 66(1) Land Economics 82, 90 (1990).

[54] For a discussion of the relationship between impact fees and housing prices, see Jennifer Evans-Cowley & Larry L. Lawhon, The Effects of Impact Fees on the Price of Housing and Land: A Literature Review, 17(3) J. of Planning 351 (2003).

[55] *See, e.g.,* Benjamin Dachis, Hosing Homebuyers: Why Cities Should Not Pay for Water and Wastewater Infrastructure with Development Charges, C.D. Howe Institute 3 (Aug. 9, 2018) (stating, "[t]he up-front costs of all [development changes] presents a potential equity concern, to the extent that new homebuyers have to pay up front for all development costs while existing homebuyers can get a free ride."); John Yinger, The Incidence of Development Fees and Special Assessments, 51(1) National Tax Journal 23, 23 & 29 (1998) (stating, "the burden of special assessments falls entirely on new residents" and "[d]evelopment fees not only insulate existing residents from the costs of infrastructure for new development but also give them a capital gain").

> municipality should bear the burden of the increased costs of their presence. This is so totally contrary to tax philosophy as to require it to be stricken down. [56]

An emerging line of environmentally-oriented scholarship also casts doubt of the wisdom of impact fees from a climate perspective. According to this school of thought, policies such as impact fees, which constrain the production of new housing in urban areas by increasing development costs, could undermine climate goals by inadvertently promoting urban sprawl. [57]

For the purposes of this article, we do not attempt to wade into the debate between the pro- and anti-impact fee camps. Instead, our purpose is merely to evaluate the extent to which New York City could legally adopt impact fees if policymakers were to believe that such a program would be desirable.

II. Options for New Impact Fees

Given our understanding of the varied purposes that proponents hope new impact fees would address, there appears to be two formulations of potential new impact fee programs which could address their concerns.

A. Legislative impact fees

First, to address the concerns that impact fees are not imposed on a wide enough range of projects under current laws, the City might opt to pass new legislation establishing an impact fee program that would apply to a broader range of development projects than are currently captured by the City's CEQR or MIH

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[56] Daniels v. Borough of Point Pleasant, 139 A.2d 265, 267 (1957).

[57] A substantial body of literature indicates that increasing urban density reduces regional GHG emissions by encouraging populations to live in areas where mass transit and non-motorized methods of transportation are possible. For a review of literature regarding the relationship between development density and climate change, see Katrina Wyman et al, Valuing Density: An Evaluation of the Extent to which American, Australian, and Canadian Cities Account for a the Climate Benefits of Density through Environmental Review, Lincoln Institute of Land Policy, Working Paper WP22KW1 (2022). Given that increasing urban density reduces transportation-related emissions, policies that restrict increased development in urban areas, such as impact fees, could inadvertently increase regional emissions. *See e.g.,* Todd Littman, Analysis of Public Policies that Unintentionally Encourage and Subsidize Sprawl, The New Climate Economy 55 (2015). *See also* Edward L. Glaeser & Matthew E. Khan, The Greenness of cities: Carbon Dioxide Emissions and Urban Development, 67(3) J. of Urban Economics 404 (2010) (stating, "restricting new development, the cleanest areas of the country would seem to be pushing new development to places with higher emissions.").

frameworks. The City might approach such a law as follows. The City might first conduct a preliminary analysis to determine the amount and type of growth that is likely to occur within a specific geographic area (whether City-wide or within particular neighborhoods) over a given period of time. The City might then identify the infrastructure and services that would be required to support the anticipated growth, and the actions needed to mitigate anticipated impacts on the existing community, and calculate their costs over time. Then, the City could develop an allocation formula for issuing fees proportionately to developers who build pursuant to this growth plan.[58]

There is ample precedent for legislative fees of this sort in other jurisdictions.[59] In fact, in recent the decades, an increasing number of cities across the United States have turned to impact fees to manage and support growing density[60] and there is at least one example of a local government in New York State that has passed a legislative impact fee law. In 1990, the Town of Brookhaven adopted its Land Use Intensification Mitigation Fee for the purpose of mitigating impacts from "land use intensification" associated with the rezoning of open spaces.[61] The town uses the fee to acquire land to preserve as open space.[62] Commentators have noted that "the law has the potential for imposing significant fees on developers and other landowners within the Town."[63]

B. Mandatory mitigation fees

A second potential option for expanding the use of fees in New York City would be to develop a mandatory mitigation fee program under CEQR. Such a program might be structured as follows. The agency performing the review under CEQR would, as is done today, analyze a development proposal for environmental

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[58] Exceptions might be made, for example, for developments of a certain size or which voluntarily undertake actions creating certain public benefits (such as setting aside land for public space).

[59] It is important to note that because the legal and policy context among different local jurisdictions is so varied, it cannot be assumed that other cities' approaches to impact fees would be either legally permissible in New York City or compatible with its existing policy framework.

[60] *See, e.g.*,, Eli Okun, Growing Cities Opting to Rely on Impact Fees, N.Y. Times (Aug. 9, 2014).

[61] Town of Brookhaven, Article VII, § 85-82 Land use intensification mitigation fee (stating that the purpose of the fees is "to mitigate any land use intensification associated with the approval of a change of zoning classification from a more restrictive use to a less restrictive use, through the acquisition of open space" in order to achieve "the goal of preservation and balanced growth"). *See also* Anthony S. Guardino, Blog: Are Land Use Fees the Solution to Long Island's Fiscal Challenges? Part 1, JDSupra (Jan. 23, 2017).

[62] Town of Brookhaven, Resolution No. 2015-0196, Adoption Of Town Of Brookhaven Land Acquisition And Management Policy, Process And Background (Mar. 12, 2015).

[63] Guardino, Are Land Use Fees the Solution to Long Island's Fiscal Challenges?

impacts and identify potential mitigation measures. The agency might then monetize the costs of some or all of these measures and then allocate some or all of these costs among developers who build pursuant to the agency action that triggered the environmental review.[64]

Because, as things stand today, developers can only mitigate or opt to pay in-lieu fees for harms that they have the technical and jurisdictional competence to address themselves, a mandatory mitigation fee program might help to broaden the range of impacts for which fees are charged and increase the amount of dedicated funds available for mitigation. For example, if we return to the idea of a project that would reduce open space in an area, if it was not possible for the developer of that particular project to dedicate new open space on site or on an adjacent piece of land, they would have no ability to mitigate their project's impacts under the current approach and it would therefore be up to the City to pay for any mitigating actions aimed at creating more open space. However, if a mandatory mitigation fee program were adopted, the City could collect funds that could be used to dedicate new open space on a City-owned parcel in the neighborhood, shifting the burden of cost back to the developer.

There are several examples from other jurisdictions of local governments using environmental review to impose impact fees. Local governments in the states of Washington and California frequently use impact fees to satisfy their mitigation obligations under the Washington State Environmental Policy Act (SEPA)[65] and the California Environmental Quality Act (CEQA), respectively.[66] There is

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[64] *See* Minelli, Reforming CEQR.

[65] While SEPA does not explicitly mention impact fees in its provisions on mitigation, the courts have treated SEPA as "providing the statutory authority and outlin[ing] the necessary components of a local ordinance to assess "impact fees." City of Olympia v. Drebick, 156 Wash. 2d 289, 314 (2006). *See also* Castle Homes & Dev., Inc. v. City of Brier, 76 Wash. App. 95, 105 (1994) ("the underlying statutory authority for mitigation of impact fees comes from [SEPA]"); Prisk v. City of Poulsbo, 46 Wash. App. 793, 800 (1987) ("SEPA authorizes a municipality to approve a subdivision application, subject to a requirement that the developer pay a fee to mitigate "specific adverse environmental impacts.") *citing* Wash. Rev. Code Ann. § 43.21C.060 (authorizing agencies to condition an action under SEPA on the mitigation of "specific adverse environmental impacts which are identified in the environmental documents"). There is other language in the statute implicitly acknowledging impact fees as a proper mitigation condition. *See* Wash. Rev. Code Ann. § 43.21C.065 (noting that "A person required to pay an impact fee for system improvements pursuant to [Washington State's general impact fee statute] shall not be required to pay a fee pursuant to [SEPA] for those same system improvements.")

[66] 14 Cal. Code Reg. § 15130(a)(3) ("An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable [where the] project is required to implement or *fund* its fair share of a mitigation measure or measures designed to alleviate the cumulative impact.") (emphasis added).

precedent for local governments in New York State using environmental review to impose impact fees as well. For example, since 1991, the Town of Colonie has charged mitigation fees to developers to address impacts on water, solid waste, and open space.[67] The fees were developed based on a series of so-called "Generic Environmental Impact Statements" (GEIS)[68] which were prepared pursuant to the New York State Environmental Quality Review Act (SEQRA).[69] Among the Town's principle motivations, it prepared the GEISs in response to local "development pressures," recognizing the "need to develop a comprehensive policy for future growth."[70] By 2019, Colonie had "collected [at least] $12 million in mitigation fees from developers inside the town's three [GEIS] zones, which cover 15,100 acres."[71]

In spite of these precedents, for both types of fees programs, there are open questions as to the breadth of harms for which the fees can be structured to address. There are also questions about the source of the City's legal authority to pursue either option: New York State does not have an impact fee enabling statute expressly authorizing local governments to enact impact fee laws, and SEQRA does not expressly authorize agencies to charge fees for mitigation either. Next, we turn to examine whether, and to what extent New York City can legally implement impact fees despite the lack of express authorization.

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[67] *See* Town of Colonie, County Of Albany, Final Generic Environmental Impact Statement: Airport Area, Joint Statement Of Findings (Dec. 26, 1991); Town of Colonie, County Of Albany, Final Generic Environmental Impact Statement: Boght Road—Columbia Street Area, Joint Statement Of Findings (2000); Town of Colonie, County Of Albany, Final Generic Environmental Impact Statement: Lish Kill—Kings Road Area, Joint Statement Of Findings (2000).

[68] They are typically "broader, and more general than site or project specific EISs." SEQRA Rules § 617.10(a). Agencies may use GEISs to review programmatic impacts as well as the common impacts from a series of related actions. *Id*. In these cases, a GEIS will usually set forth criteria to determine when more detailed supplemental review is necessary. *Id* at § 617.10.

[69] SEQRA establishes mandatory minimum environmental review requirements for state and local agencies and grants local governments the authority to pass supplementary laws that take into account local circumstances provided that they are "no less protective of environmental values, public participation and agency and judicial review" than is required by state law. SEQRA § 8-0113(1), (3). In this sense, CEQR both implements SEQRA and is an extension of it.

[70] Kelly L. Munkwitz, Does the SEQRA Authorize Mitigation Fees?, 61 Alb. L. Rev. 595 (1997).

[71] Mallory Moench, What Will Colonie's Development Look Like in a Decade?, Times Union (Jul. 28, 2019). Notably, "the town has also charged developers outside those zones $250 per lot for open space," as well as "traffic mitigation fees calculated by the Capital District Transportation Committee." *Id.*

III. Legal Issues

To determine the scope of New York City's legal authority to enact impact fees, we must resolve two questions: First, we have to determine whether the City has the requisite authority to pass *any* sort of law that formally conditions development permissions upon the payment of a fee, be it a legislative fee or mitigation fee issued under the auspices of CEQR. If the answer to this first question is yes, then we have to determine what sort of constraints may limit the types or magnitude of fees.

A. Legal authority

The most straightforward source of authority for a New York City impact fee program would be if the State legislature were to pass a law expressly authorizing such a program. Indeed, many other states have passed legislation of this kind.[72] At present, however, there is no similar legislation in New York and we are unaware of any current or prior State bills on this topic. As such, this section considers the scope of New York City's authority to act on its own, absent new State legislation. Given the body of law that exists today, we see two potential sources of legal authority for the type of impact fees that advocates seek: New York City's general home rule powers and the State Environmental Quality and Review Act (SEQRA). We consider each of these sources in turn below.

1. Home Rule

One of the foundational principles of local government law is that local governments are creatures of the state that they inhabit.[73] Federal law does not grant local governments any powers or protections. Indeed, local governments are not even mentioned in the federal constitution. Thus, to the extent that cities are imbued with particular powers, it is because their states have chosen to give them such powers. On this point, the New York Court of Appeals has remarked that, "[i]n general, [local governments] have only the law-making powers the Legislature

[72] *See infra,* note 76.

[73] On this point, Professors Richard Briffault and Laurie Reynolds note, "As a matter of black-letter principles, the states enjoy complete hegemony over their local governments…there is no federal right to local self-government"). Richard Briffault & Laurie Reynolds, State and Local Government Law 289 (8th Edition) (2016). *See also* Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 921 (1989) ("It is a familiar principle that the lawmaking authority of a municipal corporation, which is a political subdivision of the State, can be exercised only to the extent it has been delegated by the State.").

confers on them."[74] If a local government passes a law that exceeds the scope of the legislative grant that the State has provided, the relevant law will be invalidated as *ultra vires*.[75]

A number of states have passed statutes that explicitly grant their local governments the authority to pass local impact fees. At the time of writing, at least twenty-seven states had enacted laws enabling local governments to create impact fee programs.[76] New York State is not among these states. But this does not necessarily preclude New York City from enacting a fee program; in some states without impact fee enabling legislation, municipalities have relied on their generally delegated municipal home rule powers to enact local impact fees ordinances.[77] For example, the Supreme Court of Florida has upheld local school impact fees as a valid exercise of municipalities' general home rule powers.[78] As another example, the Supreme Court of Nebraska has upheld a local law creating impact fees to fund improvements to the water and wastewater systems, arterial streets, and parks, on the basis of the city's home rule power.[79] Additionally, the Supreme Court of Kansas has rejected the argument that a city "cannot charge

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[74] Kamhi v. Town of Yorktown, 547 N.E.2d 346 (1989).

[75] Kamhi, 547 N.E.2d at 347.

[76] Julian Conrad Juergensmeyer et al., Land Use Planning and Development Regulation Law § 9:9 Developer Funding of Infrastructure (3d ed.) (2021 Update). These are: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Maine, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

[77] Michael G. Sterthous, Accommodating Growth and Development after Guilderland: Is the New York Legislature about to (Re)Act on Impact Fees?, 8 Pace Envtl. L. Rev. 175 (1990); *see also* Julian Conrad Juergensmeyer et. al, Land Use Planning and Development Regulation Law § 9:9 Developer Funding of Infrastructure (3d ed.) (2021 Update) ("[in] several states without authorization or enabling statutes [courts] have found authority in home rule power"). Impact Fees and Housing Affordability: A Guide for Practitioners, Office of Policy Development and Research, U.S. Dep't of Housing and Urban Development, (2008) ("Impact fees were originally developed by local governments in the absence of explicit state enabling legislation. Consequently, such fees were originally defended as an exercise of local government's broad "police power" to protect the health, safety and welfare of the community.").

[78] *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635, 642 (1991) (citing Florida Statutes sec. 125.01(1) which states, "the board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law.") Notably, the State of Florida has since adopted an impact fee enabling statute. Fla. Stat. Ann. § 163.31801 (2006).

[79] *Home Builders Ass'n of Lincoln v. City of Lincoln*, 271 Neb. 353, 362 (2006) (citing Neb. Const. Art. XI as the basis of the city's authority); *see also Id.* at 360–61 ("The very purpose of a home rule charter is to permit municipalities to exercise every power connected with the proper and efficient government of the municipality … [U]ntil the superior authority of the state has been asserted by a general statutory enactment, the municipality may properly act under its charter.").

impact fees in the absence of state enabling legislation," finding that a local law creating traffic impact fees was authorized under a home rule provision which empowered the city to issue fees.[80]

There is reason to believe that New York City could rely on its general home rule authority to adopt at least some types of impact fees. Compared to many other states, New York has given its local governments fairly extensive powers to pass laws regulating municipal property and affairs even where there is no specific legislative grant relating to the particular matter at hand.[81] This idea—that a city could pass a law about a subject without specific authorization from the State—is the essence of what is referred to as "legislative home rule." Article IX of the New York State Constitution enshrines this principle of legislative home rule for localities in New York State; it instructs the State's local governments to establish local legislative bodies[82] and empowers such bodies to adopt laws "relating to [the local government's] property, affairs or government."[83] This grant is capacious. Indeed, the most recent edition of the New York State Handbook for Local Governments states that "the home rule powers available to New York local governments are among the most far-reaching in the nation."[84] Still, the grant is not unlimited; to the contrary, the State constitution expressly reserves the Legislature's right to pass laws preempting local legislation[85] and the Constitution itself limits local governments' authority over taxes.[86] This suggests that the City would have

[80] McCarthy v. City of Leawood, 257 Kan. 566, 582–83 (1995) (citing Art. 12, § 5(b) of the Kansas Constitution which state "Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions…").

[81] As of 2019, "at least 47 states have adopted some form of home rule for their localities." Dillion's Rule, Home Rule and Preemption, Public Health Law Center (2020) *citing* Richard Briffault et al., The New Preemption Reader 4 (2019). For a history of home rule, *see id.*; Principles of Home Rule for the 21st Century, National League of Cities (2020). See Committee on the New York State Constitution. 2016. "Home Rule Report." New York State Bar Association, April 2, 2, citing Ward, Robert B. 2006. *New York State Government* 545, 2nd ed. ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").

[82] N.Y. Const. art. IX, § 1(a).

[83] N.Y. Const. art. IX, § 2(c).

[84] New York State, Local Government Handbook 33 (2018). Commentators have argued that the grant of authority that New York provides its local governments is more generous than many other so-called home rule states. *See also* Committee on the New York State Constitution, Report and Recommendations Concerning Constitutional Home Rule, New York State Bar Association 2 (2016) citing Robert B. Ward, New York State Government 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.")

[85] *See, infra,* Part III.B.1.

[86] N.Y. Const. art. VIII. *See, infra,* Part III.B.3.

to be careful to avoid designing fees that appear to encroach on the powers of the State, or in a manner that makes them appear to be taxes.

New York State's Municipal Home Rule Law (MHRL),[87] which was adopted concurrently with Article IX,[88] implements the constitutional grant of legislative authority to local governments,[89] enumerating fourteen specific subject matters about which local governments can legislate.[90] Among other things, the enumerated subjects grant local governments with the police power to pass laws for the "government, protection, order, conduct, safety, health and well-being or persons and property" in the locality.[91] Section 10 also authorizes local governments to fix and collect fees.[92]

To our knowledge, the New York Court of Appeals has never explicitly stated that section 10 of the MHRL authorizes local governments to adopt impact fees.[93] However, the Court came close in a landmark 1989 case, *Kamhi v. Town of Yorktown.*[94] In *Kamhi*, a developer challenged a Yorktown local law that required developers to either set aside property to be used as parklands or pay the town a fee. A developer who paid the fee in order to get approval to build new multifamily housing, subsequently challenged the local law on the grounds that it was not authorized by the New York State Town Law, which is the State's general enabling legislation for towns' zoning regulations.[95] Yorktown, in turn, argued that the local law was authorized by section 10 of the MHRL.[96]

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[87] N.Y. Mun. Home Rule Law §§ 1 et seq.

[88] The Municipal Home Rule Law was enacted on April 30, 1963, and Article IX of the New York Constitution was adopted on November 5, 1963; both became effective on January 1, 1964. Article IX was implemented "through the enactment of the Municipal Home Rule Law." New York State, Local Government Handbook 41 (2018).

[89] New York State, Local Government Handbook 36 (2018).

[90] N.Y. Mun. Home Rule Law § 10.

[91] N.Y. Mun. Home Rule Law § 10(a)(12).

[92] N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(9-a).

[93] See, e.g., Noah Kazis, Furman Center, Ending Exclusionary Zoning in New York's Suburbs 19 (2020) ("[New York courts] have left ambiguous whether and when local governments have the authority to impose impact fees."); Vicky Chau & Jennifer Yager, Zoning for Affordability 31, Lincoln Institute of Land Policy (2016) *citing* Guilderland, 546 N.E.2d at 923 (noting that the N.Y. Court of Appeals has "declined to *expressly* rule on the question of whether … local governments [are permitted] to enact development impact fees.")

[94] Kamhi, 74 N.Y.2d 423.

[95] Terri Rice, Zoning and Land Use, 41 Syracuse L. Rev. 579, 583 (1989).

[96] Kamhi,

In evaluating the competing claims, the Court found that section 10 of the MHRL could indeed provide a basis for towns to adopt in lieu fees for parklands.[97] And while, the Court ultimately invalidated Yorkland's particular fee program on procedural grounds,[98] commentators generally read *Kamhi* as having endorsed the idea that local impact fees could, at least in theory, be grounded in the Section 10 of the MHRL alone, without more specific enabling legislation.[99] As a starting point, then, it seems reasonable to suspect that New York City's home rule authority could provide a basis of authority for adopting *some* sort of fee. But this does not complete the analysis because a number of other State laws appear to have narrowed the type of impact fees that local governments, including New York City, could enact.[100]

Notably, there are two other important laws in addition to the MHRL that delineate New York City's powers: the General Municipal Law[101] and the General City Law.[102] These laws define cities' powers to exercise a range of specific regulatory and administrative functions,[103] and even specifically authorize cities to impose *in lieu* parkland fees when approving site plans and subdivision plans.[104] Moreover, the General Municipal Law and General City Law were passed in 1892 and 1909, respectively,[105] decades before Article IX of the Constitution, and while they remain in force, they "now are augmented by the overriding constitutional guarantee of 'home rule.'"[106] Thus, whatever authorization the General Municipal Law and General City Law provide could likely also be grounded in the constitutional guarantee of home rule. And, in fact, to the extent that these laws

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[97] *Id.*

[98] The court found that the local law would have been spared preemption if the town had provided proper notice of intent to supersede. Kamhi, 547 N.E.2d at 352-53.

[99] Adam L. Wekstein, To Fee or Not to Fee, That Is the Legal Question: Guiding Principles Regarding Impact Fees, 33(1) Municipal Lawyer 34, 35 (2019) ("In *Kamhi v. Town of Yorktown*, the Court of Appeals held that even without specific authorization in state zoning enabling laws, a town may use its authority under the Municipal Home Rule Law to enact impact fee regulations relating to areas of purely local concern."); Terri Rice, Zoning and Land Use, 41 Syracuse L. Rev. 579, 583-587 (1989).

[100] *See, infra,* Part III.B.1.

[101] N.Y. Gen. Mun. Law §§ 1 et seq.

[102] N.Y. Gen. City Law §§ 1 et seq.

[103] New York State, Local Government Handbook 61 (2018).

[104] N.Y. Gen. City Law § 27-a; N.Y. Gen. City Law § 33. However, this authorization to impose parkland fees is not broad enough to advance the full suite of purposes that proponents hope to achieve with impact fees.

[105] New York State, Local Government Handbook 60 (2018).

[106] New York State, Local Government Handbook 34 (2018).

impact our legal analysis, it is mainly by virtue of their power to constrain the City's authority to act in this area via preemption, rather than to expand upon it. [107]

2. SEQRA

In addition to its home rule powers, the New York State Environmental Quality Review Act (SEQRA) may also supply New York City with authority to charge some types of impact fees. While neither the State nor the New York courts have yet to resolve this question, [108] the potential to adopt mandatory mitigation fees under SEQRA would be an important supplement to the City's general home rule powers under the MHRL. This is because the City has already established a process for analyzing and mitigating the impacts of future growth under SEQRA—the City Environmental Quality Review (CEQR) process, which implements the state law. Thus, the City might find it procedurally less complicated to implement a mitigation fee program through the existing CEQR process than to pass new legislation for assessing fees using its home rule authority. At the same time, mitigation fees may not achieve the full suite of objectives that proponents hope to achieve because, as described further on, it may not be possible to capture as many projects using a fee developed under its SEQRA authority as it would be possible to capture through a new legislative fee program.

SEQRA differs from its federal counterpart in that it imposes substantive 'mitigation' requirements in addition to procedural ones—indeed, it is only one of five state-level environmental review statutes to do so. [109] Namely, SEQRA requires that agencies "act and choose alternatives, which … to the maximum extent practicable, minimize or avoid [the] adverse environmental effects" of an action. [110] To fulfill this 'mitigation' requirement, SEQRA permits the agency responsible for

[107] *See, infra,* Part III.B.1.

[108] Kelly L. Munkwitz, Does the SEQRA Authorize Mitigation Fees?, 61 Alb. L. Rev. 595 (1997); Adam L. Wekstein, To Fee or Not to Fee, That Is the Legal Question: Guiding Principles Regarding Impact Fees, 33(1) Municipal Lawyer 36 (2019) ("Another potential, though legally questionable, source of authority for the imposition of impact fees could be the State Environmental Quality Review Act").

[109] *See* Minelli, Reforming CEQR, at Appendix I. The other four states are California, Massachusetts, Minnesota, and Washington. *Id.*

[110] SEQRA § 8-0109(1); *see also id.* at § 8-0109(8) (requiring agencies to "make an explicit finding that … to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided" before the project proponent may proceed with an action).

conducting the environmental review (the "lead agency") to require a project proponent to undertake certain mitigation measures as a condition of approval.[111]

SEQRA is also fairly unique among environmental review laws in *who* and *what* its requirements apply to. New York is one of only three states that extends its environmental review laws to both local governments and private actions.[112] Specifically, the law defines "agencies" to include *local* agencies, which means that local agencies are subject to SEQRA's requirements and can serve as the lead agency conducting an environmental review.[113] Additionally, SEQRA applies to "actions" that are directly undertaken or funded by public agencies as well as to *private* actions that require discretionary approvals by public agencies.[114] Together, this means that, under SEQRA, a local lead agency may require a private applicant to undertake mitigation measures as a condition of approval.[115]

In accordance with this authorization, New York City has required private applicants to take various kinds of mitigation measures in the past,[116] such as setting aside space on a project site to mitigate impacts on open space that have been revealed in the environmental review process. In a few isolated cases, private applicants have also been required to provide funding for mitigation. However, such instances are the exception rather than the rule.[117] However, research suggests that the City does not often require private applicants to undertake or pay for

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[111] SEQRA Handbook 64. "The agency may even impose conditions that are beyond the agency's jurisdiction, unless those conditions would intrude upon another agency's jurisdiction." *Id.* at 148.

[112] Of the seven states with environmental review statutes that apply to local action, only three also apply to private actions (New York, California, and Minnesota). *S*ee Minelli, Reforming CEQR, at Appendix I; Cal. Pub. Res. Code § 21000 et seq.; Minn. State Ann. § 116D.01 et seq.; SEQRA § 8-0105(4)(i).

[113] SEQRA § 8-0105.

[114] SEQRA § 8-0105(4)(i). Notably, SEQRA only applies to the "discretionary" decisions of agencies; ministerial decisions expressly are precluded from review requirements by state law. An example of a ministerial decision is the granting of a building permit; so long as the private applicant has met the requirements of the permit, the agency does not have the discretion to deny the permit. On the other hand, a decision to amend the zoning law is typically viewed as discretionary; the agency is not compelled by the law to do so when requested to by a private applicant. SEQRA Rules § 617.5(b)(25).

[115] *See, e.g.* Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 421-22 (1986) (upholding a requirement that a developer construct housing for displaced area residents as a proper mitigation measure).

[116] Minell, Reforming CEQR.

[117] *See, e.g.,* Minelli, Reforming CEQR, at 54 (to mitigate impacts on light, the Domino Sugar Rezoning noted that the private applicant would "provide funding for monitoring and maintenance of affected plantings within Grand Ferry Park and replacement, as necessary, with shade-tolerant species").

mitigation as a condition of approval. This is because private applicants typically lack the jurisdiction, ability, or technical expertise to implement the necessary measures.[118] Instead, the City is frequently left responsible for carrying out mitigation on its own—at the taxpayer's expense.[119]

To redistribute the mitigation costs that private development projects impose towards the developer, the City might adopt a mitigation fee scheme through CEQR to cover the costs taxpayers would otherwise incur. The challenge in this respect is that SEQRA does not clearly authorize agencies to impose *fees* as a means for financing mitigation; the law neither expressly authorizes nor prohibits the use of fees for mitigation. If, however, the agency can require private applicants to undertake mitigation measures as a condition of approval, they may also be able to also impose fees on that same applicant for the purpose of funding mitigation performed by the City.

There is some precedent from other local governments in New York State for imposing mitigation fees under SEQRA. In particular, a number of municipalities across the State, including Colonie,[120] Halfmoon,[121] East Greenbush,[122] and Ithaca,[123] have used Generic Environmental Impact Statements (GEISs) prepared under SEQRA as a mechanism for imposing mitigation fees on new development.[124] Unlike the more commonly used EIS, which "deals with the impacts of an action proposed for a specific location at a point in time," a GEIS is used to assess the potential cumulative impacts of a set of actions that will be carried out pursuant to a proposed program or plan, such a comprehensive rezoning for a town.[125] Where this approach has been used in connection with impact fees, the local governments prepared a GEIS analyzing the impacts of anticipated future

[118] Minelli, Reforming CEQR, at Appendix II.

[119] *Id.*

[120] *See, supra,* note 67.

[121] Town of Halfmoon, Northern Halfmoon GEIS, Statement of Findings (2002).

[122] Town of East Greenbush, Western East Greenbush Final Generic Environmental Impact Statement (2009).

[123] City of Ithaca, Southwest Area Land Use Plan Generic Environmental Impact Statement, Findings Statement (2000).

[124] Notably, these local fee schemes have not been challenged (and therefore have not been reviewed by the courts), nor has the State intervened to preempt them.

[125] SEQRA Rules § 617.10(a); SEQRA Handbook, 97-98. "A GEIS may be appropriate if: Two or more separate actions are proposed in a given geographic area, which, … if considered together, may have significant adverse environmental impacts; A sequence of related or contingent actions is planned by a single agency or individual; Separate actions share common (generic) impacts; or A proposed program or plan would have wide application or restrict the range of future alternative policies or projects."

development in their jurisdiction and then identified the capital improvements that would be necessary to serve the anticipated growth. From here, they estimated the costs of those improvements for which the local government would be responsible and developed a formula to distribute the costs among future development within the study area. For example, in its GEIS, the Town of Halfmoon calculated the expected costs for water and sewer improvements that would be needed and then divided the costs by the number of equivalent dwelling units (EDUs) that were anticipated to be developed in the study area.[126] The fees could then be collected from developers each time a certificate of occupancy is issued for an EDU.

One major benefit of mitigation fees is it would be possible to adopt a fee program without specific legislation. There is, however, very little case law examining these types of fee programs so it is difficult to predict with certainty how a court would evaluate them. Nonetheless, the one case that has considered such a program suggests that a GEIS can serve as a proper mechanism for local governments to impose mitigation fees on private developers. The case in question concerned a mitigation fee scheme developed by the Town of Malta.[127] In 2006, the town prepared a GEIS which identified anticipated impacts from future commercial development, as well as necessary infrastructure improvements and modifications.[128] To fund these improvements, the GEIS "proposed that developers in the district be assessed 'mitigation fees' which the Town would use to make capital improvements."[129] Several years later, a commercial developer charged with paying these fees brought a challenge against the town for costs it incurred, arguing, in part, that they amounted to an unauthorized tax.[130] While the reviewing

[126] Total water and sewer costs were estimated at $4.635 million and $2.39 million, respectively. The GEIS notes that "there are 4,026 EDU's based on the 20-year projections for residential, commercial and industrial development." Each EDU is charged a water impact fee of $1,151 and a sewer impact fee of $594 when the certificate of occupancy is issued. Town of Halfmoon, Northern Halfmoon GEIS, Statement of Findings 29-30 (2002).

[127] Malta Properties, 2015 WL 13049238, at *1 ("The GEIS proposed that developers in the district be assessed mitigation fees which the Town would use to make capital improvements. The fees would be in proportion to the impact that a project would have on projected growth.") (international quotations omitted).

[128] Town of Malta, Malta Town-Wide GEIS, Statement of Findings (2006); Town of Malta, Malta Town-Wide GEIS, Response to Comments (2006). The Town of Malta has claimed authority for imposing the fees under SEQRA. *See* Lakeview Outlets Inc. v. Town of Malta, 2017 WL 11015736, at *2 (N.Y. Sup. Ct. May 16, 2017) ("Malta contends that mitigation fees required by the 2006 Town Wide GEIS and SEQRA Findings Statement are lawfully imposed pursuant to SEQRA.")

[129] Malta Properties, 2015 WL 13049238, at *1.

[130] Notably, in this instance, the applicant was given a choice between performing the mitigation themselves, or paying a mitigation fee. The applicant ultimately chose to perform mitigation themselves, the cost of which ended up exceeding the cost of the mitigation fee, and sued the Town claiming the difference between the mitigation fee and costs of mitigation for which it paid

court never directly answered the question of whether the town had authority under SEQRA to impose the mitigation fees, it implicitly acknowledged the town's authority by finding that the mitigation fee was lawful.[131] The town still charges mitigation fees to this day.[132]

As an alternative to using a GEIS as a basis for developing a mitigation fee scheme, the City might impose mitigation fees on private applicants through project-specific EISs.[133] Under this approach, the City might analyze the particular impacts for individual private proposals that are subject to CEQR and impose mandatory fees on the private applicant as a condition of project approval. There are several benefits to this approach. From a practical perspective, this approach more closely aligns with the City's current practice of relying on project-specific EISs instead of GEISs. This approach might also be more legally sound because it would only impose fees on projects that would otherwise already be subject to mitigation requirements because they independantly trigger the requirement for environmental review. And by making mitigation fees mandatory for all projects subject to CEQR, it may help address concerns about inconsistency in how fees are charged under current City practices.

However, this approach is limited in that fees could only be assessed against developers undergoing environmental review, which means it would not capture projects that can be built as-of-right. This deficiency is illustrated by the recent

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amounted to an unlawful tax. Notably, the plaintiff's claims only relate to the amount the developer paid in excess of what would have otherwise been charged under the fee scheme. The developer did *not* challenge the mitigation fee scheme as a whole, implicitly accepting the Town's authority to charge fees under SEQRA. Malta Properties, 2015 WL 13049238. For a fuller discussion on how courts have distinguished impact fees from taxes, see Part II.B.3.

[131] Malta Properties, 2015 WL 13049238 at *4 (N.Y. Sup. Ct. Apr. 22, 2015) ("So called 'impact fees' assessed against a developer for the use of already existing municipal infrastructure and to fund capital improvements which benefit the general public are prohibited. Here, the Town did not mandate or compel plaintiff to pay an impact fee; plaintiff was obligated to pay a mitigation fee. … In the court's assessment, the [fee] does not constitute the imposition of an illegal tax disguised as an impact fee.") (internal citations omitted). In a separate case challenging the Town of Malta's mitigation fee scheme, the court declined to reach the question of whether the fee scheme was legal instead finding that the claim was time-barred. Lakeview Outlets Inc. v. Town of Malta, 166 A.D.3d 1445 (2018).

[132] *See* Town of Malta, Town Administrative Fees Matrix – Schedule A (Jan. 2019).

[133] One variation would be to develop a fee scheme through an EIS for a neighborhood rezoning. For example, when NYC does a neighborhood upzoning, the City might prepare a fee scheme as part of the EIS to mitigate impacts from new development in the rezoned areas. Then, the City might issue fees to subsequent developers who build pursuant to the rezoning. As opposed to relying on spot rezoning to develop and issue impact fees, this approach could help to capture as-of-right development.

Special Flushing Waterfront District project. The project comprises proposals from three separate developers to construct nine mixed-use buildings (3.4 million square feet) across four waterfront sites in Queens. Community groups have argued that the project is likely to harm the local community through impacts on open space, affordable housing, schools, and coastal resiliency.[134] However, because the project is largely within existing development rights, developers were not required to prepare an environmental impact statement.[135] In this case, the community would not be able to rely on mandatory mitigation fees because no EIS was prepared. The GEIS approach, on the other hand, could potentially capture a wider range of projects to which fees could be assessed. This is partially because individual projects which, on their own, might not reveal impacts that surpass the legal threshold of significance—and therefore might not trigger SEQRA's requirement that an EIS be prepared—are more likely to be captured in a GEIS.[136]

B. Constraints on the design and scope of impact fees

Local impact fees that would otherwise be authorized under New York City's home rule powers or the State Environmental Quality Review Act can still be invalidated if they violate another provision of state or federal law. We see three main avenues through which an otherwise-valid impact fee could be invalidated: it may be preempted by another state law that regulates the same subject area; it may

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[134] The Municipal Art Society of New York, City Planning Should Reject Flushing Waterfront Proposal; The Municipal Art Society of New York, Much Ado about Flushing.

[135] As part of the proposal, developers sought approval from the City to rezone one of the four project sites, triggering CEQR review. In a preliminary analysis of the rezoning proposal under CEQR, the City determined "that the incremental difference between the proposal and the as-of-right development would not be significant enough to result in any adverse impacts." The Municipal Art Society of New York, City Planning Should Reject Flushing Waterfront Proposal. As a result, the developers were not required to prepare an EIS and were only required to prepare an Environmental Assessment Statement (EAS), which is less rigorous. *Id.*; The Municipal Art Society of New York, Much Ado about Flushing. Notably, community advocates have brought a legal challenge against the City arguing that an EIS should have been prepared. Queens Supreme Court, Index No. 706788/2020; *See also* Christine Chung, Locals' Lawsuit Slams Flushing Waterfront Development Project, The City (Jun. 8, 2020).

[136] Minelli, Reforming CEQR. Among other things, a move towards comprehensive planning could trigger the preparation of GEIS, which in turn could serve as the basis for developing an impact fee scheme. While the City does not currently have a comprehensive plan in place, there is political momentum among some local legislators to adopt one; in 2020, the City Council Speaker Corey Johnson introduced legislation calling for a ten-year comprehensive planning cycle. NYC Council, Press Release: Speaker Corey Johnson Unveils Legislation to Create A New Ten-Year Comprehensive Planning Cycle for New York City (Dec. 16, 2020). *See also* NYC Council Speaker Corey Johnson, Planning Together: A New Comprehensive Planning Framework for New York City (Dec. 16, 2020).

violate the constitutional doctrine regarding exactions; it may be deemed to be a disguised tax, rather than a fee. These constraints restrict both the *type* of impacts that can be addressed with impact fees as well as the *size* of the fees that can be imposed. Below, we detail how these restrictions operate and the extent to which they restrict New York City's ability to impose fees.

1. Preemption

While the New York State constitution and MHRL make clear that local governments in New York can pass laws regarding a wide range of subject matters without express State authorization, they are equally clear that local governments cannot adopt laws that conflict with the State constitution or any properly enacted state statute.[137] Phrased otherwise, New York State could preempt a local law establishing a fee program if it so chooses. The State can preempt a local law expressly, by directly stating that local laws on the relevant subject matter are prohibited, or by implication. Preemption is implied wherever the local law directly conflicts with a state law or where a state legislative scheme is so comprehensive that a reasonable person would infer that the state intended to occupy the field and foreclose local regulation in the area.[138]

Unlike some other states, there is no New York State law that expressly precludes the use of impact fees by local governments.[139] Nonetheless, local impact fees—or, at a minimum, certain types of local impact fees—might still be implicitly preempted. The potential for state law to preempt local impact fees was vividly illustrated in a 1989 Court of Appeals decision, *Albany Area Builders v. Guilderland*.[140] In *Guilderland*, developers challenged a local law titled the

[137] N.Y. Const. art. IX, § 2(c). Notably, the New York State Constitution imposes more arduous procedural requirements on the State Legislature when it seeks to adopt a law that pertains to the "property, affairs, or government" of one or more but not all local governments in the state. These laws, referred to as "special" laws, as opposed to "general" laws, must be adopted utilizing the procedures specified in Art. IX § 2(b)(2) "unless a State concern is involved or affected … in some substantial measure." Adler v. Deegan, 251 N.Y. 467 (1929), amended, 252 N.Y. 615 (1930).

[138] *See* DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 190 (2001) ("Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility. The State Legislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication.") (internal citations omitted).

[139] *See* Davidson & Mulvane, Takings Localism (2021) (identifying states which have "precluded impact fees outright in certain circumstances" or otherwise "placed stringent limitations on their use").

[140] Guilderland, 546 N.E.2d 920.

Transportation Impact Fee Law (TIFL) that required applicants for building permits for projects that would increase traffic to pay a transportation impact fee. The court observed that the State already had "a comprehensive and detailed regulatory scheme[141] for allocating highway funding and that the TIFL intruded upon that scheme. The court therefore determined that the TIFL was implicitly preempted.[142]

The *Guilderland* decision suggests that New York City would, in all likelihood, also be preempted from charging impact fees for state-regulated highways. However, the court in that case expressly declined to decide whether other types of local impact fees could be permissible[143] and has not ruled on the issue since. This gap in the court's jurisprudence has led at least one commentator to posit that there might be room for local governments to act in this area, for example, where only local roads (not state highways) are being regulated.[144] Still, the *Guilderland* precedent certainly complicates efforts to make broad recourse to impact fees to finance new infrastructure in New York City.

A lower court case suggests an additional type of impact fee for which cities are likely to lack authority to adopt: sewer connection fees.[145] In *Home Builders*

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[141] Guilderland, 546 N.E.2d at 922.

[142] Guilderland, 546 N.E.2d at 923. In particular, the court determined that permitting towns to raise revenues with impact fees "would allow towns to circumvent the statutory restrictions on how money is raised and, further, would permit towns to create a fund of money subject to limited accountability, not subject to the statutory requirements governing how funds for highway improvements are spent." *Id.*

[143] Guilderland, 546 N.E.2d at 923 ("we need not reach the controversial question…whether local 'impact fees' are permitted.").

[144] "Perhaps the fees are not inappropriate with respect to governments that own and maintain roads that are not subject to the same "strictures" that the Court found constituted preemption. Similarly, such fees may be proper when highways are not involved or when they are taken into account in the budgetary process." John M. Armentano, Blog: Local Impact Fees—Home Rule Powers Should Permit Municipalities To Act, Farrell Fritz, P.C. (Mar. 24, 1999)

[145] In a similar case, the Appellate Court of the Third Department found a local town law requiring all new customers of the Port Ewen Water District to pay a water hook up fee to be preempted by State law. Coconato v. Town of Esopus, 152 A.D.2d 39 (1989). Specifically, the Court determined that Articles 12 and 12–A of the Town Law had "establis[ed] a comprehensive scheme for financing water district improvements, manifesting the [State] Legislature's intent to preempt the area of financing capital improvements to town water districts." Id. at 791 (citing Guilderland). Notably, New York City is not subject to the Town Law and the General City Law lacks analogous provisions to that of the Town Law that were at issue in Coconato. See N.Y. Gen. City Law §§ 1 et seq. This suggests that the General City Law would also not preempt the City from creating impact fees to fund water connections.

Association of Central New York v. County of Onondaga,[146] the Supreme Court of Onondaga County found that the county lacked authority to adopt a local law establishing a sewer connection fee. The Court found that the "State Legislature, in the County Law and General Municipal Law [had] provided a comprehensive scheme regulating sewer districts," which it concluded "manifests an attempt to preempt" the local law.[147] While the County Law, except for specific enumerated sections,[148] does not apply to New York City, the City *is* subject to the provisions of the General Municipal Law that the court relies on to find the county law preempted.[149] This suggests that a City law creating sewer connection fees would also be preempted. However, there may be room in the law for the City to impose other types of impact fees to help finance sewer infrastructure, such as fees for sewer extensions.[150]

There is also a State law that could inhibit New York City from developing impact fees for parklands. Indeed, while *Kamhi* is generally read as confirming that Section 10 of the MHLR authorizes local governments to condition land use approvals on the payment of an *in lieu* fee, the court in that case found that the particular law Yorktown enacted was preempted. And because Yorktown had not followed the proper procedure for superseding the Town Law, the ordinance establishing the fee program was declared invalid.[151]

Kamhi concerned a Town's authority to impose *in lieu* parklands fees as a condition for approving site plans. The New York State Town Law expressly authorizes *in lieu* parkland fees to be imposed as a condition of approval for subdivisions, but is silent with respect to whether parkland fees could be imposed

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[146] Home Builders Ass'n of Cent. New York v. Cnty. of Onondaga, 573 N.Y.S.2d 863 (Sup. Ct. Onondaga Co. 1991) (citing Guilderland).

[147] *Id.*

[148] *See, e.g.,* N.Y. County Law Art. 24.

[149] *See* N.Y. Gen. Mun. Law, Art. 14F (granting authority to cities to issue sewer rent charges for costs of "operation, maintenance and repairs of the sewer system" and for the "construction of sewage treatment and disposal works…, or for the extension, enlargement, or replacement of, or additions to, such sewer systems, or part or parts thereof")).

[150] *See* N.Y. Gen. Mun. Law § 453 (providing that revenues from sewer rents "shall not be used … to finance the cost of any extension of any part of a sewer system … to serve unsewered areas if such part has been constructed wholly or partly at the expense of real property especially benefited").

[151] Kamhi, 547 N.E.2d at 434. See also Richard Briffault, Home Rule, Majority Rule, and Dillon's Rule, 67 Chicago Kent L. Rev. 1011, 1022 (1991) ("[I]n Kamhi, the Court was concerned… with the town's failure to satisfy the formal requisites for local legislative action of the adoption of impact fees.")

as a condition for approving site plans.[152] The Court determined that the detailed State statutory scheme concerning parkland evidenced an intent to preempt the field of regulations concerning parkland fees. As such, the Yorktown law would therefore be preempted *unless* the town properly exercised its authority to supersede certain State laws, as provided for in MHRL section 10(1)(ii)(d)(3).[153] The Court went on to suggest that supersession would have been proper in this case if Yorktown had followed the proper supersession procedure outlined in the Municipal Home Rule Law. Unfortunately for Yorktown, the town had not followed the proper procedure so the local law had to be struck down.

Critically, the General Town Law that was found to preempt the Yorktown law does not apply to New York City; instead, the General City Law governs New York City's operations.[154] As indicated above, the General City Law also contains provisions authorizing *in lieu* parkland fees as a condition for both subdivision and site approval, and these provisions are nearly identical to the relevant provisions of the Town Law.[155] However, while Municipal Home Rule Law provides towns with the authority to supersede State laws in certain circumstances, the law contains no analogous supersession provision that applies to cities.[156] Without this supersession authority, the City would likely be unable to adopt parklands fees that deviate from what is expressly authorized by the State in the General City Law.

2. Exactions

The U.S. Constitution further constrains New York City's ability to impose impact fees. Of particular importance, an otherwise valid impact fee program could be invalidated if it is deemed to impose an "unconstitutional condition" on land use.

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[152] Kamhi, 547 N.E.2d at 349.

[153] This section authorizes a town to supersede "any provision of the town law relating to the property, affairs, or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature shall have prohibited the adoption of a such a local law."

[154] N.Y. Gen. City Law §§ 1 et seq.

[155] *Compare* N.Y. Gen. City Law § 27-a(6) and § 33(4) *with* N.Y. Town Law § 274-a(6) and § 277(4) *and* N.Y. Village Law § 7-725-a(6) and § 7-730(4).

[156] *Compare* N.Y. Mun. Home Rule Law § 10(1)(ii)(d)(3) (granting towns supersession authority) *and* § 10(1)(ii)(e)(3) (granting supersession authority to villages) *with* § 10(1)(ii)(c) (describing the powers conferred separately on cities in addition to those granted by the New York State Constitution). *See also* Adopting Local Laws In New York State, Div. of Local Gov. Services, N.Y.S. Dep't of State 2-3 (2021 Update).

This caution flows from the Supreme Court's jurisprudence regarding *exactions*,[157] a term which is used to refer to conditions imposed by the government on land use applications that "oblige property owners to internalize the costs of the expected infrastructural, environmental, and social harms resulting from development."[158] Exactions typically impose additional costs on developers which they otherwise would not have assumed. These costs, which are imposed as a condition of approval, have been challenged as violating the Fifth Amendment. As discussed below, impact fees are a type of exaction and are therefore vulnerable to such challenges.

The Fifth Amendment's Takings Clause prohibits governments from taking "private property … for public use, without just compensation."[159] Thus, the Constitution does not outright prohibit the government from taking private property. Rather, the government may only exercise its power to take private property if the taking is "for public use" and the government compensates the property owner for their loss of the property.[160] The Supreme Court has interpreted the Takings Clause to "constrain not only physical appropriations by the state but also regulatory actions, including exactions," that deprive an owner of a beneficial use of their property.[161]

The Supreme Court has developed a special standard for evaluating regulatory taking claims arising in the context of exactions. In *Nollan v. California Coastal Commission*,[162] the Supreme Court asserted that to comport with the Takings Clause there must be an "essential nexus" between conditions governments impose on development permissions and the harm that the development is predicted to cause;[163] in a subsequent case, *Dolan v. City of Tigard*,[164] the Court added the

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[157] Some common examples of things that have been deemed exactions include "impact fees, construction requirements, dedications of land, or conditions on future land use." James D. O'Donnell, Affordable Housing Ordinances, The Urban Layer 899 (2016).

[158] Timothy M. Mulvaney, Legislative Exactions and Progressive Property, 40 Harv. Envtl. L. Rev. 137, 137–38 (2016). *See also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (defining "exactions" as "land-use decisions conditioning approval of development on the dedication of property to public use.")

[159] U.S. Const. amend. V.

[160] Notably, what is considered an appropriate "public use" includes not only cases where the public will physically use the property, but also where the appropriation will serve a public purpose. Kelo v. City of New London, 545 U.S. 469 (2005).

[161] Timothy M. Mulvaney, Legislative Exactions and Progressive Property, 40 Harv. Envtl. L. Rev. 137, 138 (2016).

[162] 483 U.S. 825 (1987).

[163] *Id.* at 837.

[164] 512 U.S. 374 (1994)

condition must also be "roughly proportional" to the harm caused.[165] Then, in *Koontz v. St. Johns River Management District*,[166] the Court made clear that these requirements apply not only to conditions which physically limit the use of the land (such as an easement), but also to conditions of payment. Thus, "monetary exactions" that are placed on land use applications must also have an essential nexus and be roughly proportional to the impacts of the development proposal.[167]

As a 'monetary exaction,' impact fees are therefore at risk of being invalidated as an unconstitutional condition where it does not meet the Supreme Court's *nexus* and *proportionality* requirements. This is a critical constraint because it suggests that New York City might not be able to rely upon impact fees as a general source of funding for infrastructure development. Instead, impact fees might only be assessed to offset the City's costs in addressing impacts that are a direct result of a new development proposal and at a level commensurate with the size of the proposal's relative impact.

To avoid being invalidated as a taking, the City would need to ensure that a potential impact fee program satisfies these requirements for individualized assessment. For example, a formula which allocates the cost of new infrastructure among new developments based on each development's relevant contribution to the impact might help to satisfy the requirement that the condition be roughly proportional. On the other hand, requiring a single development to pay for the cost of new infrastructure that is necessitated by many new developments would likely be deemed unconstitutional. As another example, a program which assesses individual fees for specific types of impacts and deposits those fees into dedicated funds to be strictly used for addressing those impacts might help to demonstrate an essential nexus between the impact fee and the purpose for which the fee is charged.[168] The New York Court of Appeals has also suggested that an environmental impact statement may help satisfy the requirement that an essential nexus exists "between the stated purpose of the condition and [an impact] fee."[169]

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[165] *Id.* at 391. While "[n]o precise mathematical calculation is required, … the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

[166] 570 U.S. 595 (2013).

[167] *Id*.

[168] *See* Twin Lakes Dev. Corp. v. Town of Monroe, 1 N.Y.3d 98, 105 (2003) (finding that a requirement by a Town statute imposing recreation fees that the fees "be deposited into a trust fund to be used strictly for recreational purposes" help to establish an "essential nexus between the stated purpose of the condition and the fee")

[169] Twin Lakes Dev. Corp. v. Town of Monroe, 1 N.Y.3d 98, 105, *cert. denied* 541 U.S. 974 (2004), *citing* Nollan, 483 U.S. at 837. To be sure, this case does not suggest that the City would be required

By contrast, the City might have a more difficult time demonstrating that a single generalized impact fee that is deposited into the general fund has a sufficient nexus to a development proposal's specific impacts.

Notably, it is possible that a law adopting a municipal impact fee program that would not be subject to the full strictures of the *Nollan*/*Dolan* jurisprudence; the Court has justified its exactions jurisprudence as a way of protecting landowners from governments improperly using their leverage in approving permits to require landowners to provide land and other things that the government would otherwise have to compensate them for under the Fifth Amendment.[170] As such, the exactions jurisprudence could be read as most concerned with conditions imposed in the context of administrative, "case-by-case" permit decisions.[171] The Supreme Court has not held that the nexus and proportionately requirements apply to exactions imposed through broadly-based legislation. In a 2019 article, Professor Tim Mulvaney observes that "eight out of ten courts to address the issue since Koontz" refused to apply *Nollan* and *Dolan* to exactions imposed pursuant to broadly based legislation.[172] This leaves open the possibility that New York City might be able to establish that a legislative impact fee program in a broadly applicable local law is not subject to *Nollan* and *Dolan*.[173] Still, to steer clear of any potential Takings claim, the City would be wise to instill the principles that *Nollan* and *Dolan* set out into any future impact fee program.

3. Tax v. fee distinction

Another reason that an otherwise lawful impact fee could be invalidated is if it is considered to be a tax as opposed to a fee. If an impact fee is deemed to be a tax, New York City would require prior legislative authorization from the State to proceed due to constitutional and legislative limits on the City's taxation authority.

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to prepare separate environmental impact statements for each development proposal in order to impose impact fees on them. Rather, this case simply suggests that an EIS could properly serve as a mechanism for evaluating whether specific fees are necessary and the City could always establish a separate process for making this individualized assessment.

[170] Koontz, 570 U.S. 595 (2013).

[171] Timothy Mulvaney, State of Exactions, 61 William & Mary L Rev 169, 194 (2019).

[172] *Id.* at 196. *See also id*. at 200.

[173] Justice Thomas has expressed doubts that legislatively established exactions should be treated differently than administratively-based exactions. California Bldg. Industry Ass'n v. City of San Jose, Calif., 577 U.S. 1179 (2016) (concurring in denial of certiorari). *See also* Vicky Chau & Jessica Yager, Zoning For Affordability: Using the Case of New York to Explore Whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods, 25 N.Y.U. Environmental L.J. 1, 25-30 (2017) (analyzing whether New York City's Mandatory Inclusionary Housing ordinance would be considered an exaction subject to the nexus and proportionately requirements).

If, on the other hand, the charges are deemed to be a fee, the City could implement the fee program without prior state authorization.

As noted in Part III.A.1, Article XVI § 1 of the New York Constitution expressly grants the State legislature—*not* local governments—the power of taxation.[174] The State retains its authority over taxation "unless the state legislature or the Constitution unambiguously delegates certain taxation authority to a political subdivision."[175] Moreover, any "delegation of State taxing power to a municipality must be made in express terms by enabling legislation."[176] Consistent with these dictates, both the New York Constitution[177] and Municipal Home Rule Law[178] make clear that municipalities may only levy, administer, or collect local taxes which are authorized by the State legislature.

While local governments have limited taxation authority, they have considerably more authority to enact non-tax charges. Specifically, local governments are empowered to "adopt and amend local laws" on the "fixing, levy, collection and administration of local government rentals, charges, rates or fees, penalties and rates of interest thereon,"[179] as well as to collect "assessments for

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[174] N.Y. Const. Art. XVI, § 1 ("Powers of taxation; … The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.").

[175] Matter of Baldwin Union Free Sch. Dist. v. County of Nassau, 22 N.Y.3d 606, 619 (2014). Thus, municipalities, such as New York City, "have no inherent taxing power, but only that which is delegated by the State." Castle Oil Corp. v City of New York, 89 N.Y.2d 334, 338 (1996).

[176] Castle Oil Corp., 89 N.Y.2d at 338. The delegation of taxation authority "cannot be inferred." Matter of Baldwin Union Free Sch. Dist. v. County of Nassau, 22 N.Y.3d 606, 620 (2014) (internal citation omitted).

[177] N.Y. Const. Art. IX, § 2 (c)(8), (9) ("In addition to powers granted in the statute of local governments or any other law … every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to … The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.")

[178] N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(8) (1994) ("In addition to powers granted in the constitution, the statute of local governments or in any other law, … every local government, as provided in this chapter, shall have power to adopt and amend local laws … relating to … (8) The levy and administration of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws relating to local non-property taxes shall be consistent with laws enacted by the legislature. (9) The collection of local taxes authorized by the legislature and of assessments for local improvements, which in the case of county, town or village local laws shall be consistent with laws enacted by the legislature.")

[179] N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(9-a) (1994) ("In addition to powers granted in the constitution, the statute of local governments or in any other law, … every local government, as provided in this chapter, shall have power to adopt and amend local laws … relating to … The

local improvements."[180] Unfortunately, the distinction between taxes and fees is often blurred; New York City must therefore be careful to ensure that new impact fees more closely align with the characteristics that the State's courts have attributed to fees as opposed to taxes.

Before diving into the legal framework for distinguishing fees and taxes, it is important to recognize that there are different categories of "fees."[181] The archetypal government-issued fees are *user fees*, which are charges for a government-provided good or service. Common examples of user fees include fees for the use of a public facility, such as a golf course or zoo, and utility bills for "municipality-provided trash collection, electricity, water, or sewer services."[182] Here, the fee typically covers a share of the cost of the good or service provided, and the individual can choose whether to use the good/service and pay for it, or to forgo the good/service and avoid the charge.[183] A second category of fees are *regulatory fees*, which are charges that governments use "to cover the costs they incur in regulating a specific business activity or person."[184] Traditionally, regulatory fees have been thought of as "inspection and processing fees," examples of which include licensing or permitting fees, or charges for an installation or inspection.[185] Here, the costs covered by the fee are largely administrative, such as the costs involved with "issuing, inspecting, and enforcing" a permit or license.[186] For example, New York State issues annual "environmental regulatory fees" to facilities that have permits to discharge pollution, which are used to "defray the

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fixing, levy, collection and administration of local government rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon.")

[180] N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(8) (1994).

[181] This discussion of "categories" of fees draws from the work of Erin Scharff and Hugh D. Spitzer. Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion, 38 Gonz. L. Rev. 335, 349-50 (2003). Erin Adele Scharff, Green Fees: The Challenge of Pricing Externalities Under State Law, 97 Neb. L. Rev. 168, 214 (2018)

[182] Scharff, Green Fees, at 207.

[183] *See Id.* at 214 ("Classic user fees involve prices charged when a government is acting in a proprietary capacity similar to a private company. Often, the government lacks a monopoly or is providing a nonessential good. Green Bay residents are not required by law … to purchase Packers tickets. Similarly, users of municipal swimming pools are not required to be there nor are visitors to a county-run zoo.").

[184] *Id.* at 214.

[185] Spitzer, Taxes vs. Fees, at 349-50. Spitzer refers to "inspection and processing fees" as "true regulatory fees." *Id.* at 349.

[186] New York Tel. Co. v. City of Amsterdam, 200 A.D.2d 315, 317 (1994) ("where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement") *quoting* Torsoe Bros. Const. Corp. v. Bd. of Trustees of Inc. Vill. of Monroe, 49 A.D.2d 461, 465 (1975).

cost of environmental oversight, analysis and monitoring of pollution sources throughout the State."[187]

Development impact charges (i.e. impact fees and mitigation fees) do not fit neatly within either category. While impact fees are often attached to the permitting processes, they serve a distinct purpose: to defray the public's costs in handling the negative impacts of development.[188] Thus, whereas inspection and processing fees typically only cover the government's administrative costs, development impact charges also reflect the government's programmatic costs, including the cost of implementing public projects to alleviate pressures on existing public infrastructure and the environment.[189] These differences suggest the factors for determining whether a development impact charge is a fee or tax might be distinctive from the factors used to analyze user fees or inspection/processing fees.

a. Factors for distinguishing fees from taxes

Different states throughout the United States have adopted different criteria for distinguishing taxes from fees.[190] In New York State, there is a considerable body of jurisprudence concerning the tax v. fee distinction, however there is no clear test for distinguishing between the two. Instead, the courts have relied on a variety of different factors for making this determination.[191] Moreover, the courts do not appear to consider every one of these factors in every case, nor do they

[187] N.Y. Envtl. Conserv. Law, Art. 72. "Environmental Conservation Law (ECL) Article 72 and DEC regulations provide that all persons who need a permit, certificate, or approval pursuant to a state environmental regulatory program, or who are subject to regulation under a state environmental regulatory program, are required to submit an annual fee." N.Y.S. Dep't. of Envtl. Conservation, Regulatory Fee Program. Presently, New York State issues environmental regulatory fees for air quality, hazardous waste, waste transport, and water pollution. N.Y. Envtl. Conserv. Law, Art. 72. These fees are justified on the basis that "[t]hose regulated entities which use or have an impact on the state's environmental resources, should bear the cost of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state." N.Y.S. Dep't. of Envtl. Conservation, DEE-13: Environmental Regulatory Program Fees Enforcement Policy (1986).

[188] *See* Spitzer, Taxes vs. Fees, at 345 ("[B]urden offset charges [such as impact fees] are fees that allocate and recover the cost of ongoing public programs to handle negative impacts from those who cause them.").

[189] Indeed, a developer could simultaneously be charged a permit fee (covering the cost of issuing the permit) and an impact fee (to cover the costs of implementing relevant infrastructure and environmental projects) as a condition of permit approval.

[190] Scharff, Green Fees, at 214.

[191] See Jason Burge, Rethinking Fees and Taxes in Light of the New York City Health Care Security Act, 61 N.Y.U. Ann. Surv. Am. L. 679, 698-699 (2006) (listing factors courts have used to distinguish fees from taxes).

appear to explain why they are considering some factors in some cases, and other factors in other instances.

In keeping with the muddled state of the case law in this area, New York State's tax/fee jurisprudence also elides the distinctions between the different types of fees mentioned above and does not explicitly state that the factors used to determine if a charge is a fee or a tax should vary depending on the type of fee Nonetheless, a review of the cases that specifically evaluate whether a development impact charge is a tax or fee suggests that the courts mainly focus on four factors in this context. These factors are: (i) whether the amount of the fee reflects the government's costs in offsetting the harms from the development;[192] (ii) whether the improvements funded by the fees are made *necessary by the* development proposal;[193] (iii) whether the developer is "primarily and proportionately benefited" by the charge;[194] and (iv) whether the developer *voluntarily* seeks the development approval to which the fee is attached.[195] Below we provide more detail on how the courts have applied these four criteria, focusing on their implications for the structure of an impact fee program in New York City.

Generally speaking, whereas taxes are intended to raise revenue for general governmental purposes,[196] fees are intended to defray government's costs in

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[192] *See, e.g.* Gabrielli v. Town of New Paltz, 116 A.D.3d 1315, 1321 (2014). ("[The] law requires the fee to reflect the cost of mitigation or replacement of lost resources, and specifies certain expenses that the Planning Board must consider in determining that amount.").

[193] *See*, e.g. Phillips v. Town Of Clifton Park Water Auth., 286 A.D.2d 834 (2001) (finding that the specific project did not require any improvements to the system) *citing* Guilderland, 141 A.D.2d 293, 298, *aff'd* 74 N.Y.2d 372; Home Bldrs. Assn. v. Onondaga, 573 N.Y.S.2d 863; Giuliani v. Hevesi, 228 A.D.2d 348 (1996), *aff'd as modified*, 90 N.Y.2d 27 (1997).

[194] *See, e.g.,* Coconato, 152 A.D.2d at 43 (a fee constitutes a tax where it is imposed "without regard to … whether plaintiffs will be primarily and proportionately benefitted by any such expansion."); Phillips, 286 A.D.2d at 835 ("A municipality cannot charge "newcomers" an impact fee to cover expansion costs of an existing water facility absent a demonstration … that such newcomer would be primarily or proportionately benefitted by the expansion").

[195] Malta Properties, 2015 WL 13049238 at *4 (upholding a mitigation fee that the developer "was obligated to pay"). Gabrielli, 116 A.D.3d at 1321 (upholding a fee "imposed with the applicant's consent").

[196] *See, e.g.* Am. Sugar Ref. Co. of New York v. Waterfront Comm'n of New York Harbor, 55 N.Y.2d 11, 27 (1982) ("[T]he primary purpose of a tax is to raise money for support of the government generally."); New York Tel. Co. v. Amsterdam, 200 A.D.2d at 318 ("Simply stated, taxes are burdens of a pecuniary nature imposed for the purpose of defraying the costs of government services generally."). Note that courts have generally viewed charges that are allocated to the general fund as an indication that the purpose of the charge is to raise money to "generate revenue or to offset the cost of other governmental functions," and thus a tax. Harriman Ests. at Aquebogue, LLC v. Town of Riverhead, 58 N.Y.S.3d 63 (2017); Joslin v. Regan, 63 A.D.2d 466 (1978), aff'd, 48

providing a service.[197] Fees cannot exceed an amount "reasonably necessary" to cover these costs.[198] Additionally, the amount of the fee should be determined by the government on a factual basis.[199] While New York courts have consistently held the amount of licensing and permitting fees is limited to administrative costs,[200] they have also upheld development impact charges that account for a government's programmatic costs in implementing mitigation projects. In *Gabrielli v. Town of New Paltz*, the Appellate Division, Third Department upheld a town law which allowed individuals to pay conservation fees to address the impacts of development on wetlands and water resources in order to obtain approval of permit applications that would otherwise be denied. In finding the charge to be a fee rather than a tax, the court relied in part on the fact that the relevant law requires the fee "to reflect cost of mitigation or replacement of lost resources."[201]

Related to the idea that payment of the fee must reflect the government's actual costs, the courts have specifically considered whether the improvements funded by impact fees are *necessary* to the development proposal. In *Phillips v. Town of Clifton Park Water Authority*, the Appellate Division, Third Department considered whether an impact fee issued by a town to cover expansion costs of an existing water facility was a tax. The court concluded the charge was an unlawful tax, noting that a "municipality cannot charge 'newcomers' an impact fee to cover expansion costs … absent a demonstration that such a fee is necessitated by the particular project (as opposed to future growth and development in that municipality generally)."[202] In connection with the idea that impact fees may only

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N.Y.2d 746 (1979); New York Tel. Co. v. Amsterdam, 200 A.D.2d 315; People v. Brooklyn Garden Apartments, 283 N.Y. 373 (1940).

[197] Phillips, 286 A.D.2d 834 *quoting* Jewish Reconstructionist Synagogue of North Shore, Inc v. Incorporated Village of Roslyn Harbor, 40 N.Y.2d 158, 163 (1976) ("fees …are characterized as "a visitation of the costs of special services upon the one who derives a benefit from them").

[198] Harriman Ests. at Aquebogue v. Riverhead, 58 N.Y.S.3d at 65 ("A fee charged by a municipality in connection with the exercise of powers delegated to it by the Legislature must be reasonably necessary to the accomplishment of the statutory command.") (internal citations omitted).

[199] Jewish Reconstructionist Synagogue, 40 N.Y.2d at 163; ATM One L.L.C. v. Inc. Vill. of Freeport, 714 N.Y.S.2d 721 (2000).

[200] *See* Torsoe Bros., 49 A.D.2d at 616–17 ("It is well settled that where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement").

[201] Gabrielli, 116 A.D.3d at 1321 (2014). ("[T]he Planning Board does not have "unfettered discretion" to determine the amount of the fee; instead, the … law requires the fee to reflect the cost of mitigation or replacement of lost resources, and specifies certain expenses that the Planning Board must consider in determining that amount.")

[202] Phillips, 286 A.D.2d 834 (finding that the specific project did not require any improvements to the system) *citing* Guilderland, 141 A.D.2d 293, 298, *aff'd* 74 N.Y.2d 372; Home Bldrs. Assn. v.

be charged where the development project requires actual improvements, such charges are also likely to be regarded as taxes where they are "assessed against a developer for the use of already existing municipal infrastructure"[203] or for "past costs expended to develop and maintain" the facilities being accessed.[204]

The courts have noted that the general "justification which underlies fee structures has most often been expressed as a visitation of the costs of special services upon the one *who derives a benefit* from them."[205] Thus, courts are less likely to regard a charge as a tax if the payor is "primarily and proportionately benefitted."[206] One court has gone so far as to state that impacts fees that are used to fund capital improvements that benefit the general public are prohibited.[207] However, the fact that regulatory fees may also create benefits for the general public does not necessarily mean that courts will regard them as a tax, so long as the payor is the *primary* beneficiary of the improvements.[208] Additionally, the courts also deemed a fee that imposed the whole cost of maintaining a particular type of infrastructure on new development alone to be an impermissible tax.[209]

Charges for compulsory services are more likely to be considered taxes. While courts have primarily considered this factor in reviewing user fees,[210] they appear to be more likely to uphold a fee that is paid voluntarily.[211] Importantly,

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Onondaga, 573 N.Y.S.2d 863; Home Bldrs. Assn. v. Onondaga, 573 N.Y.S.2d 863; Giuliani v. Hevesi, 228 A.D.2d 348, *aff'd as modified*, 90 N.Y.2d 27.

[203] Malta Properties, 2015 WL 13049238 at *4.

[204] Phillips, 286 A.D.2d 834.

[205] Jewish Reconstructionist Synagogue, 40 N.Y.2d at 163, 162.

[206] Coconato, 152 A.D.2d at 43; Phillips, 286 A.D.2d at 835.

[207] Malta Properties, 2015 WL 13049238 at *4 ("So called "impact fees" assessed against a developer for the use of already existing municipal infrastructure and to fund capital improvements which benefit the general public are prohibited.) *citing* Phillips, 286 A.D.2d 834; Coconato, 152 A.D.2d 39; Guilderland, 141 A.D.2d 293, *aff'd* 74 N.Y.2d 372.

[208] Malta Properties, 2015 WL 13049238 at *3. ("E]ven though the Town recognizes that the additional work indirectly benefits its interests, the direct beneficiary of the additional work was the plaintiff, not the Town.") Notably, the court in this case distinguishes 'impact fees' from 'mitigation fees,' but does not clearly articulate the factors it used for making this distinction. *Id.* at *4 ("Here, the Town did not mandate or compel plaintiff to pay an impact fee; plaintiff was obligated to pay a mitigation fee.").

[209] Phillips, 286 A.D.2d at 836-837.

[210] *See, e.g.* State Univ. of N.Y. v. Patterson, 42 A.D.2d 328 (1973) (finding concerning compulsory charges on private fire protection systems such as risers, sprinkler systems and hydrants to be a tax); Kessler v. Hevesi, 824 N.Y.S.2d 763 (Sup. Ct. 2006), *aff'd as modified*, 45 A.D.3d 474 (2007) (finding compulsory charges for 911 service for wireless telephone users a tax).

[211] *See* Gabrielli, 116 A.D.3d at 1321 ("This fee—imposed with the applicant's consent and for the applicant's benefit—is not 'imposed for the purpose of defraying the costs of government services

whether payment of the charge is a mandatory condition of a regulatory approval does not appear material to the courts' analysis; rather, courts only appear to look to whether the payor voluntarily sought the development approval to which the fee is attached.[212] Thus, impact fees should be considered "consensual" for the purposes of this analysis where the payor voluntarily seeks a development approval from the City. On the other hand, impact fees charged to existing developments that are not seeking land use approvals from the City would more likely be deemed non-consensual by the courts and therefore a tax.

IV. Conclusion

Whether New York City should adopt impact fees is part of a larger debate surrounding both how the City finances infrastructure to support new development, as well as how it deals with the impacts of new development on existing community.[213] Impact fees are only one of many types of value capture tools that governments can use to raise funds for addressing these concerns, and there may be other, more effective or equitable ways to capture part of the value generated by new development. Of course, the City would be in the strongest legal position if the state adopted legislation expressly authorizing the City to legislate on impact fees. However, in the absence of such express authorization, should the City decide that it wants to adopt impact fees, we believe that it has the legal ability to do so either as a legislative fee, based on the City's home rule authority, or as a mitigation fee through its authority under SEQRA.

While there appears to be room in the legal landscape for the City to adopt impact fees (in one form or another), the fee program would be nonetheless constrained by certain constitutional and statutory limitations, which limit the City's ability to rely on impact fees. Still, there may be certain applications in which impact fees may be an effective and viable alternative to traditional means of raising revenue, helping the City to ensure that essential public infrastructure, services, and environmental measures are adequately funded. With a better understanding of

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generally without relation to particular benefits derived by the taxpayer,' and is therefore not a tax.").

[212] *See* Malta Properties, 2015 WL 13049238 at *4 (upholding a mitigation fee that the developer was "was obligated to pay").

[213] Notably, some have proposed eliminating SEQRA's application to local government actions, such as rezonings, and instead requiring developers to pay impact fees instead of undertaking environmental review. *See* Stewart E. Sterk, Environmental Review in the Land Use Process: New York's Experience with SEQRA, 13 Cardozo L. Rev. 2041 (1992) (proposing environmental impact fees replace the application of SEQRA to zoning decisions); see also Stewart E. Sterk, Exploring Taxation as a Substitute for Overregulation In the Development Process, 78 Brooklyn L. Rev. 417 (2013).

legal authority and constraints, a next logical step would be for the City to evaluate and weigh the relative merits and drawbacks of impact fees.

Table 1. Summary of sources of legal authority and constraints upon different impact fee structures

	Legislative fee	**Mitigation fee**
Source of authority	Home Rule	SEQRA
Types of impacts that cannot be addressed		Impacts from as-of-right development projects (maybe)[214] Impacts which are not identified as "significant"
	Infrastructure with State-regulated funding schemes (e.g. highways, sewer connections) Areas expressly reserved by the state	
Limits on the design and scope of the fee	Fees may only be assessed for development approvals that the *developer seeks* Fees may only cover improvements *made necessary* by the development proposal Payors should be the *primary beneficiary* of the fee (indirect benefits on the public are permissible) Fees must be used to address harms that are *directly related* to the proposal The amount of the fee must be *roughly proportional* to the City's costs in addressing the harm caused	

[214] Whether or not as-of-right development projects are subject to mitigation fees under CEQR would likely depend on how the fee program is structured. *See* Part III.A.2.