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A summary of potential sources of legal authority, constraints, and options

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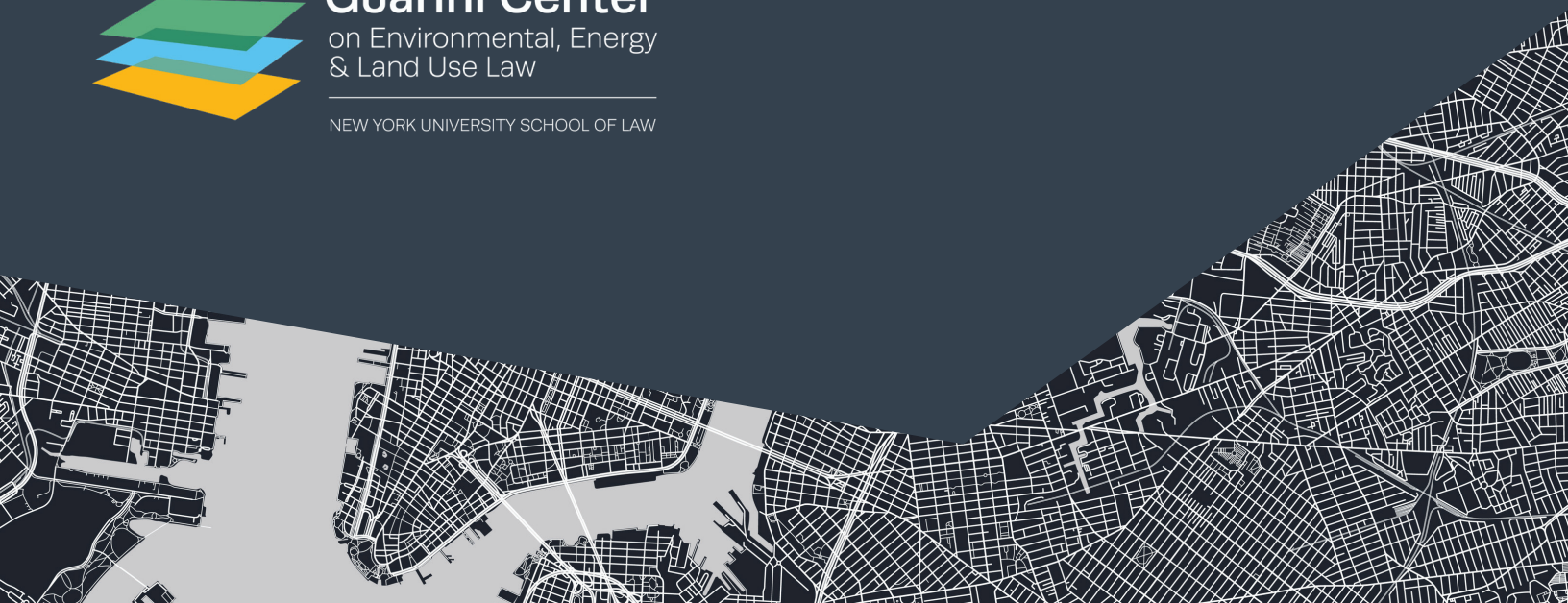

POLICY BRIEF

Impact Fees in New York City? A summary of potential sources of legal authority, constraints, and options

Author

Adalene Minelli, *Senior Fellow*

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Guarini Center on Environmental, Energy and Land Use Law
New York University School of Law
139 MacDougal Street, 3rd Floor
New York, NY 10012 212

law.guarini@nyu.edu
guarinicenter.org

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Introduction

New development offers a variety of potential social and economic benefits for New York City, including promoting housing affordability, generating new jobs, expanding the tax base, and reducing segregation. Increasing urban density could also benefit the climate by displacing growth that would otherwise occur in the surrounding suburbs, where per capita greenhouse gas emissions are much higher.[1] At the same time, new development puts additional pressure on the local environment, including on critical physical and social infrastructure, much of which is already overburdened and in need of upgrades.[2] Yet, New York City, like many other cities, faces numerous practical, political, and legal challenges in raising the revenue it needs to support new growth.

In this context, some have called upon the City to explore whether or not to adopt an impact fee program. 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 pay a proportionate share of the new or additional public infrastructure and services needed to support it, and for mitigating its adverse impacts on the environment. Used 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 policy brief identifies two potential sources of legal authority that New York City could draw upon should it wish to impose impact fees on new development: its general home rule powers and the State Environmental Quality and Review Act (SEQRA). It also identifies some potential constitutional and statutory constraints, including limitations under state doctrines on preemption and local taxation, and under federal exactions jurisprudence.

The status quo: existing development impact charges in New York City

New York City already places a number of charges on new development that are intended to mitigate certain social and environmental impacts.'

In-Lieu Affordable Housing Fees.[3] Enacted in 2016, the City's Mandatory Inclusionary Housing (MIH) Law requires developers to include a number of permanently affordable units in new residential multifamily buildings in areas that are rezoned to allow for greater residential density.[4] In certain cases, the law permits the developers to pay into an affordable housing fund rather than setting aside affordable units on site, which the City uses to develop and preserve affordable housing in the local community.[5]

In-Lieu CEQR Mitigation Fees. The City occasionally collects fees from developers subject to environmental review under the City Environmental Quality Review (CEQR), the process

1 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**, Working Paper WP22KW1, Lincoln Institute of Land Policy (2022).

2 City of New York, **OneNYC 2050: Building a Strong and Fair City**, Vol. 9, p. 6 (2019); N.Y.C. Dep't of Design & Construction, **A Strategic Blueprint for Construction Excellence** 16 (2019).

3 "When a developer is required to build units on site 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.

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

5 N.Y.C. Council, **Mandatory Inclusionary Housing**.

by which the City evaluates the environmental impacts of certain development proposals. While the City often requires developers to mitigate harms that it identifies, it also sometimes permits developers to pay a mitigation fee in lieu of undertaking specific mitigation measures.[6]

Ad Hoc Impact Fees & CBAs. The City has also, on occasion, come to informal agreements with developers to make certain financial contributions in exchange for a project's approval. These payments, which are not formally required by any law, could be considered de facto impact fees. Some developers have also entered into "Community Benefits Agreements" (CBAs), through which developers pledge to provide certain benefits or improvements in exchange for communities' pledges not to oppose projects.[7]

Why new impact fees?

Some have called for the City to explore new types of fees on development. Generally speaking, proponents' reasons for supporting impact fees fall into two categories.

Fees as a means of supporting new growth. Some have called for the City to adopt impact fees to generate funding for infrastructure improvements and additional public services needed to support incoming populations.[8] Notably, New York State's Constitution expressly limits local governments' authority to issue new taxes[9] and take on new debt, constraining their ability to finance new infrastructure and services. Given these fiscal constraints, some have looked at impact fees as a potential tool for the City to finance growth.[10]

Fees as a means of protecting incumbent communities. Some have called for impact fees as a means of better protecting incumbent communities from the adverse impacts of new development.[11] Here the concern is that the City's existing processes fail to account for and address many of the impacts created by new development, leaving existing communities to deal with unmitigated consequences, such as increases in local rents, diminished open space, and school overcrowding, or to shoulder the financial burden of addressing those impacts.

Criticisms of impact fees

Notably, there is substantial debate among scholars and stakeholders as to whether impact fees are desirable.[12] Some housing scholars argue against impact fees on the grounds that they constrain supply, thereby increasing

6 Adalene Minelli, **Reforming CEQR: Improving Mitigation under the City Environmental Quality Review Process**, Guarini Center on Environmental, Energy and Land Use Law (2020).

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

8 See e.g., New York City Independent Budget Office, **Budget Options for New York City** (2022); Sarita Rupan, **Development Impact Fees**, Manhattan Community Board 1 (2018); NYC Dep't of Env. Protection, Presentation: **Water and Sewer Rate Study** (2010).

9 N.Y. Const. art. XVI, § 1.

10 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. See 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) (noting that the City's "budget process fails to sufficiently...fund the infrastructure needed to accommodate projected growth.").

11 See e.g., The Municipal Art Society of New York & New Yorkers for Parks, **A Public Champion for the Public Realm** (2020); Sydney Céspedes, Laura Wolf-Powers, Elena Conte, **Public Action Public Value**, Pratt Center for Community Development (2019); Class Size Matters, **Space Crunch in NYC Public Schools** (2014).

12 This policy brief does not attempt to assess the merits of these criticisms or pass judgment on whether the City should adopt an impact fee program. Instead, the goal is simply to assess whether the City has the legal authority to adopt such a program if policymakers want to do so.

housing costs.[13] This may be of particular concern to New York City, where impact fees, combined with other existing costs, might make otherwise viable projects uneconomic, thus aggravating the City's affordable housing crisis.[14] From an environmental perspective, others believe that 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.[15] Some also view impact fees as inequitable because they disproportionately burden new residents with the cost of improving public infrastructure while shielding incumbent residents, who may also benefit from the improvements.[16]

Options for New Impact Fees

Presently, there appears to be two primary pathways for adopting impact fee programs in New York City: pass new legislation authorizing impact fees and mandate mitigation fees under the City's existing environmental review process.

13 See, e.g., Vicki Been, **Impact Fees and Housing Affordability**, 8(1) Cityscape: A Journal of Policy Development & Research 139 (2005); 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).

14 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).

15 See Katrina Wyman et al., **Valuing Density** (2022); Todd Littman, **Analysis of Public Policies that Unintentionally Encourage and Subsidize Sprawl**, The New Climate Economy 55 (2015); Edward L. Glaeser & Matthew E. Khan, **The Greenness of Cities: Carbon Dioxide Emissions and Urban Development**, 67(3) J. of Urban Economics 404 (2010).

16 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) ; John Yinger, **The Incidence of Development Fees and Special Assessments**, 51(1) National Tax Journal 23, 23 & 29 (1998).

Legislative impact fees

New York City Council passes new legislation establishing an impact fee program.

Example. The City Council might direct an agency to conduct a study to determine the amount and type of growth that is likely to occur within a specific geographic area (e.g., citywide, or across a particular borough or neighborhood) over a given period of time. The agency might then identify the infrastructure and services needed to manage the new growth and mitigate its impacts, and calculate their costs, which would be allocated among certain developers who build in the area according to this anticipated growth.

Precedents. In recent decades, an increasing number of cities across the United States have passed laws creating impact fees,[17] including at least one local government in New York State. In 1990, the Town of Brookhaven adopted its Land Use Intensification Mitigation Fee to address impacts from the rezoning of open spaces. [18] The town uses the fees it collects to acquire land to preserve as open space.[19]

Mandatory mitigation fees

City agencies develop a mandatory mitigation fee program through the City's CEQR process.

Example. The lead agency in an environmental review under CEQR might prepare an environmental impact statement (EIS) for a proposed action, in which it analyzes the action for antic-

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

18 Town of Brookhaven, Article VII, § 85-82 Land use intensification mitigation fee. See also Anthony S. Guardino, Blog: **Are Land Use Fees the Solution to Long Island's Fiscal Challenges?** Part 1, JDSupra (Jan. 23, 2017).

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

ipated impacts and identifies potential mitigation measures. The agency then might calculate the costs of some or all of these mitigation measures and develop a fee schedule to allocate some or all of these costs among developers who build pursuant to the action under review.[20]

Precedent. There are several examples of local governments in other jurisdictions using environmental review to impose impact fees, including in the states of Washington[21] and California.[22] Some local governments in New York State have also developed mitigation fees through their environmental review processes, including Colonie,[23] Halfmoon,[24] East Greenbush,[25] and Ithaca.[26]

Legal Authority

Unlike many other states,[27] New York does not have a statute expressly authorizing local governments to enact impact fee laws. There are, however, two potential sources of legal authority for impact fees: New York City's general home rule powers and the State Environmental Quality and Review Act (SEQRA).

Home Rule

In some states without impact fee enabling legislation, municipalities have relied on their municipal home rule powers to enact local impact fees laws.[28] There is reason to believe that New York City could also rely on its 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 authorization from the state on the particular matter.[29]

New York City's home rule authority is grounded in Article IX of the New York State Constitution, which empowers local legislative bodies to adopt laws "relating to [the local government's] property, affairs or government."[30] New York State's Municipal Home Rule Law (MHRL)[31] also grants local governments the power to pass laws for the "government, protection, order, conduct, safety, health and well-being or persons and property" in their jurisdiction,[32] and to fix and collect fees.[33]

While New York courts have never explicitly stated that the State's home rule law authorizes local governments to adopt impact fees, at least one opinion from the New York Court of

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20 See Minelli, **Reforming CEQR** (2020).

21 Washington State Environmental Policy Act, Wash. Rev. Code Ann. § 43.21C.060.

22 California Environmental Quality Act, 14 Cal. Code Reg. § 15130(a)(3).

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

24 Town of Halfmoon, **Northern Halfmoon Generic Environmental Impact Statement** (2002).

25 Town of East Greenbush, **Western East Greenbush Final Generic Environmental Impact Statement** (2009).

26 City of Ithaca, **Southwest Area Land Use Plan Generic Environmental Impact Statement** (2000).

27 At least twenty-seven states have passed legislation expressly authorizing municipalities to impose impact fees. Julian Conrad Juergensmeyer et al., Land Use Planning and Development Regulation Law § 9:9, **Developer Funding of Infrastructure** (3d ed.) (2021 Update).

28 See *Id.*; **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.

29 Committee on the New York State Constitution, **Report and Recommendations Concerning Constitutional Home Rule**, New York State Bar Association, 2 (Apr. 2, 2016).

30 N.Y. Const. art. IX, § 2(c).

31 N.Y. Mun. Home Rule Law §§ 1 et seq.

32 *Id.* at § 10(a)(12).

33 *Id.* at § 10(1)(ii)(a)(9-a).

Appeals suggests that such authority could—at least in theory—be grounded in Section 10 of the MHRL, without more specific enabling legislation.[34] Thus, 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.

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, though neither the State Legislature nor the courts have yet resolved this question.[35] SEQRA requires that agencies "act and choose alternatives, which … to the maximum extent practicable, minimize or avoid [the] adverse environmental effects" of an action.[36] To satisfy this requirement, SEQRA grants government agencies broad authority to require a project proponent to undertake mitigation measures as a condition of approval.[37]

SEQRA applies to both local governments and private actions,[38] meaning that a local agency may require a private applicant to undertake mitigation measures as a condition of approval.[39] While SEQRA does not clearly authorize agencies to impose fees on private applicants to finance mitigation, it also doesn't expressly prohibit their use. Thus, there is grounds for the claim that SEQRA supplies agencies the authority to impose fees for the purpose of mitigation.[40]

There is very little case law examining mitigation fees, however at least one case suggests that a Generic Environmental Impact Statement (GEIS) could serve as a proper mechanism for local governments to impose mitigation fees on private developers.[41] New York City is not necessarily limited to using a GEIS to develop mitigation fees, and could always decide to rely on EISs, which more closely aligns with its current practice. However, one potential benefit to using a GEIS is that it is more likely to capture a wider range of projects, particularly those that might not otherwise be subject to environmental review.[42]

Legal Constraints on Impact Fees

Local impact fees that might otherwise be authorized under New York City's home rule powers or the State Environmental Quality Review Act could still be invalidated if they violated other provisions of state or federal law.

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34 Kamhi v. Town of Yorktown, 74 N.Y.2d 423 (1989); 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); Terri Rice, **Zoning and Land Use**, 41 Syracuse L. Rev. 579, 583-587 (1989).

35 Kelly L. Munkwitz, **Does the SEQRA Authorize Mitigation Fees?,** 61 Alb. L. Rev. 595 (1997); Adam L. Wekstein, **To Fee or Not to Fee** (2019).

36 N.Y. Envtl. Conserv. Law § 8-0105(4)(i); see also *id.* at § 8-0109(8).

37 N.Y.S. Dep't of Environmental Conservation, **The SEQRA Handbook**, 64 (4th ed., 2020). "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.

38 N.Y. Envtl. Conserv. Law § 8-0105. See also Minelli, **Reforming CEQR**, Appendix I (2020).

39 See, e.g., Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 421-22 (1986).

40 See Lakeview Outlets Inc. v. Town of Malta, 2017 WL 11015736, at *2 (N.Y. Sup. Ct. May 16, 2017).

41 Malta Properties, 2015 WL 13049238, at *1 (N.Y. Sup. Ct. Apr. 22, 2015).

42 Examples of projects that would not be subject to environmental review are those that do not have legally significant impacts or do not require discretionary decisions by the city (e.g. as-of-right development).

Preemption

While New York City has relatively broad authority to adopt local laws, it cannot adopt laws that conflict with the State constitution or State statutes.[43] The State can preempt a local law expressly by directly stating that local laws on the relevant subject matter are prohibited. Preemption may also be implied where the local law 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 foreclose local regulation in the area.[44] Unlike in some other states, there is no New York State law that expressly precludes the use of impact fees by local governments.[45] Nonetheless, certain types of local impact fees might be impliedly preempted. For example, New York courts have invalidated local impact fees for highways[46] and sewer connections[47] on the basis that the State already had comprehensive and detailed state statutory schemes regulating these areas.

Exactions

A fee program could also be invalidated if it is deemed to impose an "unconstitutional condition" on land use. This caution flows from the U.S. Supreme Court's jurisprudence regarding exactions, which refers to conditions imposed by a local government on land use applications that "oblige property owners to internalize the costs of the expected infrastructural, environmental, and social harms resulting from development."[48] These costs have been challenged as violating the Fifth Amendment, which prohibits governments from taking "private property … for public use, without just compensation."[49]

The U.S. Supreme Court has developed a special standard for evaluating taking claims arising in the context of exactions. To avoid being invalidated: (1) there must be an "essential nexus" between the condition a government imposes on development permission and the harm that the development is predicted to cause;[50] and (2) the condition must also be "roughly proportional" to the harm caused.[51] The Court has also made clear that these requirements apply both physical and monetary conditions, such as impact fees.[52] Notably, the New York Court of Appeals has suggested that an environmental impact statement may help a fee satisfy the essential nexus requirement.[53]

Tax v. fee distinction

Finally, an impact fee could be invalidated if it is considered to be a tax as opposed to a fee. The New York Constitution expressly grants only the State legislature the power of taxation,[54] and local governments cannot impose taxes "unless the state legislature or the Constitution unambiguously delegates certain taxation

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43 N.Y. Const. art. IX, § 2(c).

44 DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 190 (2001).

45 See Timothy Mulvaney & Nestor Davidson, **Takings Localism**, 121(3) Colum. L. Rev. 215-276 (2021).

46 Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920 (1989).

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

48 Timothy M. Mulvaney, Legislative Exactions and Progressive Property, 40 Harv. Envtl. L. Rev. 137, 137–38 (2016).

49 U.S. Const. amend. V.

50 Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987).

51 Dolan v. City of Tigard 512 U.S. 374, 391 (1994).

52 Koontz v. St. Johns River Management District, 570 U.S. 595 (2013). It is unclear whether the requirements apply to exactions imposed through broadly-based legislation. Nevertheless, to mitigate the risk of invalidation, policymakers may still wish to ensure that any future impact fee programs meet these standards.

53 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.

54 N.Y. Const. art. XVI, § 1.

authority to [it]."[55] The New York Constitution[56] and Municipal Home Rule Law[57] also make clear that municipalities may only levy, administer, or collect local taxes that are authorized by the State legislature.

While local governments have limited taxation authority, they 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,"[58] as well as to collect "assessments for local improvements."[59]

There is a considerable body of jurisprudence on the distinction between taxes and fees, but New York courts have not articulated a clear test for distinguishing between the two. Instead, the courts have relied on a variety of different factors for making this determination.[60] Cases that specifically evaluate development impact charges suggest that the courts are likely to find that a charge is proper (i.e. not a tax) if: (i) the amount of the fee reflects the government's costs in offsetting the harms from the development;[61] (ii) the improvements funded by the fees are made necessary by the development proposal;[62] (iii) the developer is "primarily and proportionately benefited" by the charge;[63] and (iv) the developer voluntarily seeks the development approval to which the fee is attached.[64] Impact fees that meet these criteria appear more likely to be upheld.

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 communities. Impact fees are only one of many types of "value capture" tools that governments can use to raise funds for addressing these concerns,[65] and there may be other, more effective or equitable ways to capture part of the value generated by new development. 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. In these cases, there appears to be room in the legal landscape for the City to use them.

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55 Matter of Baldwin Union Free Sch. Dist. v. County of Nassau, 22 N.Y.3d 606, 619 (2014); Castle Oil Corp. v City of New York, 89 N.Y.2d 334, 338 (1996).

56 N.Y. Const. art. IX, § 2 (c)(8), (9).

57 N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(8).

58 Id. at § 10(1)(ii)(a)(9-a).

59 Id. at § 10(1)(ii)(a)(8).

60 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).

61 See, e.g., Gabrielli v. Town of New Paltz, 116 A.D.3d 1315, 1321 (2014).

62 See, e.g., Phillips v. Town Of Clifton Park Water Auth., 286 A.D.2d 834 (2001) citing Guilderland, 141 A.D.2d 293, 298, aff'd 74 N.Y.2d 372; Home Builders Ass'n of Cent. New York v. Cnty. of Onondaga, 573 N.Y.S.2d 863 (Sup. Ct. Onondaga Co. 1991); Giuliani v. Hevesi, 228 A.D.2d 348 (1996), aff'd as modified, 90 N.Y.2d 27 (1997).

63 See, e.g., Coconato v. Town of Esopus, 152 A.D.2d 39 (1989); Phillips v. Town Of Clifton Park Water Auth., 286 A.D.2d 834 (2001).

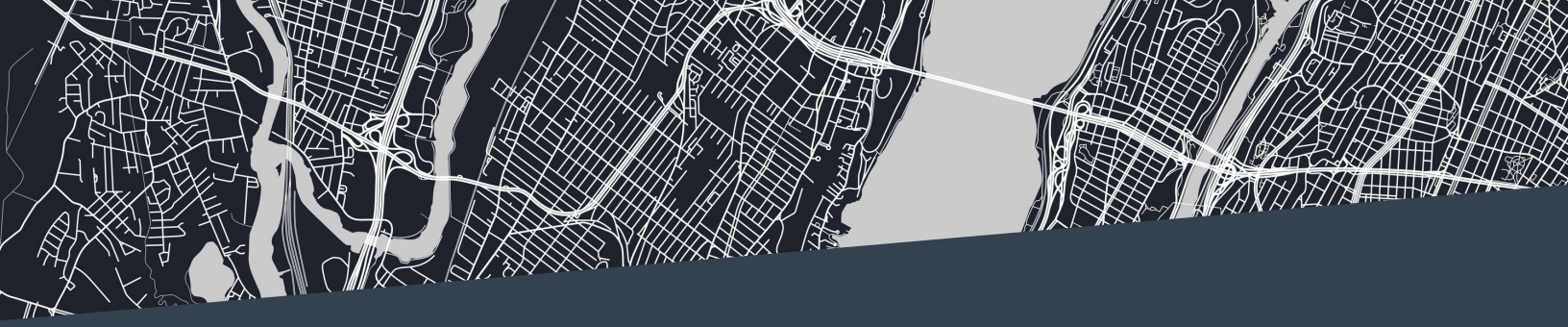
64 See, e.g., Malta Properties, 2015 WL 13049238 at *4; Gabrielli, 116 A.D.3d at 1321.

65 Lourdes Germán & Allison Ehrich Bernstein, **Land Value Capture: Tools to Finance our Urban Future**, Lincoln Institute of Land Policy (2018).

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

Type of fee	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)[1] 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 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	

1 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.



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