# COLORADO MUNICIPAL LEAGUE
# ANNUAL SEMINAR ON MUNICIPAL LAW

COLORADO
MUNICIPAL
LEAGUE

# Background History

- George Sheetz sought a building permit from El Dorado County, California to construct a single-family residence (1,854 sq. ft.) on his property.
- El Dorado County previously adopted a “traffic impact fee” based upon a fee schedule for anticipated road costs contained in the County’s previously enacted General Plan.
- The traffic impact fee was calculated based upon the type and location of the new development requiring Sheetz to pay a $23,420 traffic impact fee as a condition of approving the building permit.
- Sheetz paid the traffic impact fee under protest and subsequently challenged the traffic impact fee as an unconstitutional taking under the U.S. Constitution.

# California Opinion

- California appellate court rejected Sheetz's appeal based upon California Supreme Court precedent holding that *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* do not apply to impact fees which are generally applied to a broad class of property owners through legislative action.

# SCOTUS Ruling

- The unconstitutional conditions doctrine prohibits the government from requiring a person to relinquish constitutional rights in exchange for a discretionary benefit.
- A land use permit condition is constitutional only if there is an "essential nexus" and "rough proportionality" between the government's demand and the proposed land use. (See *Nollan* and *Dolan*) – but does this apply to broadly applicable legislative actions?
- Considering precedents of the 5th Amendment Takings Clause and the states' police power to regulate land use, the Supreme Court unanimously held there is no basis to exempt legislative actions, such as the traffic impact fee, from Takings precedent.
- On remand, the California appellate court will consider "whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development" under *Nollan*/*Dolan*.

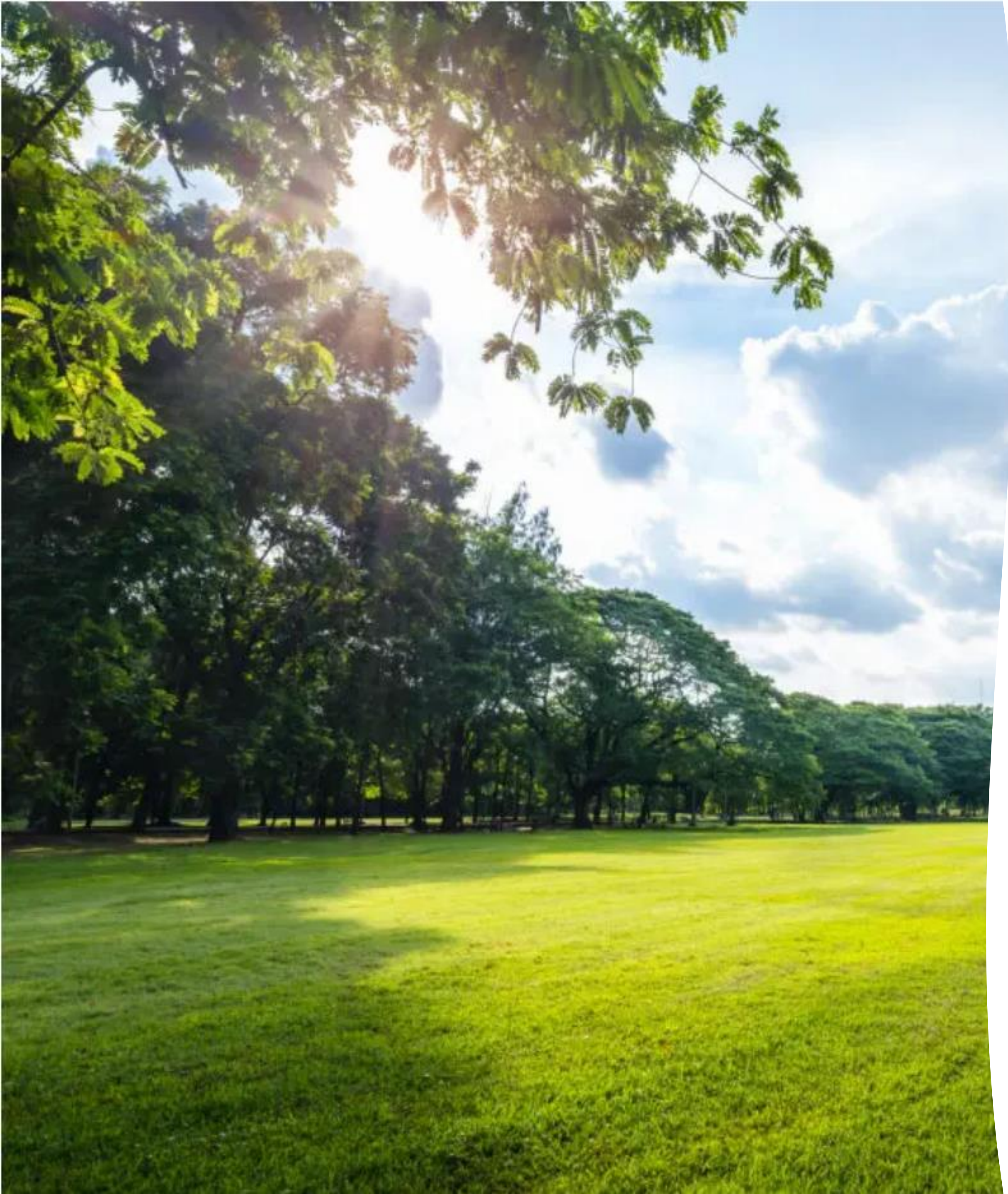
# The Concurrences

- Justice Gorsuch concurred that “nothing in *Nollan*, *Dolan*, or [the *Sheetz*] decision supports distinguishing between government actions against the many and the few any more than it supports distinguishing between legislative and administrative actions.”

- Justice Kavanaugh joined by Justices Kagan and Jackson emphasized that the Supreme Court’s decision does not prohibit “the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property.”

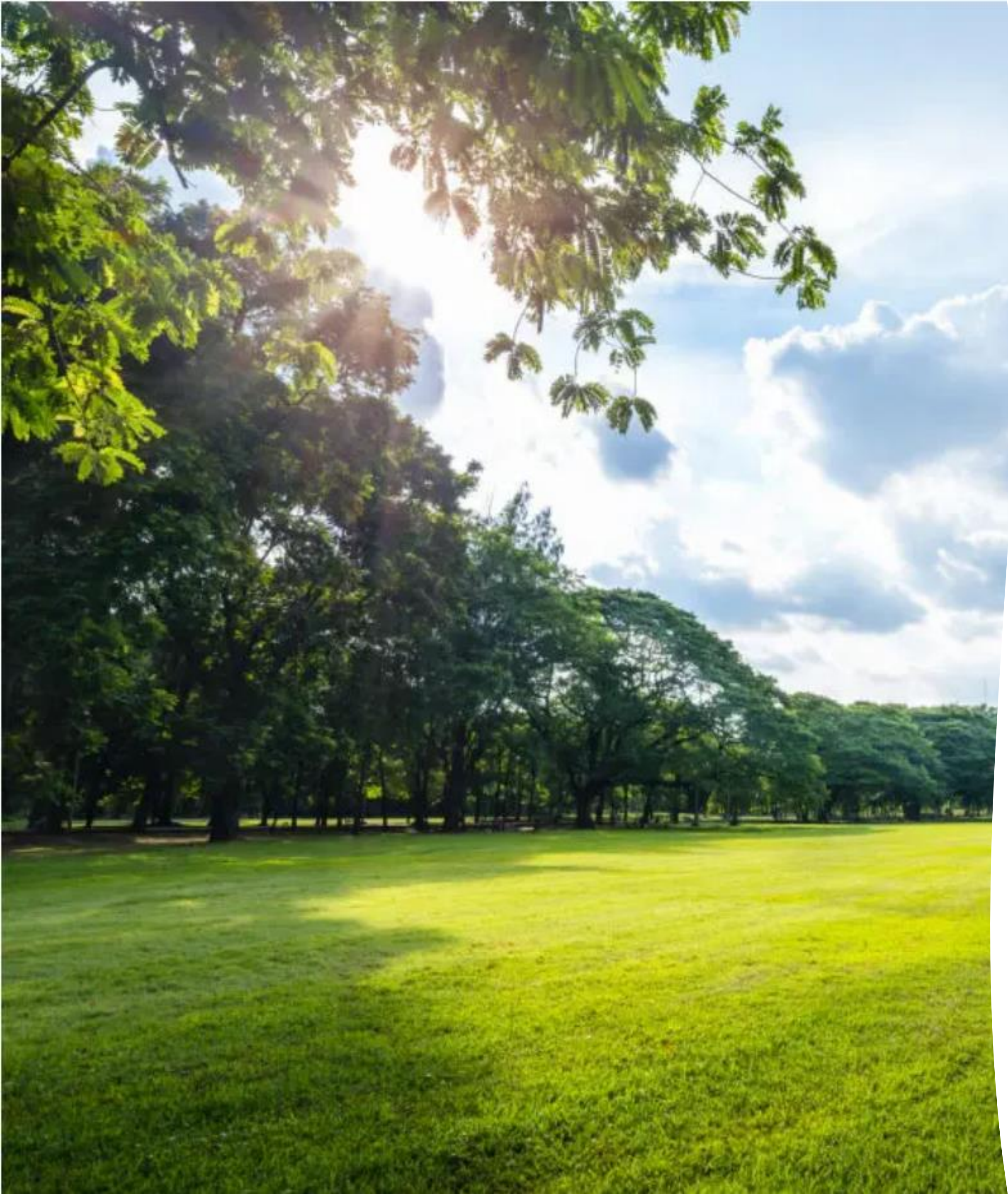
# The Future

- 18 states filed an amicus brief in the *Sheetz* case in support of the county explaining that many states have laws protecting property owners and developers from excessive mitigation fees.
- Following the *Sheetz* decision, many jurisdictions will likely reassess whether existing impact fees comply with *Nollan/Dolan*.



# Fact Patterns

- City has a standard park land or fee in lieu requirement, reliant upon a chart describing the amount of park land/fee per additional single family residential unit or equivalent, not including commercial development.
- The land/fee schedule was developed based on a study (now ten years old) by a consultant hired to assess recreational needs created by various classes of development.
- City repeals and reenacts the park/fee code section by adding a series of findings describing how the study took into account the legitimate governmental purpose of the requirement, and how the chart actually makes an individualized application because it lists different levels of dedication dependent upon the number and kind of residential units.
- The city does not update the study.



# Fact Patterns, cont'd.

- City has a standard park land or fee in lieu requirement, reliant upon a chart describing the amount of park land/fee per additional single family residential unit or equivalent, not including commercial development.
- City updates the supporting study, wherein the consultant details why the land/fee in lieu numbers are actually as individualized as reasonably possible, and readopts the chart, citing the new study.
- **QUESTION**: Does this satisfy Sheetz?

# Fact Pattern #2

- Existing property contains an operating hotel with 120 rooms. Applicant wants to convert the hotel rooms to residential studio apartments by adding kitchens to each unit resulting in 120 residential units.
- City has a Capital Expansion Fee (CEF), which assesses new residential developments for the proportionate share of the cost of new capital facilities required for public services (fire, police, govt facilities, neighborhood and community parks) and transportation infrastructure.
- The City wants to impose the CEP, taking the position that 120 new residential units are being created and, thus, the full CEF must be imposed based on the average unit size. This will result in approximately $1M in fees.
- **<u>QUESTION</u>**: Does this satisfy <u>Sheetz</u>? Would it be more defensible if the City only imposed a proportion of the fee in light of the existing infrastructure and hotel building?

# Fact Pattern #3

- City Council adopts an ordinance addressing requirements for approval of a service plan submitted pursuant to Title 32.
- The ordinance requires, as a condition of service plan approval, the construction of affordable/attainable housing, or a payment in lieu of such construction, by the developer/proponent of the service plan. The affordable housing requirements are based on a study commissioned by the City. The validity of the study is not questioned by the developer/proponent.
- **QUESTION:** Pursuant to Sheetz, is the City's affordable housing requirement enforceable as a condition precedent to service plan approval, as opposed to a condition precedent to development/building permit approval?

# Fact Pattern #4

- City has a code requirement for dedication of school land or fee in lieu, reliant upon numbers provided by the school district. The requirement is reflected in a chart:

| School | Student/Lot | Acres /Student | Dollars/Acre | In-Lieu Fees |
|---|---|---|---|---|
| Elementary | .294 | .033 | $25,000.00 | $243.00 |
| Middle | .154 | .067 | $25,000.00 | $258.00 |
| High | .192 | .037 | $25,000.00 | $178.00 |
| Total | | | | $679.00 |

- City tells the school district to update the chart or provide alternate language in response to Sheetz.

- **QUESTION**: If the district does not comply, can the city simply delete the requirement, leaving the school district on its own?

# Fact Pattern #5

- A City legislatively adopted an affordable housing impact fee on all development in the City. The fee schedule imposes a different fee/sf depending on the type of development: single family ($5/sf), multifamily ($4/sf), commercial ($8/sf), and industrial ($3/sf).
- An applicant developing a large industrial project disputes the affordable housing impact fee claiming there is no "rough proportionality" between the industrial project and its impact on housing.
- Before *Sheetz,* because the City adopted the affordable housing impact fee schedule legislatively, Colorado's position was that this was acceptable and not subject to the *Nollan* "rough proportionality" test.
- **<u>QUESTION</u>**: After *Sheetz*, this fee is now subject to the *Nollan* "rough proportionality" test, do you think it continues to be defensible?

# Fact Pattern #6

- Municipality adopts a traffic impact fee on all new development, based on a traffic study performed by the municipality's staff in concert with outside traffic consultants.
- The impact fee is based on the type of development (residential/ commercial/ industrial/ mixed use) and based on the anticipated traffic impacts based on development type and size.
- Municipality enters into a series of revenue sharing agreements with developer that include sales taxes, urban renewal property tax increment revenues, use taxes, and lodging taxes. The revenue sharing agreements obligate the developer to construct certain roadway improvements, but are silent as to the municipality's contribution to such improvements from the impact fee revenues paid by the developer.
- Municipality interprets the combination of the impact fee ordinance and the revenue sharing agreements to mean that no funds generated by the impact fee will be applied to roadway improvements constructed by the developer.
- **QUESTION**: Pursuant to Sheetz, is the municipality's action in applying the impact fee ordinance and use of revenues generated therefrom enforceable?

# Fact Pattern #7

City has a standard park land or fee in lieu requirement, reliant upon a chart describing the amount of park land/fee per additional single family residential unit or equivalent, not including commercial development.

City amends the supporting code section to provide that if the applicant does not want to simply provide the dedication or fee as set out in the chart the applicant may perform its own site-specific study for consideration by the city in place of the standard.

**QUESTION**: Does this satisfy Sheetz? Is defensibility enhanced or diminished if the City simply repeals the chart and requires an applicant-funded study in each case, using consultants from a city-approved list?

# Fact Pattern #8

- Town adopts an ordinance requiring, as a condition precedent to approval of a service plan pursuant to Title 32, that all metropolitan districts approved pursuant to the ordinance must impose, annually, an additional mill levy, to revenues generated from the additional levy to be remitted to the Town to offset the additional cost of municipal services required by the new development to be located within the metropolitan district.
- The additional mill levy requirement is not supported by any study or fiscal analysis of the cost of municipal services to be required by the new development. The ordinance does not segregate the revenues generated from the additional district mill levy to be applied to additional costs resulting from the new development.
- **QUESTION**: Is the Town's requirement that the district impose an additional mill levy and remit the revenues generated therefrom to the Town defensible pursuant to Sheetz?

# Fact Pattern #9

- A water and sanitation district ("District") has proposed to assess the cost of expanding its sanitary sewer capacity, specifically replacement of the main interceptor pipeline and related improvements, against a group of "large" developers who are in the process of getting approvals from the Town the District serves.
- The District imposed a tap fee on existing, completed projects in its service area for capital projects, and plans to also impose a tap fee on these "large" future developments.
- The group of developers protests the cost of the upgrade because they believe the tap fees (past and future) should pay for the cost of any upgrade.
- **QUESTION**: Under Sheetz, can the District impose both the cost of expansion of the sanitary sewer and the tap fee?