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A COMPARATIVE CONSIDERATION OF DEVELOPMENT CHARGES IN CAPE TOWN

Colin Crawford* and Julian C. Juergensmeyer**

During the Study Space IX week in Cape Town, a frequent concern we heard expressed by the urban professionals we met was about the city's need for infrastructure improvements. This is of course a common refrain the world over,¹ although given the rapid urbanization of sub-Saharan Africa in particular,² the need for infrastructure is especially pressing. Moreover, South Africa is often a leader on the continent in matters involving spatial planning.³ Thus, it is perhaps no surprise that South African cities, including Cape Town, in recent years have promulgated sophisticated development charge regulations.

However they are labelled, – development charges, impact fees, impact assessments, betterment fees⁴ – the fact is that conditioning development upon a requirement to provide some additional service usually related to the burden that will be placed upon the municipality by the development, has become a common practice the world over. In addition, more recently other devices have become equally popular, notably land value recapture programs.⁵ As discussed below, these may in fact be more promising options for solving Cape Town's infrastructure needs.⁶ With respect to development charges specifically, however, their popularity stems from the fact that they lessen the financing

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¹ See Crawford, Sześciło & Juergensmeyer. "Social Function and Value Capture: a Role to Play in Polish Land Development Regulation?" Study Space VIII: Phoenix Cities: Urban Recovery and Resilience in the Wake of Conflict, Crisis and Disaster, ed. E. Gmurzynska, 62 *Studia Iuridica* (2016).

² See generally Carlos Nunes Silva, *Urban Planning in Sub-Saharan Africa: Colonial and Post-Colonial Planning Cultures* (New York: Routledge, 2015).

³ We deliberately use the phrase "spatial planning" or "spatial development" here rather than the more common term in the U.S., "land use planning", in light of the negative, apartheid-era associations of the latter phrase in South Africa. See Graham & Berrisford, *Development Charges in South Africa: Current Thinking and Areas of Contestation* <http://www.imesa.org.za/wp-content/uploads/2015/11/Paper-1-Development-charges-in-South-Africa-Current-thinking-and-areas-of-contestation-Nick-Graham.pdf>

⁴ See English Expert Committee on Compensation and Betterment (Uthwatt Committee) Final Report. Cmd. No. 6386 (1942).

⁵ Martim Smolka, *Implementing Value Capture in Latin America: Policies and Tools for Urban Development* (Lincoln Institute of Land Policy, 2013).

⁶ See *infra* notes 71 and 72 and accompanying text.

burden of the usually cash-short municipality.⁷ However, as these remarks will argue, the appeal of the practice on paper can obscure the actual difficulty of collecting the development charges and expending them so as to provide needed infrastructure. This challenge is one not lost on South Africans, including Cape Town officials and planners.⁸

This article, will therefore look at the relatively new Cape Town development charge initiative in a comparative perspective.⁹ Part I will discuss the U.S. experience with development charges, including examples both effective and less so. The aim in Part I will be to demonstrate the achievements and shortcomings of development charges – or impact fees, as they are most commonly called in the U.S. – as utilized in the U.S., which was an early adopter of such practices globally.¹⁰ Part I will also suggest areas in which Cape Town practitioners (of whatever kind, whether lawyers, urban planners, engineers and so on) might want to take care as they seek to work with their legislation, based on the U.S. experience. Part II will then provide an assessment of Cape Town's development charge (DC) efforts in context. Part II also will assess DC efforts in Cape Town in comparison with other models, including the U.S. model and ask, in light of South African spatial management literature, what, if any, concerns stand out for Cape Town's successful implementation of a DC program. Based on the previous two parts, Part III will, finally, briefly conclude with some observations and concerns about the practicability of Cape Town

⁷ Nelson, Nicholas & Juergensmeyer, *IMPACT FEES: Principles and Practice of Proportionate-Share Development Fees* (2009).

⁸ Assessing the Fiscal Impacts of Development: Study Report, February 2015, National Treasury

<http://sacitiesnetwork.co.za/wp-content/uploads/2015/05/Fiscal-Impact-of-Development-Report-Final.pdf>

⁹ The Cape Town program website is City of Cape Town Development Charges Website <http://www.capetown.gov.za/work%20and%20business/planning-portal/tariffs-and-charges/development-charges>. Although we have chosen to concentrate on Cape Town, it should be noted that similar programs exist in other South African cities. See for example Approval for the City of Tshwane's Incentive Framework

<http://www.tshwane.gov.za/sites/Council/Council%20Resolutions/98.%20Council%20Resolutions%2027%20November%202014/04.%20Approval%20for%20the%20City%20of%20Tshwane%20Incentive%20Framework.pdf>; Kwadukuza Municipality Draft Policy Regulating the Payment & Use of Development Charges May 2015 <http://www.kwadukuza.gov.za/attachments/article/2207/Development%20Charges%20Draft%20Policy%20IAP%20May%202015.pdf>; Provincial Gazette Igazethi Yephondo September 26, 2016 No. 3738 <http://code4sa-gazettes.s3.amazonaws.com/archive/ZA-EC/2016/provincial-gazette-ZA-EC-vol-23-no-3738-dated-2016-09-26.pdf>.

¹⁰ Development charges have been used for at least 70 years in the United Kingdom and for about 40 years in the United States. See Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governmental Capital Funding Dilemma*, 9 *FLA. STATE UNIV. L. REVIEW* 415 (1981); Malcolm Grant, *Compensation and Betterment*, in *BRITISH PLANNING* 62-76 (1999).

achieving significant infrastructure improvements using its new development charge regulations.

I. A BRIEF ASSESSMENT OF THE U.S. EXPERIENCE WITH DEVELOPMENT CHARGES

In the 1970's American local governments began to have shortfalls in their infrastructure accounts. New growth was accelerating, thereby increasing the need for new infrastructure and, at the same time, the cost of providing infrastructure was increasing due to inflation and the public demand for bigger and better roads, parks, schools and public buildings. In the decades that followed – up to and including the current one - traditional revenue sources started stagnating and even disappearing. Property tax revolts begun in California spread to other parts of the country and resulted in the inability of local government to raise more revenue by raising property taxes. In some states, actual caps on property taxes were enacted and in other states political rather than legal limitations caused the same result when existing residents balked at the idea of their property taxes being spent to build infrastructure for new residents. To make matters worse, many federal and state grant programs began to dry-up, and as inflation increased, the folly of setting dollar amounts rather than percentage amounts of taxes such as the gas tax, led to empty coffers for local governments.

The universal approach to being unable to pay a bill is to look for someone else to pay it; the obvious direction for local governments to look was to developers. Before the 1970's were over and at a rapid pace in the years to follow, local governments began to require developer contributions toward infrastructure costs as preconditions for development approval. The slogan “Make Growth Pay for Itself” achieved bumper sticker popularity and thus began the era of required developer funding of infrastructure in the United States. As discussed above, the United States was by no means the originator of developer funding requirements but the speed at which developer infrastructure funding requirements spread - was unusual. Today, all fifty states have development charges, or impact fees, as they are usually called, in one form or another although their scope and amount range from de minimis to quite substantial and vary considerably from state to state.¹¹

The evolution of impact fees has revolved around several key issues: (1) What legal authority do local governments (cities and counties, in the US) have to impose them?; (2) If there is legal authority, what constitutional standards determine their validity or invalidity?; (3) What infrastructure items can be financed through them?; (4) How is the amount of the fees determined?; and,

¹¹ A 2015 Survey by Duncan and Associates reports a range of average impact fees per single family unit with a high of \$23,500 in California to a low of \$1,000 in Arkansas. See <http://www.impactfees.com>

finally (5) What limitations cover their expenditure? As we will discuss later, most of these issues have relevance to development charges in South Africa.

A. LEGAL AUTHORITY

The first issues confronting a local government in any country which wishes to charge impact fees is whether it has the legal authority to do so. Unless there is a specific impact fee enabling act or code or a constitutional provision on point this can be a troublesome issue and was for many years in most of the United States. The first issue raised is whether the fee should be considered a tax or a regulatory charge. If it is labelled a tax, which is often the development community's first assertion in opposition,¹² then in most jurisdictions worldwide it may be illegal because local governments usually have limited taxing powers. In the United States, state laws and constitutional provisions regarding the powers of local governments generally confine local government imposed taxes to the property tax and special sales taxes. In those few jurisdictions in the United States where the courts recognized that the power of taxation could be used to impose development charges, millage or other limits made them indefensible or impractical.

As a result, in most U.S. states the proponents of impact fees needed for the courts to consider them development regulations enacted pursuant to the police power – i.e. the power of local governments to promote and protect the public health, safety, morals and general welfare of the community. In South Africa, these challenges have been resolved with authorizing legislation at the national and local levels.¹³

B. STANDARDS FOR VALIDITY

If the courts of a jurisdiction without a specific enabling statute or constitutional provision accepted the contention that impact fees were regulatory in nature and not exercises of the power of taxation, then the next exercise became that of identifying the standards to which such land development regulations need to be consistent. In U.S. law, the overriding

¹² This seems to be the case in South Africa as well. “Commercial property developers in eThekweni have been asked to shell out even more, including a large new development ‘tax – a tax that the municipality has ‘invented’ according to property owners who claim it is illegal.” Fictitious Tax on Property Developers

<http://www.sacommercialpropnews.co.za/south-africa-provincial-news/kwazulu-natal/3954-fictitious-tax-on-property-developers.html>

For other developer arguments in opposition, see Amber Dawn Newsletter 21 (Comment from property developer to other individuals interested in property development)

http://www.amberdawn.co.za/site/news/view/16/14/2013/07/03/Amber_Dawn_Newsletter_21/_:Anger_Over_New_Metro_Charges (Article discussing Durban developers that, as a result of development charges, will go out of business or relocate to ‘friendlier’ municipalities)
<http://www.iol.co.za/dailynews/news/anger-over-new-metro-charges-1178498>

¹³ See *infra* notes 43-48 and accompanying text.

concept is that such police power-based regulations must be reasonable and cannot be arbitrary or capricious. Impact fee case law in their early years interpreted and applied the reasonableness requirement by adopting the dual rational nexus test. Succinctly stated, Prong One of the test specifies that the impact fee charged cannot be greater in amount than the cost to the local government of providing the infrastructure for the development from which it is collected. Prong Two states that impact fee revenues collected consistently with Prong I must be spent for the infrastructure for which it is collected and to benefit the development paying the fee. The meaning and ramifications of the dual rational nexus test will be discussed more below. South African legislation similarly appears to apply a comparable formula,¹⁴ although – and predictably – the country has experienced developer backlash criticizing the impact fees as a stealth form of taxation.¹⁵

C. INFRASTRUCTURE FOR WHICH IMPACT FEES CAN BE COLLECTED

Once the legal authority issue is resolved – at least to the satisfaction of the local government – the next step is to determine what items of infrastructure new growth can developers be required to pay for. In some jurisdictions, the question is answered in the state’s impact fee enabling Act. In Georgia, for example, the Development Impact Fee Act limits impact fees to the following infrastructure items: roads, parks, libraries, water and storm water and sewer treatment facilities, and fire and police protection infrastructure¹⁶. In Florida, a state without a general impact fee enabling statute, the list of eligible facilities has been judicially created through litigation and, for example, includes schools. In other jurisdictions, the list has been expanded to include environmental infrastructure such as open space, aquifer recharge areas, and scenic view preservation. In still others, social infrastructure such as affordable housing and day care facilities is financed through impact fees. Similarly, yet again, South Africa’s list of development charge-related expenditures is limited.¹⁷

D. HOW IS THE AMOUNT OF A FEE DETERMINED?

Once the types of infrastructure to be partially or totally financed through impact fees is determined, a difficult calculation must be performed to determine the amount of the fee. Prong One of the two-prong rational nexus test assumes prime importance by forbidding the local government to charge

¹⁴ Id.

¹⁵ See footnote 16 supra and Nick Graham & Stephen Berrisford, Development Charges in South Africa: Current Thinking and Areas of Contestation <http://www.imesa.org.za/wp-content/uploads/2015/11/Paper-1-Development-charges-in-South-Africa-Current-thinking-and-areas-of-contestation-Nick-Graham.pdf>.

¹⁶ GA. Code Ann, Sec. 36-71-1 et seq. The most commonly encountered infrastructure item not found in the Georgia list is schools.

¹⁷ See infra note 34 and accompanying text.

more than it will cost to provide the infrastructure necessitated by the development being charged. This is commonly referred to as the proportionate share requirement. Impact fees that are designed to respect this principle – which should be all of them – are often referred to as proportionate share impact fees. Note that this does not require local government to charge the full amount of its costs but only forbids charging more than that amount. Determining costs requires considerable skill, and data and nearly always requires the local government to establish levels of service for the infrastructure items. For example, X acres of parks per 10,000 residents or roads that provide traffic engineers established level of service B. Once again, these are problems that South African lawyers and planners are also grappling with.¹⁸

The most technically difficult task in determining fee amounts relates to credits. In impact fee terminology, “credit” has two meanings. The easier is the concept of allowing developers with local government approval to build needed infrastructure themselves and have the value of what they build “credited” as payment of the fees otherwise due. This is common practice and often appeals to developers who frequently maintain that they can build infrastructure more efficiently than local government. The other and more difficult use of the term “credits” refers to the offsets against the fees which represent other ways in which the developer will pay for the infrastructure. For example, once the new development starts paying property taxes, some of those taxes may be designated for infrastructure construction or bond payments for bonds issued to raise money to build infrastructure. These calculations are never simple, but to ignore them will violate Prong One of the dual rational nexus test, since the developer would otherwise be paying twice for the infrastructure.¹⁹

E. LIMITATIONS ON EXPENDITURE OF FEES

Prong Two of the dual rational nexus test requires that impact fee revenues can only be spent for the infrastructure for which it is collected. For example, fees collected for roads can only be spent on roads and not on parks, and vice versa. Furthermore, the fees must be spent to benefit the fee payor – i.e. the new development from which it is collected. This requirement not only is designed to guarantee the fairness of the process, but also is used as a way of establishing that they are not taxes since no such restraint is placed on the power of taxation. One should note that this principle forbids using impact revenues to pay for the needs of existing residents and means that if the level of service is to be raised, funds must be found outside the impact fee process to pay for the share attributable to existing residents. As with so many of the questions

¹⁸ Graham & Berrisford, *Development Charges in South Africa: Current Thinking and Areas of Contestation* <http://www.imesa.org.za/wp-content/uploads/2015/11/Paper-1-Development-charges-in-South-Africa-Current-thinking-and-areas-of-contestation-Nick-Graham.pdf>.

¹⁹ Nelson, Nicholas & Juergensmeyer, *IMPACT FEES: Principles and Practice of Proportionate-Share Development Fees* (2009).

addressed in this section, this is, again, an important part of the calculus in South Africa.²⁰

F. ROLE OF IMPACT FEE ENABLING ACTS

The easiest way to solve all five issues discussed above is to have an Impact Fee Enabling Act. Twenty-six of the United States have legislation in regard to impact fees; the most comprehensive ones are the Georgia²¹ and the Texas²² Acts. Many states have adopted one of them in whole or in part. Since the authors believe that the Georgia Act is superior to the Texas Act, it will be described briefly to examine how it resolves the issues discussed above.

The Georgia Development Impact Fee Act was originally adopted in 1990 and legislatively authorizes the adoption of impact programs by Georgia's local governments provided they engage in capital improvement programming. It adopts the dual rational nexus concept and emphasizes the proportionate share principle. As already mentioned, the statute contains a list of the infrastructure items that can be the subject of impact fee programs. Finally, the statute gives detailed rules for calculating fees, including credits to be given, and how they can be expended. Thus, the Georgia statute neatly limits the role of impact fees, provides a clear, principled justification for them and provides precise formulae for calculating them. Yet again, the more recent South African legislation does the same,²³ despite relative neglect by local governments.²⁴

The above then raises the question: what is the possible relevance of this for Cape Town? In Part III below, we will address that question. However, before proceeding further, it merits noting – as indicated at the end of many of the sub-sections above – that much of what has been said above already constitutes a concern that has been addressed or is being addressed in South African legislation and in development practice. To some extent, of course, this reflects the universality of the difficulties of paying for and providing infrastructure services. However, the similarities (indeed, we reflected that we could take South African development charge legislation and by changing out the name of a South African municipality for a U.S. municipality, the laws were virtually interchangeable) also led us to wonder whether development charge legislation in South Africa has been sufficiently adapted to the local context. That is, for example, it is notable that the legislation does not focus on housing provision – treating housing as part of the infrastructure, in a country where a huge housing deficit and related service backlog – for reasons related to the

²⁰ See, e.g., *infra* notes 46-48 and accompanying text; see generally Graham & Berrisford, *supra* note 19.

²¹ GA. Code Ann, Sec. 36-71-1 et seq.

²² Tex. Local Gov't Code Ann., Title 12. Sec. 395.001 et seq.

²³ See *infra* notes 46-48 and accompanying text.

²⁴ See *infra* note 32 and accompanying text.

forced divisions of apartheid. Therefore, in what follows we will consistently seek to ask whether South African – and especially Cape Town – development charge practice might be tweaked to respond more robustly to local conditions. In addition, we will endorse those South African voices suggesting that devices other than development charges, such as land value recapture programs, might be better in many instances as a means of funding infrastructure in South Africa generally and Cape Town specifically. To this end, the next section will review features of the Cape Town example.

II. CAPE TOWN AND DEVELOPMENT CHARGES

To assess the prospects for a successful DC effort in Cape Town, at least three matters merit discussion. First, DCs are not new to Cape Town. Some form of DC regulation has existed in South Africa since the 1980s. In fact, much earlier than in the United States.²⁵

However, in the judgment of the National Treasury they have not been used “effectively” due to “uncertainty on their legal status, basis of calculation, [and] usage of associated revenues.”²⁶ As noted in Part I, these are common tensions in the struggle to implement DCs, especially the second and third factors.²⁷ Since then, however, the Republic has taken steps both to clarify the legal status of DCs and to refine their calculation and application.

Second, it bears mention that the initial target categories today for DCs in South Africa constitute a fairly standard list in global terms, namely potable water provision, sewerage collection and treatment, electricity distribution, municipal roads and associated infrastructure, and solid waste disposal (including landfills and transit stations).²⁸ Moreover, the formula for calculation, though not necessarily trouble-free in practice²⁹ (in South Africa or anywhere in the world), applies a fairly typical series of considerations as follows: “DC is based on the estimated share of the municipal network design capacity to be utilised by the developer/applicant; [the] total impact of development must be expressed in terms of the unit cost per relevant infrastructure unit; and DC quantifies the once-off capital cost of the

²⁵ “In South Africa, municipalities have levied development charges in various forms for many years. In the former Cape Province, Betterment Fees were in use from at least 1935, based on the percentage of the value of any improvement that was made to a land holding.” Davis Savage, “Evaluating the performance of Development Charges in financing municipal infrastructure investment,” Discussion Paper (2d draft 23 March 2009).

²⁶ National Treasury, Republic of South Africa, National Development Charges Policy Framework, 9 May 2016, at 6 (presentation on file with author).

²⁷ See, e.g., *supra* note 33 and accompanying text.

²⁸ *Id.* at 10.

²⁹ See generally Graham & Berrisford, *supra* note 19.

infrastructure capacity required by the development.”³⁰ As noted at the end of Part I above,³¹ however, it concerns us that, for example, in the case of Cape Town with its unique land use patterns that largely result from historical land uses prior to the end of apartheid, that development charges might gain favour if the list of permissible uses were adjusted to respond directly to local circumstances.

Thus, on the one hand it is promising that the government is now making clear efforts to educate and specify the nature of DCs. However, the fact that DCs have existed for some time but have not been widely embraced suggests that work will have to be done. Clearly efforts need to continue to be undertaken to convince relevant stakeholders that DCs are an important part of the spatial management development mix, as government officials argue.³² But signs are that this will not be easy. Recent publications on development charges suggest that changing attitudes is easier said than done.³³ Unsurprisingly, developer protest to the DCs, alleging that they are effectively an unfair form of taxation, heralded more recent efforts to promote and clarify their use. As noted in Part I, this constitutes a standard feature of the DC debate.³⁴ Nonetheless, developers are influential players. Getting them on board and convinced of the fairness of conditioning development upon DC acceptance is crucial.³⁵ As indicated, it is our view that one way to increase their popularity would be to rework the list of development charges to recognize legacy land use challenges. Alternately, it may be that more aggressive pursuit of other mechanisms, such as land value recapture programs, might be time and energy better spent than trying to convince developers of the fairness of development charges.

Third, the legal framework governing the administration of DCs in South Africa is complicated. On the one hand, this is a plus because it speaks to the fact that DCs have been studied and thought deeply about. On the other

³⁰ Supra note 10 at 11.

³¹ See supra notes 30-31 and accompanying text.

³² See generally, Graham & Berrisford, supra note 19.

³³ Jugal Mahabir and Ntombizodwa Mabena, Identifying The Funding Constraints In Municipal Capital Investments, Chapter 9 in the Technical Report to the Annual Submission on the 2015/16 Division of Revenue, Financial and Fiscal Commission, Midrand, South Africa 261 (2015/16) (“Observing, in relevant part, that development charges “have been highly volatile financing sources for municipalities, especially metropolitan municipalities, rural municipalities and district municipalities. Possible reasons for this are: the administrative complexities embedded in the structure of development charges in South Africa, specifically relating to methodologies for costing these charges; legal contestations that have occurred between municipalities and developers over levying charges and weak regulatory frameworks.”(citation omitted).)

³⁴ See supra notes 16 and 19 and accompanying text.

³⁵ Nelson, Nicholas & Juergensmeyer, *IMPACT FEES: Principles and Practice of Proportionate-Share Development Fees* (2009).

hand, as will be seen below, this opens the possibility for confusion and manipulation of the system.

The ultimate authority for DCs in South Africa extends from the Constitution. Article 152 commands that a municipality must “ensure the provision of services to communities in a sustainable manner” and “to promote social and economic development.”³⁶ Moreover, a municipality has certain “developmental duties,” specifically to “structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community” and to participate in national and provincial development programmes.”³⁷ This last instruction is especially important as it both clarifies the responsibility of municipalities to provide community needs and also the requirement to do so within the context of development initiatives established by superior levels of government.

There is yet more relevant legislation. Section 75A of the Municipal Systems Act³⁸ “provides the underlying legal basis for a municipality to require a DC.” The Act allows municipalities to recover costs associated with municipal functions or services, including from third-party actors such as developers. As a result, they conclude, Section 75A “thus enables the municipality to enter into an agreement with a developer to require the developer to install infrastructure to provide or contribute towards providing a service in lieu of having to pay a DC.”³⁹ Also important in this connection is the Spatial and Land Use Management Act of 2013 (SPLUMA). SPLUMA ambitiously seeks to establish uniformity in spatial management throughout the Republic, including development of national, regional and municipal levels.⁴⁰ SPLUMA Section 49 provides that “[a]n applicant [for development permission] is responsible for the provision and installation of internal engineering services” while a “municipality is responsible for the provision of external engineering services.”⁴¹

However, the omissions in this provision are problematic for determining the extent of the DC responsibility. The problem arises from a lack of consistency with other planning terminology. Most South African planning legislation refers to “bulk” and not “external” services. Graham and Berrisford

³⁶ Constitution of the Republic of South Africa (1996), Chapter 7, Art. 152 (b) and (c).

³⁷ *Id.* At 153.

³⁸ Republic of South Africa, Municipal Systems Act, Act 32 of 2000.

³⁹ Graham & Berrisford, *supra* note 19, discussion of Local Government: Municipal Systems Act.

⁴⁰ Republic of South Africa, Spatial Planning and Land Use Management Act, Act 16 of 2013, Articles 9-11.

⁴¹ Graham & Berrisford, *supra* note 19, discussion of Section 49.

point out that the SPLUMA definition thus omits mention of what are commonly called “link” services – that is those services that connect “internal” and “external” services. The consequence, they say, is that “SPLUMA necessitates a complex, even convoluted, construction in the drafting of national, provincial and municipal legislation dealing with engineering services.”⁴² As noted in Part I, impact fee success is demonstrably achieved when the covered services are described in detail. This is, for example, a major reason for the success of the Georgia Impact Fee Enabling Act.⁴³

In addition, an applicant need take account of municipal requirements, including the provisions of the 2015 Cape Town municipal by-laws⁴⁴ and more recent policy guidance on DCs.⁴⁵ The policy guidance states the four principles that are to govern DC administration in Cape Town, namely (1) equity and fairness, (2) predictability, (3) spatial and economic neutrality and (4) administrative ease and uniformity.⁴⁶ That is all very well and good. However, in a country as economically and socially unequal as South Africa,⁴⁷ (1) and (3), to cite just one example, present conflict. Equity requires rectifying differences of resource distribution – and so would suggest, for example, a preference for pursuing DCs in townships and other products of apartheid-era spatial management. By contrast, (3) speaks of neutrality, which argues for a contrary result, for not giving a preference for any sort of area or economic group. It is hard to imagine how they can be reconciled. Graham & Berrisford, similarly, express concerns about the predictability factor, noting that “[i]t would, however, be unreasonable for poor households to bear these costs [i.e. the costs of the related services], which in any event are already subsidised by national transfers.” They therefore conclude that, “[i]n order to promote predictability and coordination, particularly in low cost housing developments, the costs associated with municipal infrastructure (i.e. the development charge) should still be established before subsidies are applied in a transparent manner to fund the liability.”⁴⁸ Thus, and consistent with what we have suggested

⁴² Graham & Berrisford, *supra* note 19, discussion of Section 49.

⁴³ See *supra* note 26.

⁴⁴ City of Cape Town Municipal Planning By-Law, 2015, available at <https://www.westerncape.gov.za/eadp/files/basic-page/uploads/City%20of%20Cape%20Town.pdf> (last accessed April 11, 2017).

⁴⁵ City of Cape Town, Development Charges Policy for Engineering Services for the City of Cape Town, Policy No: 20037 (Approved by Council 29 May 2014 C 41/05/14).

⁴⁶ *Id.* At 4-5. See also Graham & Berrisford, *supra* note xx at 4-5 (explaining in greater detail what these terms will mean in practice.)

⁴⁷ See, e.g., Statistics South Africa, Living Conditions of Households in South Africa, at 15 (released 11 January 2017)(reporting, for example, that White-headed households earned on average 4.5 times more than Black-headed households), available at <http://www.statssa.gov.za/publications/P0310/P03102014.pdf> (last accessed April 11, 2017).

⁴⁸ Graham & Berrisford, *supra* note 19, discussion of National Treasury Draft Framework.

already, the Cape Town development charges regulation might benefit from greater clarity than in our view the four principles (however admirable) provide. The U.S. experience, in the success of the impact fee enabling acts, indicates that a very specific purpose is best. Given South Africa's continuing struggles with inequality, it might thus be best to focus on equity, and even to privilege the use of development charges in particular areas, providing they include housing infrastructure. However, as foreign observers, we recognize that the choice should be a domestic one.

In other words, this is to say that the fact of South Africa's huge income inequality creates enormous concerns about the practical application of the existing DC rules. Perhaps partly for this reason, the Western Cape government has expressed concerns about the usefulness of DCs and their negative effects on housing affordability,⁴⁹ favouring instead public-private partnerships for purposes of housing developments, despite their cumbersome nature.⁵⁰ Although of course DCs are not only used in the housing context, this is no small concern in South Africa, where the housing deficit, and associated service deficit, is considerable.⁵¹ Typically, low-cost housing, which in South Africa is categorized as "social" and not "economic" infrastructure, is not funded by DCs.⁵² However, given the chronic shortage of capital for all infrastructure, there is no reason in theory that this should not happen.⁵³ Nonetheless, if this were to happen there would arise serious challenges of how to off-set the DCs attributable to "social" infrastructure.⁵⁴ In addition, it would be essential to promote a high degree of transparency so that "unscrupulous developers" do not inflate "the costs of the infrastructure that they have installed in order to set off a greater amount against their overall development charges liability."⁵⁵ In a region where spatial management activities have long been beset by a lack of transparency and associated corruption,⁵⁶ this may be no easy task.

In sum, the successful implementation of DCs in South Africa is

⁴⁹ F. Cuming, Western Cape Government Department of Environmental Affairs and Development Planning, Development charges and housing affordability: A policy conundrum 35 (2013).

⁵⁰ *Id.* At 41-42

⁵¹ Presentation of Gareth Haysom to Study Space Cape Town, Thursday, June 30, 2016 (notes on file with authors).

⁵² Graham and Berrisford, *supra* note 19.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See, e.g., Stephen Berrisford, Why It Is Difficult to Change Urban Planning Laws in African Countries, 22 *Urb. Forum* 209, pp. 217-225 (2011), available at <http://link.springer.com/article/10.1007/s12132-011-9121-1> (last accessed April 11, 2017)(observations by a South African discussing Sub-Saharan African generally).

especially challenging given the country's history and current context. We note only the following matters, the resolution of each of which will affect the more widespread use of DCs in the country:

- 1) Service backlog created by decades of apartheid-era inequity and neglect of service provision. As suggested above,⁵⁷ however, this creates something of a chicken-or-egg problem with DCs. On the one hand, local governments are constitutionally mandated to provide infrastructure,⁵⁸ and special attention is given to the provision of inclusionary and affordable housing. Yet as noted above, housing is considered a "social" infrastructure obligation and so outside of the ambit of activities traditionally financed by DCs. Thus, a practice gap needs to be filled to make this possible without passing on costs to the poorest South Africans. At the same time, a generation of construction of housing at no cost to the inhabitant, and sometimes of uncharged services, has created an expectation in some quarters of "free" services."⁵⁹ Clearly, part of making DCs a more viable option requires not just educating on DCs but on changing the understanding of how municipal services overall are paid for and used.
- 2) South Africa may have outstanding spatial management legislation but, like most sub-Saharan countries, it lacks an abundance of well-trained spatial management professionals equipped to handle the volume of development activity.⁶⁰ DC regulations and processes are by their nature complicated and the questions of valuation and duration are not always easily resolved.⁶¹ Thus, the need to increase spatial management professional capacity must be understood as part and parcel of the process of creating more widespread acceptance of and adoption of DCs as a municipal service financing option.
- 3) Differences of terminology need to be resolved in the relevant legislation and regulations. This is equally true for conflicts between laws, as in the conflict, noted above, between "bulk" services in one law and "external" services in the other and for conflict within legal instruments, just as the Cape Town policy guidance's contradictory principles.
- 4) In addition, some outside observers, and notably the World Bank,⁶²

⁵⁷ Supra notes 43-50 and accompanying text.

⁵⁸ See supra note 44 and accompanying text.

⁵⁹ Such as the provision of full subsidized housing units. Presentation of Tristan Görgens (Western Cape Government) to the Study Space IX seminar, July 1, 2016.

⁶⁰ See Berrisford, supra note 64, at 19.

⁶¹ See supra notes 23-25b and accompanying text.

⁶² World Bank, Evaluating the performance of Development Charges in financing municipal infrastructure investment (Discussion Paper – Second Draft 23 March 2009), available at

argue that additional legal instruments and guidance are needed to make DCs a robust part of the municipal service financing mix.

- 5) While developer protests are commonly loud in opposition to DCs, they must be a special focus of education efforts, to change the normative expectation of who has responsibility for service provision, and when.

III. PROSPECTS FOR SUCCESS GOING AHEAD

What lessons do the foregoing comments summarizing key U.S. experiences with DCs hold for South Africa and Cape Town? First, and to emphasize a point made above, the laws and regulations, at both the national and local levels, would benefit from being as specific as possible, as to both purpose and implementation. We also note an added benefit of greater specificity, namely the possibility of promoting the highest level of transparency.⁶³ Second, we suggest it is worth rethinking the areas in which development charges should be applied, to respond directly to the most pressing South African social and economic issues as they manifest themselves in spatial use. We acknowledge, of course, that this could entail legislative and even constitutional changes (e.g. for the funding of “social” expenditures) that may be more easily suggested than accomplished. Third, and relatedly, there may be ways to make the development charges more appealing to developers and other stakeholders who would use and benefit from them if other measures, such as “green offsets” that would encourage energy-savings, as part of the applicable regulatory structure.⁶⁴ Finally, and as also touched on above, it may simply be that development charges are not the best vehicle for promoting infrastructure provision in a society deeply unequal and with a relatively small private development sector.⁶⁵ For this reason, other measures also mentioned above, from public-private partnerships to land value recapture programs, may hold greater promise in Cape Town specifically and in South Africa more broadly in the unending search for the best means to finance infrastructure in a world where – almost no matter where you are – municipal finances are reduced.

http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Development_Charges-Draft_2-23_March_09.pdf (last accessed April 11, 2017).

⁶³ See, e.g., Berrisford, *supra* note 64, at 223. See also Graham and Berrisford, *supra* note 19 (citing concerns about corruption in section on “Thresholds and exemptions.”).

⁶⁴ Graham & Berrisford, *supra* note 19, discussion of Discounts for ‘green’ infrastructure.

⁶⁵ Stuart Paul Denoon-Stevens, Developing an appropriate land use methodology to promote spatially just, formal retail areas in developing countries: The case of the City of Cape Town, South Africa, 54 *Land Use Policy* 19-20 (2016).