IMPACT FEE HANDBOOK

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Impact Fee Handbook

National Association of Home Builders

This publication is designed as a resource to provide accurate and authoritative information in regard to the subject matter covered with the understanding that its authors are not engaged in rendering legal, accounting, and other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

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CHAPTER 1

Introduction

- ***What Are Impact Fees?***
- ***Why Do We Have Impact Fees?***
- ***Local Government Fiscal Stress and the Rise of Impact Fees***

The United States is experiencing a public infrastructure financing deficit that is the result of increasing demand for new and upgraded infrastructure systems coupled with diminished fiscal resources. Communities have turned to impact fees as a politically expedient means by which to construct public infrastructure systems. However, the use of impact fees may shift much of the financial burden away from all public infrastructure users (the general public) to a narrow segment of the public—homebuilders and new homebuyers. Aside from basic issues of fairness and equity, the use of impact fees raises legal, economic, technical, administrative, policy, and financial concerns for interested parties.

This Handbook was developed to provide homebuilders and other parties interested in impact fees a resource for exploring these issues and to provide strategies for achieving balanced infrastructure financing solutions.

The Impact Fee Handbook includes the following sections:

- Legal Aspects of Impact Fees
- Economic Aspects of Impacts Fees
- A Closer Look at Impact Fee Technical Studies
- Administrative Issues
- Alternatives to Impact Fees
- Political and Public Relations Strategies
- Appendices:
  A Case Studies
  B State Impact Fee Enabling Legislation Summary Chart
  C General Impact Fee Statute Considerations
  D Arizona, Montana, and Texas Impact Fee Statutes
  E Resources

While each section of the Handbook was designed to stand on its own, the Handbook's value lies in connecting each section so as to present the reader with a comprehensive picture of impact fees. It is recommended that the reader familiarize him or herself with the contents of the entire Handbook and then read in depth the sections most relevant to your situation. If there are areas that should be covered based on real world success and

failures in working with impact fees, readers are encouraged to let the staff at NAHB know so they can be addressed in future Handbook updates.

What Are Impact Fees?

Generally, impact fees are charges levied against new development in order to generate revenue for the purpose of funding capital improvements necessitated by that development. *Impact fees should not be confused with subdivision exactions that require developers either to "dedicate" land for public use or contribute cash in lieu of land for the purchase of land or facilities perceived to be necessary by local governments.* As a fundamental tool, impact fees are broader and more flexible than subdivision exactions. Impact fees can be levied on various types of development, including subdivision, condominium, commercial, and industrial projects. Unlike subdivision exactions, impact fees can be used to fund the construction of offsite facilities.

Typically, impact fees are:

- levied on an "up-front" or "front-end" basis, usually at the time of building permit issuance or subdivision approval;
- dedicated to a specific public use, such as a transportation facilities, sewer facilities, water facilities, or parks and recreation facilities, etc.;
- calculated on the basis of the number of residents or bedrooms in a dwelling, the square footage of a building, the linear footage of the front property line, or as a flat fee per unit or building lot, or some other formulation; and,
- prescribed by ordinance, although the dollar amount may or may not be specified.

Government has long imposed narrower charges for a variety of onsite capital improvements, including sewer and water hookups, storm water management facilities, and street and sidewalk construction. More recently, though, communities have levied impact fees on developers for a number of offsite improvements such as the development of community-wide recreational facilities, the construction of highway segments, or the expansion of centralized wastewater treatment plants. Often the need for these services and facilities is only indirectly attributed to a specific subdivision or project, giving rise to developer objections to funding such general improvements.

Impact fees range from several hundred to hundreds of thousands of dollars per home or building. They raise such fundamental social questions as:

- Who *really* pays?
- How is the fee calculated?
- Where does the money go?
- How and where is the money spent?
- Who *really* benefits from the new or expanded public facilities? What is the impact on housing costs?

- How is economic development affected? What are a community's financing alternatives?
- How does an impact fee policy mesh with a community's and region's affordable housing policy?
- Is new development being required to pay its *fair* share or something more?

Why Do We Have Impact Fees?

Impact fees were initiated in the 1970s in Florida and California—areas facing high growth and restrictive tax systems. Coupled with cutbacks in federal aid, local governments began searching for a new funding source: impact fees. In reality, many of these "fees" are a hidden charge placed upon a discrete segment of the general public—those citizens moving into new houses and apartments. In many, if not most, cases, consumers paying these charges already live in the community. They are first-time or move-up home buyers, and new families or individuals leaving their parent's home. .

The use of impact fees has spread rampantly as a result of several factors. Local governments are often pressed to extend public services to urban expansion areas because of a strong market preference for suburban housing products coupled with an expanding population base and rapid rate of new household formation. In particular, governments in high-growth areas struggle to keep pace with the demand for new public services while simultaneously maintaining and repairing existing public facilities. The cost of constructing new public infrastructure has increased substantially over the past decade as local governments compete in a globalized marketplace for raw materials, while at the same time, spending more to meet stringent federal and state mandated design standards. Nonetheless, citizens expect local governments to maintain existing levels of service despite diminishing fiscal resources.

Traditionally, local government has financed public services through (i) general fund revenues and (ii) the issuance of general obligation bonds that are repaid by future property tax collections, or (iii) revenue bonds that are paid through the net revenues of the utility constructing the improvements. General obligation bonds are defined as a debt liability backed by the full faith and credit of the issuing community. Revenue Bonds are backed by the full faith and credit of the community's utilities. Any of these approaches tends to be politically unpopular with existing residents.

Communities argue that the use of these financing mechanisms may require property tax increases, utility rate increases, or reductions in existing services. In addition, many states have adopted constitutional or statutory limitations on a local government's ability to issue debt, commonly including a requirement to attain approval by a majority or supermajority of voters.

In addition, voters across the nation have passed tax-cutting measures, including California's Proposition 13 and Massachusetts' Proposition $2^1/_2$, to limit the ability of local governments to raise taxes and to reduce the scope of government and government-supported services.

One consequence of the popularly termed "taxpayer revolt" is the emergence of local government policy that deems residential development acceptable only if it can "pay its own way." In many communities, public officials maintain that new development exacts public costs that exceed expected benefits. Decision makers, therefore, are frequently reluctant to approve development proposals that would require significant and politically unpopular outlays for service expansion. If they do approve development, local policy makers often condition permission to build on the payment of impact fees, effectively shifting some of the responsibility for service and facility provision from the public to the private sector.

Usually, however, decision makers fail to recognize the broad range of benefits associated with new development. They look only to the short term costs rather than to the full range of benefits a new development project generates at the time of project completion such as increased property tax revenues and other economic contributions by new households.

Impact fees generally do not require voter approval nor do they result in property tax or utility rate increases, at least directly, paid by current residents.

Local Government Fiscal Stress and the Rise of Impact Fees

During the past 30 years, many local governments have experienced some degree of fiscal stress resulting from rising service demands and from constraints on their ability to raise revenues. Fiscal stress, broadly defined, is when public service demands grow because of increasing population, inflation, rising real incomes, or other reasons, while the local revenue base—taxes, grants, and user fees and charges—does not grow fast enough to meet the increased public service demands. The difference in the growth rates of service demands and revenues necessitates either increases in tax rates or decreases in the level of services, or some combination of the two.

Another source of fiscal stress may have come from decreasing aid from the federal government, in part resulting from the changing focus of the federal government away from domestic issues to foreign policy, national defense, and homeland security.[1]

For an aggregation of all local governments, there is no definitive measure of effective tax rates. A crude measure of effective tax rates is local general revenues from their own sources (that is, total revenues less revenues from locally owned public utilities, transit systems, local employee retirement systems, and federal and state aid), as a percentage of Gross Domestic Product (GDP). This ratio provides an estimate of effective local government revenue-raising efforts since it measures their own-source general revenues (OSGR) relative to aggregate output (GDP).

During the 30-year period from 1966 to 1996, the period that includes the "tax revolts" in California and Massachusetts, local governments lessened their reliance on property taxes. In 1966 revenues from property taxes comprised nearly half of the total local

revenues, however, 30 years later, in 1996, the property taxes only comprised 28 percent. [2] Since 1966, local governments confronting rising service demands from mandates from higher levels of government and their own constituents and constrained from increasing property taxes, raised revenues from other sources.

Rising Service Demands

Population growth visibly increases public service demands. Roads, schools, and other public facilities become more congested. In order to keep a constant level of public services, the local public capital stock must expand to reduce congestion (assuming there was no excess capacity prior to growth). Inflation also increases the cost of providing public services, as local governments must pay more for their purchases of goods and services, including employee compensation.

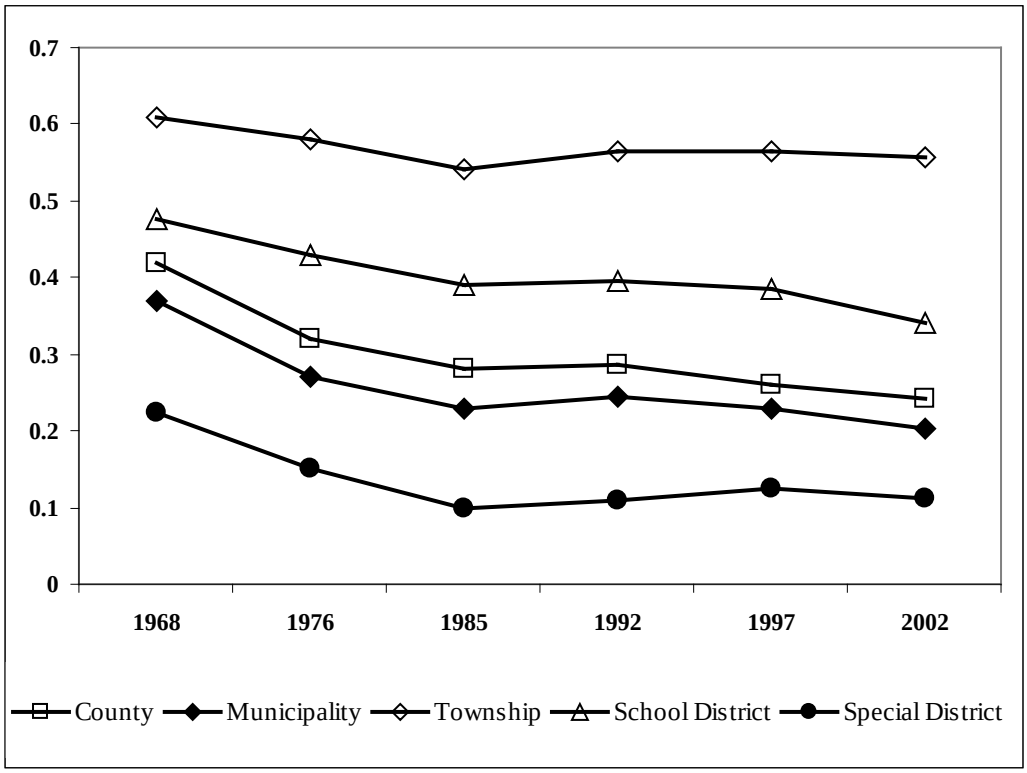
Another source of pressure on local governments for increased public services comes from higher levels of government. Since the mid-1960s, both federal and state governments have increasingly turned to mandates on local government to provide for increased levels of environmental protection, increased quality of public education, and upgraded jail facilities, to name a few. For local government officials, these mandates from higher levels of government are particularly burdensome because they are often completely unfunded. Local officials must devote portions of their fiscal resources to satisfying the requirements of federal and state governments rather than addressing local priorities.

Revenue Constraints

Two other sources of fiscal stress on local government are constraints on their ability to raise local revenues and decreased state and federal aid. According to Altshuler and Gomez-Ibanez (1993, p. 23), voter discontent with taxes of all sorts grew during the 1970s, when real incomes were flat or declining but effective tax rates were rising.[3] The most visible manifestations of voter dissatisfaction with property taxes came in 1978 with the passage of Proposition 13 in California and Proposition $2^1/_2$ in Massachusetts.[4] These pieces of legislation required their respective state governments to stabilize effective property tax rates at the levels that prevailed in the mid-1970s. Fee and miscellaneous revenues have increased substantially compared to property taxes as a result of property tax limitations placed on local governments. By 1999, 23 states generated more local revenue from fees and miscellaneous income than property taxes, an increase from only three states in 1972. The increased dependence of local governments on sources of revenue other than property taxes has led to a decrease in local property taxes as a share of general revenue. Overall, the proportion of property taxes as a part of general revenue has decreased from an average of 40.3 percent in 1972 to 29.1 percent in 1999.[5]

The chart on the following page highlights local property tax revenue as a proportion of general revenue from 1968 to 2002.[6]

Figure 1.1: Local Property Taxes as a Proportion of General Revenue (1968 – 2002)



Source: 1968-1997 data from chart in "State and Local Finances under Pressure", edited by David L. Sjoquist, 2003. 2002 data obtained from the U.S. Census Bureau. Census of the Governments. www.census.gov/govs/www/

Opposition to property taxation also came from groups concerned about the inequality of per-pupil expenditures for elementary and secondary education among school districts within their states. Reliance on local property taxes to finance public schools allowed school districts with high levels of property wealth per pupil to fund high-quality programs with relatively low effective tax rates, while school districts with low levels of property wealth per pupil were forced to levy relatively high effective tax rates to fund lower-quality programs. These groups argued that state aid did not sufficiently reduce inequalities in per-pupil spending across the state, and that the remaining inequalities violated the state constitutional provisions of adequate education spending for all pupils. Successful court cases in California, New Jersey, Iowa, Texas, and other states required states to reallocate state aid and, in some instances, to reduce reliance on property taxation for financing public education. The Michigan legislature has acted to require the state to assume full responsibility for school funding in place of local property taxes.

Declining Federal and State Aid

Further exacerbating local government fiscal stress has been the relative decline in aid from higher levels of government for the past 30 years. The changing composition of federal and state aid since the late 1970s has adversely affected the ability of state and local governments to finance infrastructure. A stark decline in aid from the federal level of

government has contributed to the growing problem. To compensate for the declining fiscal assistance from the federal government, local governments have pursued other revenue sources.

Economic factors have also played a role in decreasing government aid. For example, poor economic conditions during the 2001 recession created additional fiscal pressure on local governments. State and federal government tax collections decreased, which meant less funding was appropriated to local governments. As a result, local governments tapped reserves, raised existing fees and charges, and adopted measures to create diverse revenue sources to fill the revenue gap.[7]

Local Government Response to Fiscal Stress

The fiscal stress confronting local governments and, to a lesser extent, state governments, forced many state and local government officials to find ways to reduce expenditures. Reducing current service levels is politically difficult because diminished service levels are readily visible to constituents and are often as contentious as tax increases. One method of limiting expenditure growth is to reduce spending for infrastructure maintenance. This expedient choice allows local officials to keep other services at current levels, and the effects of deferring maintenance spending are not readily or immediately apparent.

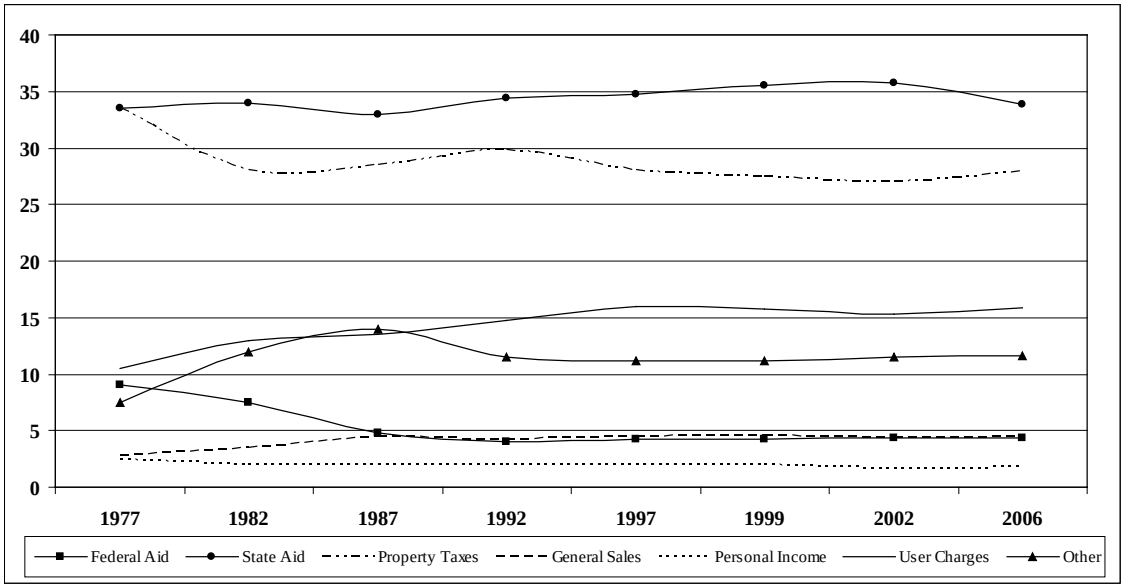
The deadly collapse of the I-35W Bridge in Minneapolis in 2007, and the catastrophic failure in 2005 of the levees in New Orleans following Hurricane Katrina punctuate the nation's current infrastructure maintenance crisis. These failures are a symptom of the nation's systemic neglect of infrastructure which, according to a 2007 Urban Land Institute report, has resulted in a $1.6 trillion deficit in needed repair and maintenance spending through 2010.[8]

Revenue Diversification

Local governments diversified their sources of general revenues in response to opposition to property taxes. During the 1970s, property taxes accounted for approximately 34 percent of locally raised general revenues. Between 1977 and 1999, the proportion of local own source general revenues from property taxes fell from 34 percent to 27 percent (see graph below). Sales taxes, which had provided approximately 3.5 percent local own-source general revenues in the 1970s, accounted for approximately 4.5 percent of local government OSGR by 1999. Approximately 16 percent of all local OSGR came from user charges and miscellaneous revenues by 1999.[9]

The graph on the following page highlights the share of funding sources contributing to local general revenues from 1977 to 2006.

Figure 1.2: Share of Funding Sources Contributing to Local General Revenues (1977 – 2006)

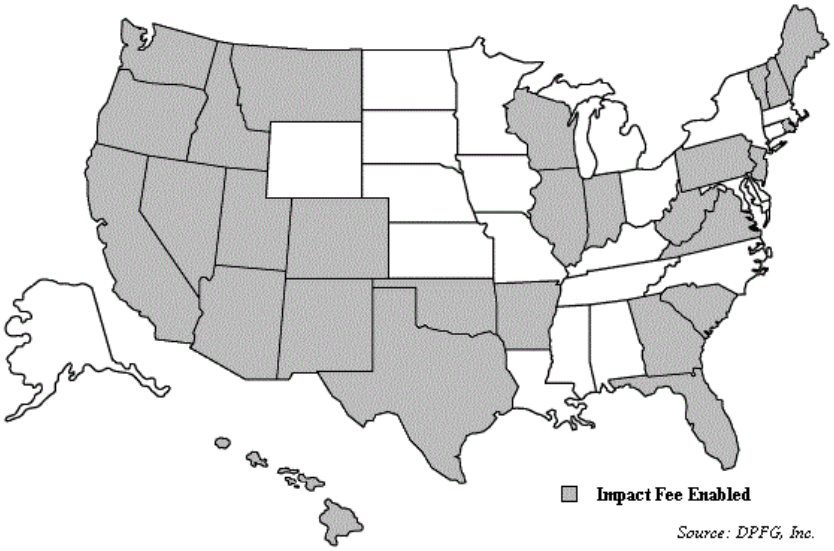


Source: Robert Tannenwald, Are State and Local Revenue Systems becoming Obsolete?, National Tax Journal, Sept. 2002.
U.S. Census Bureau. Census of the Governments: 1977, 1982, 1987, 1992, 1997, 1999. www.census.gov/govs/www/. 2002, 2006 data updated utilizing the same source.
Footnote: "Other" category consists of: selective sales, corporate income, motor vehicle license tax, other taxes, and miscellaneous general revenue.

Impact Fee Usage

The use of impact fees has spread widely throughout the United States, especially in regions affected by rates of growth and development including southern and western states. It is less common for communities in Midwestern or northeastern states to utilize impact fees. As of 2015, twenty-nine (29) states had impact fee enabling statutes. In addition to states with impact fee enabling statutes, communities in "home-rule" states may also use impact fees even if a state enabling statute has not been enacted.

Figure 1.3: States with Impact Fee Enabling Acts (2015)



According to statistics publicized by the Government Accountability Office (GAO), 39 percent of counties and 59 percent of communities with populations greater than 25,000 imposed some type of impact fee to finance infrastructure.[10]

Where impact fees are utilized, the dollar amount per home has grown substantially over the years. For example, Snyder and Stegman (1986, p. 76), citing a California Building Industry Association study, found that the average impact fee, measured in 1983 dollars, on a single-family detached house, with 3 bedrooms, rose from $1,087 in 1975 to $6,847 in 1983, or 511 percent.[11] Based on more recent surveys conducted by Duncan Associates, a similar new home in California would require impact fee payments of approximately $22,154 in 2012 and $23,455 in 2015, representing a 6% increase in over the four year period.[12]

Conclusion

In light of the economic pressures on local governments, it is easy to understand why local governments are increasingly turning to impact fees for the provision of public services. *For growing communities, impact fees represent a vast store of potential revenue that can be tapped at less political cost than other sources. This does not mean, however, that impact fees are always the best or wisest solution for the financing of public infrastructure when taking into account social equity considerations and the need to maintain long-term community support for capital spending programs.*

Endnotes

1. Terri A. Sexton, National Tax Journal, Washington, June 2004. Vol. 57, Iss.2.
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3. Alan A. Altshuler and Jose A. Gomez-Ibanez, *Regulation for Revenue: The Political Economy of Land Use Exactions* (Washington, DC: The Brookings Institution, 1993).
4. During this period, the federal government and many state governments began to either partially or fully index their individual income tax codes to moderate the adverse effects of inflation on family income tax burdens.
5. *State and Local Finances Under Pressure*, Edited by David L. Sjoquist, Studies in fiscal federalism and state-local finance, 2003.
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11. Thomas P. Snyder and Michael A. Stegman, *Paying for Growth: Using Development Impact Fees to Finance Infrastructure* (Chapel Hill, NC: Urban Land Institute, 1986).
12. Clancy Mullen, *National Impact Fee Survey: 2012 & 2015*, Duncan Associates.

CHAPTER 2

Legal Concepts of Impact Fees

- ***Authority to Impose Impact Fees***
- ***Impact Fees as Unlawful Taxes***
- ***Federal and State Constitutional Issues***

This chapter discusses general legal principles that apply to typical impact fees. Because these principles vary from state to state, it is important to consult with counsel when faced with an impact fee ordinance.

There are three key legal concepts that have a direct bearing on whether the fee has been validly enacted and applied. First, a municipality must have authority to enact the impact fee—either from a state enabling statute or implied by other legal authority. Second, the impact fee must not be imposed in a manner that makes it an unlawful "tax in disguise." Third, an impact fee must be constitutional. Additionally, organizations and individuals who are considering a challenge to an impact fee must be able to show that an injury has occurred as a result of the impact fee.

Authority to Impose Impact Fees

Without the proper legal authority, municipalities are unable to enact an impact fee. This authority is express—granted by a state legislation—or implied by a municipality's inherent powers.

Enabling Legislation

Many states have enabling legislation which specifically authorizes impact fees. These statutes usually are beneficial for builders as they help to establish certainty and transparency in the development process. Impact fee statutes usually require municipalities to follow prescribed procedures when implementing local impact fee programs.

Georgia's enabling statute, for example, allows municipalities and counties to charge development impact fees if they first enact a comprehensive plan with a capital improvements section. The statute establishes legislative intent, outlines definitions, procedures and the appeals process to be used in the implementation of any impact fee. Ga. Code Ann. §§ 36-71-1 *et seq.* (2006). Most notably, Georgia's statute requires municipalities to form an advisory committee, which includes representatives from the development industry, to assist with the creation of an ordinance. Ga. Code Ann. § 36-

71-5 (2006). If the municipality fails to properly form this committee, the impact fee is invalid.

When municipalities fail to follow the procedures or parameters outlined in a state enabling statute, the resulting impact fee ordinance may not have been properly enacted. In some states, municipalities must strictly follow the planning and zoning procedures outlined in the enabling statute. For example, an impact fee ordinance in Idaho was invalidated because the city was located within a county containing less than 200,000 people, the minimum imposed by the state law for empowering cities to impose development impact fees. *Idaho Building Contractors Ass'n v. City of Coeur D'Alene*, 890 P.2d 326 (Idaho 1995).

On the other hand, some state courts have upheld impact fees even when a municipality has not strictly followed all of the procedures in the state's enabling statute. For example, in *Charleston Trident Home Builders, Inc. v. Town Council of Summerville*, 632 S.E.2d 864 (S.C. 2006), a court found that a municipality "substantially compli[ed]" with an enabling statute even though its capital improvements plan did not incorporate every element required by the statute.

Usually, impact fee enabling statutes classify what type of infrastructure may be improved through the use of impact fees. For example, Virginia's statute authorizes municipalities to use impact fees for road improvements, but additionally allows for public facilities impact fees only on properties that are currently zoned agricultural and are being subdivided for by-right residential development. Va. Code Ann. § 15.2-2317 – 2329. If a municipality attempts to impose an impact fee for infrastructure not authorized under the enabling statute, there is a strong likelihood that it is invalid. An impact fee for school improvements was invalidated in Nevada because the enabling statute did not specifically authorize school impact fees. *Douglas County Contractor's Ass'n v. Douglas County*, 929 P.2d 253, 259-261 (Nev. 1996).

Implied Authority

In the absence of a state enabling statute, municipalities must have some other source of authority from the state before they may impose an impact fee. Municipalities are commonly described as operating under either home rule or Dillon's Rule. This important distinction has a direct bearing on a municipality's ability to enact impact fees and other growth control measures.

Municipalities which operate under Dillon's Rule are limited to those powers which have been expressly granted by the state.[1] Therefore, a Dillon's Rule municipality must be able to rely on a state enabling statute before it has authority to impose an impact fee. In a classic Dillon's rule case, the Supreme Court of New Hampshire invalidated an impact fee because the municipality had not been expressly granted this power under the statute authorizing municipalities to charge administrative fees. *Bd. of Water Comm'rs v. Mooney*, 660 A.2d 1121 (N.H. 1995).

Some Dillon's Rule municipalities have argued that their ability to enact impact fees stems from their general planning and zoning authority—which usually includes the ability to impose fees. This argument, however, may be on the decline because courts have proven unwilling to equate the authority to impose administrative fees with the authority to enact an impact fee.[2]

On the other hand, home rule municipalities have a greater degree of independence over their regulation of land use. Generally, home rule municipalities have broad discretion in the exercise of their planning and zoning powers, so long as their regulation does not conflict with state law.

Home rule municipalities often rely on this authority to justify their ability to enact impact fees.[3] For example, a Nebraska court upheld an impact fee under a city's home rule charter—finding that the city's home rule authority was sufficiently broad that it included the authority to impose taxes on development. *Home Builders Ass'n v. City of Lincoln,* 711 N.W.2d 871 (Neb. 2006).

In contrast, other courts have imposed greater limits on the ability of home rule municipalities to enact impact fees.[4] The Supreme Court of Mississippi, for example, held that the state's home rule statute did not allow the municipality to assess impact fees without express enabling authority. *Mayor of Ocean Springs v. Homebuilders Ass'n,* 932 So.2d 44 (Miss. 2006). The court distinguished the municipality's ability to impose fees with its ability to enact taxes. The court noted that, under Mississippi's constitution, general municipal services must be funded by traditional tax revenue, and the state had to explicitly authorize an alternative method, such as impact fees.

Impact Fees As Unlawful Taxes

As the Mississippi case shows, it is important to determine whether an impact fee actually amounts to an unlawful tax—even when a municipality might otherwise have authority to impose the impact fee. The central distinction here is that the power to tax is separate from the state's police power. As put by the Arizona Supreme Court, in *Casa Grande v. Tucker,* 817 P.2d 947, 950 (Ariz. 1991):

> *A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.*

Whether an impact fee results in an unlawful tax depends on the facts of a specific case and specific tests created by state courts. Frequently, courts examine where the impact

fee funds are going in any tax vs. fee analysis. If an impact fee is used to raise revenue for general public infrastructure, instead of defraying the impact of development on a specific type of infrastructure, the impact fee takes on characteristics of a tax. *Courts also look at whether those who pay the impact fee are, in fact, causing the infrastructure problem and whether the proceeds being applied to infrastructure will benefit those who pay (development) and not just the public as a whole.*[5]

Federal and State Constitutional Issues

Even when a municipality has properly enacted an impact fee ordinance, it must still meet certain constitutional requirements before it can be considered valid. Impact fees may be challenged on three grounds under the U.S. Constitution: (1) the ordinance violates a developer's due process rights; (2) it results in a violation under the Equal Protection Clause; and (3) the fee is an unconstitutional exaction under the Fifth Amendment. Regarding due process and equal protection, the status of the law mostly well-settled. Unfortunately, the legal atmosphere is less settled concerning claims that impact fees are unconstitutional exactions.

In addition, note that state constitutions and state statutes often provide similar protection to the U.S. Constitution and can often be brought as separate claims under a single lawsuit.

Violations of the 14th Amendment—Due Process & Equal Protection

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits states from depriving any person of their property without due process of law. When the government has acted arbitrarily and/or irrationally, the developer can bring a due process claim and may be entitled to damages under 42 U.S.C. §1983, and/or injunctive relief. Similarly, when the government has discriminated against the developer, the developer can bring an equal protection claim under 42 U.S.C. §1983.

Due Process

An impact fee ordinance may be challenged under the due process clause even though the municipality has acted within its police powers to protect the public. Due process claims focus on whether the impact fee in question is a *reasonable* exercise of the state's police power. To raise a successful due process claim, the developer must show that the municipality's interference with his property rights was arbitrary, irrational and capricious.

Substantive Due Process

In substantive due process cases, most courts use a three pronged test. *First, is the exaction rationally related to a legitimate public purpose? Second, are the means adopted to achieve this purpose reasonably necessary? Third, is the regulation unduly*

oppressive on the property owner? If the ordinance fails any of the three prongs of the test, it will be invalidated. The third prong is generally the most disputed.

Although the third prong requires the application of a "balancing test" between the rights and needs of the public versus the rights of the individual property owner, there are several factors used to determine whether the ordinance is unduly oppressive: (1) the nature of the harm sought to be avoided; (2) the availability and effectiveness of less drastic means of achieving the goal of the ordinance; and (3) the economic loss suffered by the property owner.

It is difficult to overcome the test used in substantive due process challenges. Therefore, such challenges are not often successful.

Procedural Due Process

In procedural due process cases, an ordinance imposing exactions on developers may be challenged if it was not enacted under the proper procedures set forth in the state enabling legislation. *Whether a municipality has violated a developer's right to procedural due process often depends upon local law. The procedural due process afforded to an individual will vary according to each state's own laws but generally, the developer will be entitled to fair notice and a hearing on the issue at hand.*

Raising a claim of procedural due process is not an effective way to prevent the imposition of an exaction. In effect, a procedural due process violation serves merely as a delaying tactic. Following a judgment in favor of a developer claiming a violation of procedural due process, the municipality will often reenact the exaction legislation with the necessary corrections to ensure the protection of procedural due process rights.

Equal Protection

In some cases an exaction may also be challenged on the theory that it violates the right to equal protection. The Equal Protection Clause of the Fourteenth Amendment ensures all people equal protection under the law, meaning that states cannot unreasonably discriminate between persons who are similarly situated.

The use of a classification of development, resulting in different treatment for each group, does not necessarily result in a violation of the equal protection clause of the United States Constitution. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Unless a case involves a "suspect classification," which includes treating groups of people differently based on race, national origin, religion, or alienage, the law merely requires that classifications be rationally related to legitimate governmental purposes.

When an ordinance does not expressly use classifications for the purposes for imposing exactions on developers, the ordinance may still be subject to an equal protection challenge if the ordinance is discriminatory in its application.

In most cases, it is difficult to successfully challenge a zoning ordinance on equal protection grounds because the ordinance only needs to be rationally related to legitimate government purpose and the challenger must rebut a presumption that the ordinance (a legislative act) is constitutional and valid.

Violations of the 5th Amendment—Impact Fees as Unconstitutional Exactions

The Fifth Amendment to the U.S. Constitution requires that private property shall not be taken for public use without just compensation. Traditionally, a taking occurs when the government physically invades private property or requires the dedication of a piece of property to the state. Second, a government *regulation*, as opposed to a physical intrusion, can also be a basis for a takings lawsuit. Finally, the U.S. Supreme Court has also recognized that the Fifth Amendment is implicated when the government places conditions on a development applicant in return for a development permit (i.e. exactions). Unfortunately, the Supreme Court's jurisprudence is limited to cases where the government has conditioned a development approval on a case-by-case (also called *ad hoc)* basis, and it is an open question as to whether legislatively-imposed impact fees are subject to the same analysis. Nevertheless, NAHB consistently argues that legislatively-imposed exactions and *ad hoc* exactions must both meet the same constitutional requirements. Specifically, NAHB argues that the Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) instruct municipalities regarding the appropriate level of and purposes for the exaction.

In *Nollan*, the Court explained that *there must be an "essential nexus" between the development condition and the anticipated impacts of the development. Without this connection, the condition could result in a violation of the Fifth Amendment.*

In *Dolan*, the Court discussed what constitutes a reasonable level of a development condition. The Court held that *development conditions must bear a "rough proportionality" to the development's impact on existing infrastructure.* In order to meet this proportionality requirement, municipalities must make an individualized determination that the impact of proposed development warrants the exaction. "No precise mathematical calculation is required, but 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." *Dolan* at 391.

Where a condition of development approval is not in proportion with the development's anticipated impact, the *Dolan* rough proportionality test is not met and the government has violated the Fifth Amendment. This violation occurs regardless of whether the imposition by the government is for a dedication of land or for a monetary payment. *Koontz v. St. Johns River Water Management District,* 133 S.Ct. 2586 (2013).

Several courts have directly applied the heightened scrutiny standard in *Nollan* and *Dolan* to impact fees.[6] The California Supreme Court, for example, stated that a municipality must account for the actual impact of a proposed development, as well as any relative benefit the project will contribute, before imposing a fee. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

Other courts have refused to extend this standard to monetary conditions like impact fees.[7] Courts in this camp frequently distinguish *Nollan* and *Dolan* from legislatively-imposed conditions. These courts usually explain that "the two-pronged heightened scrutiny that the Court adopted in *Dolan* was animated by the Court's particular concern with the sort of governmental leveraging that can arise in case-by case . . . imposition of development conditions." *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002). In other words, because impact fees apply generally to all developers, the heightened scrutiny test does not apply.

States with express enabling authority for impact fees usually include the standards for nexus and proportionality within the text of the statute itself.[8] *Otherwise, three general tests have emerged among the state courts to determine the constitutionality of impact fees (1) the reasonable relationship test, (2) the dual rational nexus test, and the (3) specifically and uniquely attributable test. These state tests stem from either state enabling statues or case law.*

The first test is the least restrictive, and only requires a reasonable relationship between the fee and the new development's impact on public facilities.[9] This test is the most favorable to government, as it is fairly easily satisfied.

The dual rational nexus test has two components, which both must be satisfied in order for an impact fee to be constitutional. First, the impact fee must be reasonably attributable to new development's impact on the municipality's infrastructure. Second, the funds from the fee must be used to benefit the new development itself.[10]

In *Upton v. Town of Hopkinton,* 945 A.2d 670 (N.H. 2008), the Supreme Court of New Hampshire recently explained the dual rational nexus test this way:

> *[A]n impact fee must be a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee.*

Resolution of the dual rational nexus test is dependent on the facts of each individual case. A court will analyze the methodology used to calculate a development's impact and whether capital improvements actually benefit the development that is required to pay the fee. If this methodology is sound, a court is likely to find the impact fee to be constitutional.[11]

The most restrictive test, and therefore the most favorable to development, is the specifically and uniquely attributable test. 'Specifically and uniquely attributable' means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by the required improvement or facility. Illinois is the author and primary user of the specifically and uniquely attributable test although a few states have applied it as well. *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect,* 176 N.E.2d 799 (Ill. 1961). The principal challenge developers can bring against impact fees in these states is whether the new development is the sole cause of the allegedly needed capital facilities.

Standing

The party challenging an impact fee ordinance must have "standing" before bringing a claim in court. Essentially, this means that the party must have suffered a tangible injury as a result of the impact fee. For a builder or developer, this standing is based on payment of the fee. However, for an organization, such as a homebuilder's association, standing tends to occur more often.

Generally, an organization can have standing on behalf of its members if it meets the following requirements: "(1) [it] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." When the plaintiff is not the object of the government action, standing is not precluded, but it is "substantially more difficult" to establish. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In the context of impact fees, courts will likely find that an organization has standing when one of its members has had to pay the fee. For example, in *Charleston Trident Home Builders, Inc. v. Town Council,* 632 S.E.2d 864 (S.C. 2006), the Supreme Court of South Carolina held that the home builders association had standing because there was evidence that its president had paid more than $100,000 worth of impact fees since the ordinance was enacted. *While it may be possible for an organization to establish standing for the future payment of impact fees, it will be difficult to establish that an injury is imminent and not speculative.*[12]

Organizations generally claim declaratory or injunctive relief, rather than monetary damages, because courts are unlikely to find that all members have suffered identical damages.

Endnotes

1. Dillon's rule is named for John Forrest Dillon, a 19th Century judge who determined that, under the 10th Amendment to the U.S. Constitution, local governments are mere political subdivisions of the state when exercising their powers.
2. *Durham Land Owners Ass'n v. County of Durham*, 630 S.E.2d 200 (N.C. Ct. App. 2006).
3. *See, e.g. McCarthy v. City of Leawood, 894* P.2d 836 (Kan. 1995); *HBA of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000).
4. *See, e.g. Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901 (5th Cir. 2002).
5. *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d 850 (Md. 1990); *Home Builders Ass'n of Greater Des Moines v. City of West Des-Moines*, 644 N.W.2d 339 (Iowa 2002).
6. *N. Ill. Home Builders Ass'n v. County of Dupage*, 649 N.E.2d 384 (Ill. 1995); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. Ct. App. 2000).
7. *San Remo Hotel L.P. v. S.F. City & County*, 364 F.3d 1088 (9th Cir. 2004); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995); *Waters Landing Ltd.P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994).
8. *See, e.g.* Ariz. Rev. Stat. § 9-463.05; Ark. Code Ann. § 14-56-103; Me. Rev. Stat. Ann. tit 30-A § 4354; Mont. Code Ann. § 7-6-1601 – 1604.
9. Cal. Gov't Code § 66001 (B) (2007).
10. *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981);
11. *HBA of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000).
12. *Newton County Home Builders Ass'n v. Newton County*, 648 S.E.2d 420 (Ga. Ct. App. 2007).

CHAPTER 3

Economic Implications of Impact Fees

- ***Introduction***
- ***Who Ultimately Pays an Impact Fee?***
- ***Implications of Higher House Prices***
- ***Are Impact Fees Really Necessary?***
- ***Conclusion***

Impact fees on new residential development are a form of market intervention. In the absence of an intervention, the economic forces of supply and demand will bring about an unconstrained outcome to the interactions among consumers and producers of housing, and the suppliers of inputs (such as land, labor, building materials, and the entrepreneurial skill to consummate the process) utilized to build the housing. Impact fees unquestionably change the outcome. The questions remain: In what ways do impact fees affect the economic forces of supply and demand and by how much.

Part of the unconstrained outcome of supply and demand within a local housing market is a set of pricing components for new housing units and each of the inputs that comprise the building of a home. Such pricing components may include, but not be limited to: land, labor, building materials and profit. In this framework, profit is considered a price paid to developers to induce them to risk capital and apply entrepreneurial skill to residential development projects. The imposition of an impact fee influences at least one of these prices. If the pricing components for a project remain unchanged, and an impact fee is imposed, the price of housing increases. In short, someone has to pay the fee. Chapter 3 explains why, in the typical case, pricing components are unlikely to decrease, meaning the home buyer is ultimately the party who pays the impact fee.

Chapter 3 also demonstrates that the imposition of impact fees may cause home prices to increase by more than the amount of the impact fee. Such a scenario occurs primarily because development costs, such as financing charges and broker commissions, are often calculated as a percentage of other costs. To illustrate the effect that impact fees passed on to home buyers may have on housing affordability, the number of households "priced out" of the market as a result of the impact fee is described and estimated. For purposes of the chapter, priced out is defined as households able to qualify for a mortgage on a median-priced home prior to the imposition of the impact fee, but not afterward.

This leads naturally to the question of whether or not impact fees are really necessary. Chapter 3 demonstrates that, given existing fees and taxes within a typical metropolitan area, the economic activity generated and supported by home building may, after some

time, result in enough additional local government revenue to cover current expenses plus the cost of providing infrastructure. In this sense, new housing can be said to pay for itself.

Who Ultimately Pays an Impact Fee?

From the perspective that developers and home builders are the ones that provide the cash outlay for impact fees, it may be said that they pay the impact fees. However, similar to any tax or other costs imposed on businesses, the ultimate burden of payment will, to varying degrees, be passed to new home buyers in the form of higher house prices[1] (or, equivalently, smaller houses with fewer amenities), or come from suppliers of products and services utilized to build and deliver the home in the form of lower prices paid for those products and services.

To put this argument in perspective, Figure 3.1 identifies the components that comprise the price of a typical single family home.

Figure 3.1 Sale Price Breakdown
For an Average Single-Family Home in 2013

Average Lot Size: 14,359 sq. ft.
Average Finished Area: 2,607 sq. ft.

Description	Average	Share of Price
Finished Lot Cost (including financing cost)	$74,509	18.60%
Total Construction Cost	$246,453	61.70%
Financing Cost	$5,479	1.40%
Overhead and General Expenses	$17,340	4.30%
Marketing Cost	$4,260	1.10%
Sales Commission	$14,235	3.60%
Profit	$37,255	9.30%
Total Sales Price	$399,532	100%

The cost of an impact fee is fully passed on to the home buyer, unless any of the seven line items in Figure 3.1 are reduced. Theoretically, it is possible that the ultimate effect of impact fees is to reduce demand for these inputs and drive down the price of the items. The question is how likely this is to happen in practice for a particular item.

Impact fees, building permit fees, and water and sewer fees fall within the total construction cost figure. In most cases, permit and other fees imposed by local governments on new construction, will most likely not decrease over time as reason for imposing a fee on the construction of a home is to raise revenue, it makes little sense for the local jurisdiction to simultaneously relinquish that revenue through a concomitant reduction in fees on the same home.

In order for a reduction in the cost of labor per home to occur, wage rates for local construction workers must decline. For a significant wage decline to occur in response to an impact fee on new residential construction, new residential construction within the jurisdiction must account for a large proportion of the demand for local construction labor and construction workers building the homes must have relatively few opportunities for work on new residential construction in neighboring jurisdictions, on non-residential new construction, or on remodeling.

If a residential impact fee is imposed across all jurisdictions in a market area, including potential development sites on the fringes, it, by definition, removes the option for local workers to construct new homes that are not subject to the impact fee. On the other hand, to the extent that such a broadly imposed fee inhibits new construction, it could be discerned that the replacement of existing structures would be delayed, which may result in an increase in the demand for remodeling work.

A similar argument applies to overhead and general expenses. New home construction typically represents a minor part of a local economy that a change in impact fees would not change demand enough to generate noticeable declines in prices paid for general overhead expenses. In the short run, if impact fees inhibit new construction, the effect may be to increase overhead costs per unit, as overhead would then need to be allocated across fewer units of production.

It seems even more obvious that conditions in a single local market will have no significant impact on the cost of building materials. Markets for building materials are regional, if not national and may even be international, in scope. The effect of one local market on demand for building materials is typically negligible and imposing a fee on construction in one jurisdiction will not generally result in the builders paying less for lumber, wall board, or other building products.

Credit markets are also national or international in scope, making it difficult for local action to have an effect on financing costs. Locally imposed impact fees will not reduce the interest rates or improve the terms builders and developers can obtain on acquisition, development, and construction loans.

At first, it may seem reasonable to assume that, because the builders and developers write the checks, the impact fee is deducted from the profit. Such a scenario would not be true in a competitive market, however, as profits to home building must remain competitive with home building in nearby areas and returns available in other, similar industries with a corresponding level of risk. Otherwise, builders would be better off constructing homes elsewhere, pursuing a different business, or investing resources in alternative investment options. In short, a competitive rate of return is required in order to keep local builders in business in the long run.

Home building is widely recognized as a competitive industry. According to a 2003 monograph by the American Real Estate and Urban Economics Association, “In the United States, as in most countries, the market for housing services per se can be

approximated by a competitive market… Few landlords or developers are large enough to exert significant market power."[2]

A competitive housing market is defined as large numbers of consumers and producers acting independently to make market decisions. The firms in the market are competing against one another, and there are no barriers to entry: whenever firms are earning excess profits, these are competed away by other firms who enter the industry, increase supply, and compete away the excess.

The most complicated item to analyze is the raw land cost. It is conceivable that an impact fee imposed on local construction to some extent inhibits demand for raw land and places downward pressure on the price. The extent to which this happens depends on local housing market conditions, other local land use policies—including policies of other local governments in the surrounding area—and the time frame being considered.

If impact fees are imposed in one jurisdiction but land is readily available in a surrounding market area that does not impose impact fees, builders may choose not to purchase land in the jurisdiction that imposes the fee unless owners of land within the jurisdiction are willing to take a reduction in price that fully compensates for the fee.

However, there are realistic scenarios under which land in surrounding jurisdictions may not be readily available. One scenario may be that surrounding jurisdictions are unwilling to change zoning or accelerate approval of residential building permits to accommodate construction activity that would otherwise spill over into their areas from the jurisdiction imposing the impact fee.

Even if home building is largely confined to the area over which the fee is imposed or land is already owned by builders, the willingness of land owners to sell at a lower price depends upon economic conditions and other land use policies within that jurisdiction. If other profitable uses for the land are available, and local jurisdictions readily change zoning to allow land to be utilized for those purposes, the owner of the land has no reason to accept a lower price for a residential use. Notwithstanding current zoning restrictions, the owner may be unwilling to sell land at a price that offsets the impact fee, if he or she reasonably expects zoning restrictions to change in the future.

Given the local nature of land use decisions, the types of restrictions often imposed, and the role of expectations, a reasonable working assumption is that nationwide residential developers will have difficulty passing impact fees to land owners in the form of lower land prices, and will therefore tend to pass them on instead to home buyers in the form of higher house prices.

From the perspective of new home buyers, the price of the home to the buyer may increase by more than the impact fee amount. One may ask, how can this scenario be possible? Payment of an impact fee typically occurs during development. An impact fee paid early in the production process has associated carrying costs and can substantially increase the costs builders and developers pay. In a typical case, NAHB

estimates that total developer and builder costs will increase by 137 percent of the impact fee.

NAHB research shows that, on average, regulations imposed by government at all level account for 25 percent of the final price of a new single family home built for sale[1]. Every time a local or regional government raises construction costs by, for example, increasing the price of construction permits or impact fees, the cost of building a house rises. In fact, the final price of the home to the buyers will usually go up by more than the increase in the government fee. This is because each time construction costs increase other costs such as commissions and financing charges automatically rise as well. As a result, most cost increases are passed on to the buyers with additional charges. The size of these charges depends both on the type of fee/cost increase and when it is imposed in the development/construction process. NAHB estimates that the add-on charges range from 0 percent if a fee is imposed directly on buyers to 39 percent if cost is incurred when applying for site development approval (see Figure 3.2). So that for every $1 increase in fees incurred, for example, when acquiring a building permit, the final price of a new home to its final customer rises by $1.20. Alternatively, every $833 increase in fees imposed at the time of the building permit results in a $1,000 increase in house prices.

Figure 3.2 Impact Fee Effect on Sale Price

Description	Time (months)
Length of time:	
Permit to Start	0.8
Start to Construction Completion	6.2
Construction Completion to Home Sale	4.8
Total	**11.8**

Building Costs/Fees	Add-on Charges
Imposed directly on buyer	0%
During construction	16%
At start of construction	18%
When building permit acquired	20%
During development	37%
When applying for site development approval	39%

The bottom line is that a $1,000 impact fee imposed at the time of development approval will typically increase the costs to builders and developers to at least $1,390. Most if not all of the price increase is likely to be passed on to home buyers. In some cases, depending on particular local conditions, the price increase may be partially

[1] See P. Emrath "How Government Regulation Affects the Price of a New Home", Housing Economics Online, July 2011

offset by falling land prices. In rare circumstances, depending on local conditions, the price increase may be partially offset by declining wages for construction workers.

Impact fees on rental housing units would have similar effects on prospective tenants. Impact fees would tend to increase rents in new units to cover higher development costs.

Implications of Higher House Prices [5]

When an impact fee is passed to the buyer, what are the implications? Obviously, one is an adverse effect on housing affordability. One way to illustrate the potential extent of the adverse effect is to apply national mortgage underwriting standards to estimate the households that qualified for a mortgage before a house price increase, but no longer qualify for a mortgage afterwards. Households that no longer qualify for a mortgage following the price increase are referred to as being "priced out" of the market for the home.

Applying this approach to the U.S. as a whole reveals that in 2014—utilizing typical assumptions about the mortgage, down payment, property taxes and property insurance, a $1,000 impact fee which increases the price of a median-priced new home by $1,370, prices out about 282,588 households as illustrated below in Figure 3.3.

Figure 3.3 US Households Priced Out of the Market by Impact Fees, 2014

Description	Mortgage Rate	House Price	Monthly Mortgage Payment	Taxes and Insurance	Minimum Income Needed	Households That Can Afford House
Without Fee	4.50%	$275,000	$1,321	$391	$73,382	41,959,112
With Fee	4.50%	$276,370	$1,328	$393	$73,748	41,676,524
Difference		**$ 1,37**	**$ 7**	**$ 2**	**$ 366**	**- 282,588**

* Calculations assume a 10% down payment and a 45 basis point fee for private mortgage insurance. A Household Qualifies for a Mortgage if Mortgage Payments, Taxes, and Insurance are 28% of Income.

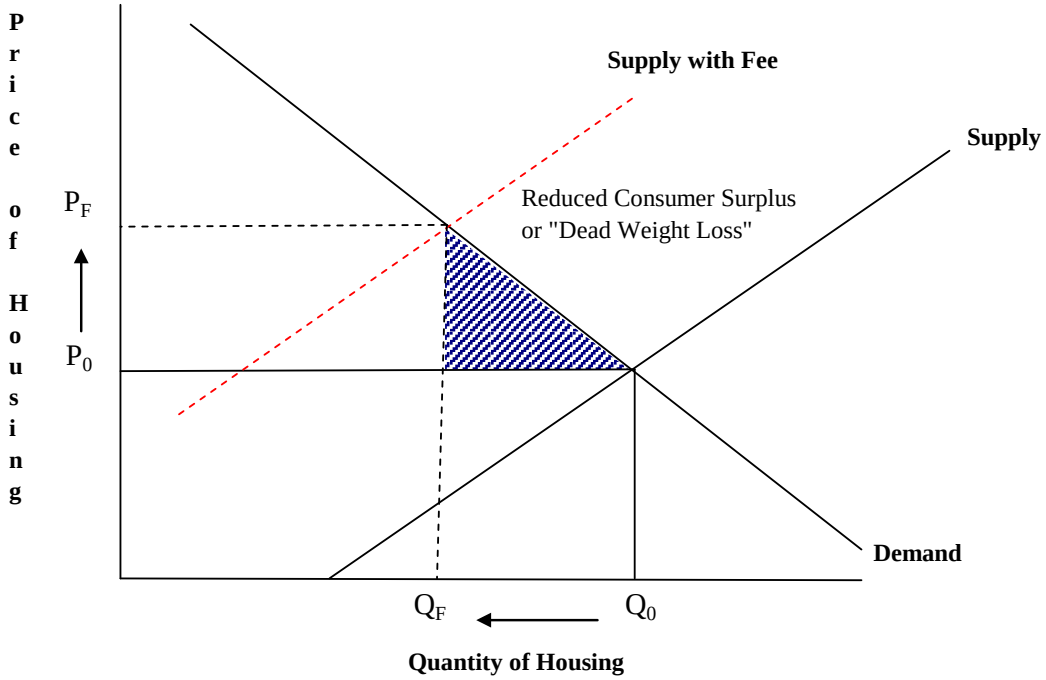
The priced-out calculation requires an income distribution as illustrated in Figure 3.3, and assumptions about mortgages, property taxes and property insurance. The income distribution, taxes and insurance rates are based largely on data from the Census Bureau's American Community Survey (ACS). Given appropriate information about housing prices, income distributions, taxes and insurance rates, it's possible to apply the priced-out analysis to local housing markets.

NAHB estimated new house prices for 357 Metropolitan Statistical Areas (MSAs).[6] Household income distributions, as well as information about real estate taxes and insurance, are available for MSAs from the ACS.[7] The priced-out analysis based on these data for 357 MSAs are illustrated in Exhibit A located at the end of this chapter.

The number of households priced out of the market by a $1,000 impact fee (resulting in a $1,370 price increase) ranges from a low of 19 in the Napa, CA, MSA and 30 in the Carson City, NV, MSA, to a high of 5,742 in the New York, Northern New Jersey, Long Island NY-NJ MSA. The MSA with second largest number of priced-out households is the Chicago, Joliet, Naperville IL-IN-WI MSA, with 5,325 households priced out as the result of the imposition of an impact fee.

The priced-out results do not provide a specific answer to the extent of the impact on new construction (that would require a complicated economic model that includes estimates of the willingness of households to buy smaller houses, older houses, or houses with fewer amenities; interrelationships between different segments of the local housing market; and adjustments made by home builders and surrounding local governments). It is possible, however, to indicate the general effects impact fees have on new construction on a graph of supply and demand in a local housing market as illustrated in Figure 3.4 below.

Figure 3.4 Supply and Demand in a Local Housing Market



The imposition of an impact fee translates into an increase in the cost to produce a home. On Figure 3.4, the imposition of an impact fee is equivalent to shifting the supply curve up and to the left. The effect of the impact fee on consumers of new homes is thus some combination of a price increase and reduction in quantity of housing produced.

The area below the demand curve but above the market price is called a “consumer surplus,” because all consumers pay the same, market-clearing price for housing although many of them may be willing to pay more. When the imposition of an impact fee shifts the supply curve, the consumer surplus is reduced. Consumers are made worse off because they are both consuming less housing and paying a higher price for housing. The lost surplus is called a “dead weight loss” and is illustrated as the area of the shaded triangle in Figure 3.4.

Note that, although local builders maintain a normal profit margin in this scenario, total profits are reduced, as the same per unit profit margin is earned on fewer units of production.

Existing homes in the area will also be affected by this scenario, because they are substitutes for new housing. As impact fees raise the prices of new homes and prospective buyers view existing homes as an alternative, upward pressure is placed on the prices of existing homes. Empirical research supports the argument that impact fees raise the price of existing homes as well as new homes.[8] This research finds that existing homes are relatively close substitutes for new homes in particular impact-fee-imposing jurisdictions.

Similarly, prospective renters are likely to consider existing rental units as substitutes for new rental units, placing upward pressure on rental rates for existing housing. The combination of rising prices for existing homes and rental rates in existing rental units results in "windfall" gains to current owners of housing units. The opposite is true for current tenants in existing rental units as they are doubly squeezed by impact fees. The ability of current tenants to purchase a home or move to a newer rental unit is hampered by higher housing prices and tenants may be forced to pay higher rents for their current residence.

To the extent that impact fees raise the price of all homes in a given community, the affordability of housing in that area is reduced. A reduction in housing affordability will have a negative effect on attracting and retaining workers and will have a direct impact on local governments as police officers, firefighters, teachers, and other public sector workers are heavily impacted when home prices rise. In addition, the shortage of affordable housing will make it difficult for the community to retain its own sons and daughters as they leave their parents' homes and look for affordable first homes of their own.

Are Impact Fees Really Necessary?

The premise underlying the use of impact fees is that development, especially residential development, does not pay for its fair share of the burden imposed upon the local government as new development requires the expansion of public infrastructure as well as the hiring of additional public sector workers.

NAHB has developed a model to estimate the costs to local governments for the additional public infrastructure and public sector workers that are attributable to new growth. Detail on the methodology is available in the report *The Local Impact of Home Building in a Typical Metropolitan Area: Comparing Costs to Revenues for Local Governments*: http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=35601&subContentID=119792.

The general approach of the model is to assume local jurisdictions supply residents of new homes with the same levels of services that they currently provide, on average, to occupants of existing structures. The amount spent by jurisdictions to provide public services is available to the public from the Census of Governments, where all units of government in the U.S. report line item expenses, revenues, and intergovernmental transfers once every five years to the Governments Division of the U.S. Census Bureau. The Census of Governments accounts can be aggregated for every local government in a typical metropolitan area and then used to estimate total annual expenses per 100 single family and 100 multifamily housing units.

Local taxes and government spending patterns vary considerably by jurisdiction across the U.S., so defining averages for a typical metropolitan area is not completely straightforward. The figures presented in Figure 3.5 were calculated by aggregating data from the majority of the roughly 88,000 local governments in the U.S. and scaling them to the number of housing units. Areas in which revenues collected by local jurisdictions exceed 15 percent of personal income were excluded in order to exclude extreme values from cases where significant local government activity exists without substantial housing markets (for example, mining communities).

Figure 3.5 Current Expenses for Local Governments per 100 Housing Units

Description	Single Family	Multifamily
Education	$ 142,000	$ 82,000
Police Protection	45,000	33,000
Fire Protection	20,000	15,000
Corrections	14,000	11,000
Streets and Highways	6,000	4,000
Water Supply	15,000	8,000
Sewerage	8,000	4,000
Health	19,000	14,000
Recreation and Culture	21,000	16,000
Other General Government	69,000	51,000
Electric Utilities	15,000	11,000
Gas Utilities	2,000	1,000
Public Transit	1,000	1,000
Other Government Functions	1,000	-
Total	**$ 378,000**	**$ 251,000**

Source: NAHB calculations based on data from the Census of Governments, U.S. Census Bureau.

In addition to current expenses, providing services to residents requires local governments to make capital expenditures for items such as schools and other buildings, equipment, roads, and other structures.

Estimating capital expenditures for schools, roads and other structures is more complicated than estimating current expenses. The process is to estimate a traditional economic model, where expenditures are a function of labor and capital, with state level data, for which information about the capital stock can be derived.[9] The results are then applied to the typical metropolitan area, where capital required per housing unit can be computed as a residual. The results for 100 single family and 100 multifamily housing units are illustrated in Figure 3.6.

Figure 3.6 Capital Needed by Local Governments to Support 100 Housing Units (in $ Thousand)

Description	Single Family	Multifamily
Schools	$ 759,000	$ 442,000
Hospitals	83,000	61,000
Other buildings	241,000	179,000
Highways & streets	150,000	104,000
Conservation & development	5,000	4,000
Sewer systems	189,000	99,000
Water supply	249,000	130,000
Other structures	241,000	179,000
Total	**$ 1,917,000**	**$ 1,198,000**

Source: results from NAHB "local impact of home building" model that estimates capital owned and maintained by local governments: http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=35601&subContentID=10018

If, in the estimation of local policy makers, the increase in property tax revenues generated by development would not be sufficient to cover the increases in debt service and other costs of providing public services, local governments may decide to impose impact fees on new growth in order to maintain property tax rates at the current level. Often omitted from policy makers' estimates are the long-term economic and fiscal benefits of growth.

NAHB has also developed a model to estimate the total economic benefits of home building. The model captures the effect of the construction activity itself (Phase I), the ripple impact that occurs when income earned from construction activity is spent and recycled in the local economy (Phase II) and the ongoing impact from new homes occupied by residents who pay taxes and purchase locally produced goods and services (Phase III). In order to accurately capture the positive impact residential construction has on a community, it’s important to include the ripple effects and the ongoing benefits.

In each phase, the expanded economic activity results in additional revenue for local governments in the area. In Phase I, even without impact fees, local government

revenue is generated by local sales taxes on materials, and a variety of other taxes and fees paid by the local businesses that participate in the process of building, marketing, and selling the home. In Phase II, as the income earned in Phase I is spent, local government revenue is generated by sales taxes, other taxes and fees paid by local consumers and businesses resulting from the expanded economic activity, and revenue for government-owned utilities and other local government enterprises. In Phase III, the residents of the new homes spend money locally and generate taxes, fees, and revenue for local government much as in Phase II—with the exception that the revenue is recurring, and also includes the increase in local property taxes that normally results from the development of residential properties.

Results of the revenue generated in each phase for a typical metropolitan area can be found in the report *The Local Impact of Home Building in a Typical Metropolitan Area: Income, Jobs, and Taxes Generated*: http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=35601&subContentID=28002.[10] Results in the report assume an average impact fee (broadly defined to include permits, hook-up charges, etc.) of $7,008 per single family and $2,762 per multifamily housing unit.

In order to judge whether or not impact fees are necessary, the results are recalculated under the alternative assumption that home builders and developers pay **no impact or other fees of any kind to local governments.** These results are summarized in Figure 3.7.

Figure 3.7 Revenue Generated for Local Governments per 100 Housing Units

	One-Time Effect				Ongoing, Annual	
	Phase I		Phase II		Phase III	
Description	**Single Family**	**Multi- Family**	**Single Family**	**Multi- Family**	**Single Family**	**Multi- Family**
Business Property Taxes	$ 163,000	$ 54,000	$ 140,000	$ 61,000	$ 90,000	$ 100,000
Residential Property Taxes	-	-	-	-	270,000	107,000
General Sales Taxes	125,000	46,000	45,000	20,000	29,000	32,000
Specific Excise Taxes	22,000	7,000	19,000	8,000	12,000	14,000
Income Taxes	23,000	10,000	12,000	5,000	8,000	8,000
Licenses Taxes	1,000	1,000	1,000	-	1,000	1,000
Other Taxes	21,000	7,000	18,000	8,000	11,000	13,000
Residential Permit/Impact Fees	-	-	-	-	-	-
Utilities & Other Govt. Enterprises	88,000	38,000	106,000	46,000	134,000	97,000
Hospital Charges	45,000	20,000	20,000	9,000	42,000	40,000
Transportation Charges	19,000	8,000	9,000	4,000	6,000	6,000
Education Charges	20,000	9,000	9,000	4,000	6,000	6,000
Other Fees and Charges	86,000	32,000	57,000	25,000	39,000	37,000
Total	**$ 613,000**	**$ 232,000**	**$ 436,000**	**$ 190,000**	**$ 648,000**	**$ 461,000**

Source: results from NAHB "local impact of home building" model that estimates the economic benefits of new construction. Technical documentation available from the NAHB Housing Policy Department.

The next issue to address is whether the generated revenues are sufficient to cover all costs listed in Figures 3.5 and 3.6, employing several conservative assumptions to avoid understating costs. For example, it is assumed that demand for public capital facilities generated by the new housing units cannot be met through current excess capacity. Instead, local governments invest in new structures and equipment at the start of the first year, prior to the construction of any homes. To the extent that neither assumption

is true, interest costs would be somewhat lower than reported in the following discussion.

To compare the streams of revenues and expenditures over time, it is assumed that half of the current expenses and half of the ongoing, annual revenues are realized in the first year. This would be the case if construction and occupancy took place at an even rate throughout the year.

The difference between revenues and current expenses in a given year is an operating surplus. At the beginning of the first year, capital investment is financed through debt by borrowing at the current municipal bond interest rate, with the interest accruing throughout the year. Each year following the first year, the operating surplus is first utilized to pay the interest on the debt, then to pay off the debt at the end of the year. Results are illustrated for the 100 single family homes in Figure 3.8 and 100 multifamily units in Figure 3.9.

Figure 3.8 Costs and Revenue for Local Governments Generated by 100 Single Family Units in a Typical Metropolitan Area With No Impact Fees

Year	Current Expenses	Revenue	Operating Surplus	Capital Investment Start of Year	Debt Outstanding End of Year	Interest on Debt	Net Income
1	$ 189,000	$ 1,372,681	$ 1,183,681	$ 1,917,000	$ 820,824	$ 87,505	$ (820,824)
2	378,000	647,748	269,748	-	588,545	37,468	232,280
3	378,000	647,748	269,748	-	345,662	26,865	242,883
4	378,000	647,748	269,748	-	91,692	15,778	253,970
5	378,000	647,748	269,748	-	-	4,185	265,563
6	378,000	647,748	269,748	-	-	-	269,748
7	378,000	647,748	269,748	-	-	-	269,748
8	378,000	647,748	269,748	-	-	-	269,748
9	378,000	647,748	269,748	-	-	-	269,748
10	378,000	647,748	269,748	-	-	-	269,748
11	378,000	647,748	269,748	19,000	-	-	250,748
12	378,000	647,748	269,748	-	-	-	269,748
13	378,000	647,748	269,748	-	-	-	269,748
14	378,000	647,748	269,748	-	-	-	269,748
15	378,000	647,748	269,748	-	-	-	269,748

Source: results from NAHB "local impact of home building" models.

Figure 3.9 Costs and Revenue for Local Governments Generated by 100 Multifamily Housing Units in a Typical Metropolitan Area With No Impact Fees

Year	Current Expenses	Revenue	Operating Surplus	Capital Investment Start of Year	Debt Outstanding End of Year	Interest on Debt	Net Income
1	$ 125,500	$ 652,645	$ 527,145	$ 1,198,000	$ 725,540	$ 54,685	$ (725,540)
2	251,000	460,846	209,846	-	548,813	33,119	176,728
3	251,000	460,846	209,846	-	364,018	25,052	184,795
4	251,000	460,846	209,846	-	170,788	16,616	193,230
5	251,000	460,846	209,846	-	-	7,796	202,050
6	251,000	460,846	209,846	-	-	-	209,846
7	251,000	460,846	209,846	-	-	-	209,846
8	251,000	460,846	209,846	-	-	-	209,846
9	251,000	460,846	209,846	-	-	-	209,846
10	251,000	460,846	209,846	-	-	-	209,846
11	251,000	460,846	209,846	14,000	-	-	195,846
12	251,000	460,846	209,846	-	-	-	209,846
13	251,000	460,846	209,846	-	-	-	209,846
14	251,000	460,846	209,846	-	-	-	209,846
15	251,000	460,846	209,846	-	-	-	209,846

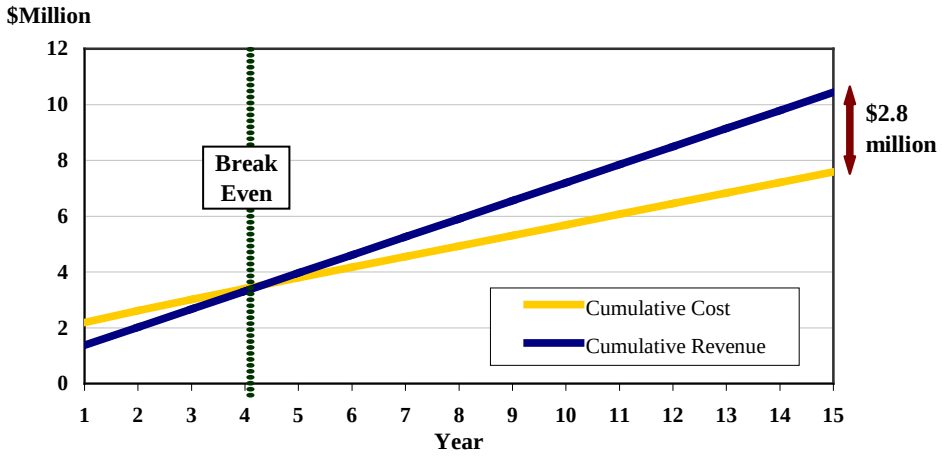
Source: results from NAHB "local impact of home building" models.

As Figure 3.8 illustrates, in the first year without the imposition of impact fees, 100 average single family homes constructed in the typical metropolitan area, generate an estimated $1.4 million in tax and other revenue for local governments. 100 average single-family homes also generate $189,000 in current expenditures to the local government for providing public services to the net new households at current levels, and $1.9 million in capital investment for new infrastructure and equipment necessary to serve the needs of new residents. The analysis assumes that local governments finance the capital investment by borrowing at the current municipal bond rate.

In a typical year after the first, the 100 single-family homes result in $648,000 in recurring tax and other revenue for local governments, and $378,000 in local government expenditures needed to continue providing services at current levels.

After 15 years, the homes will generate a cumulative $10.4 million in revenue for local governments compared to only $7.6 million in expenditures, including annual current expenses, capital investment, and interest on debt as illustrated in Figure 3.10.

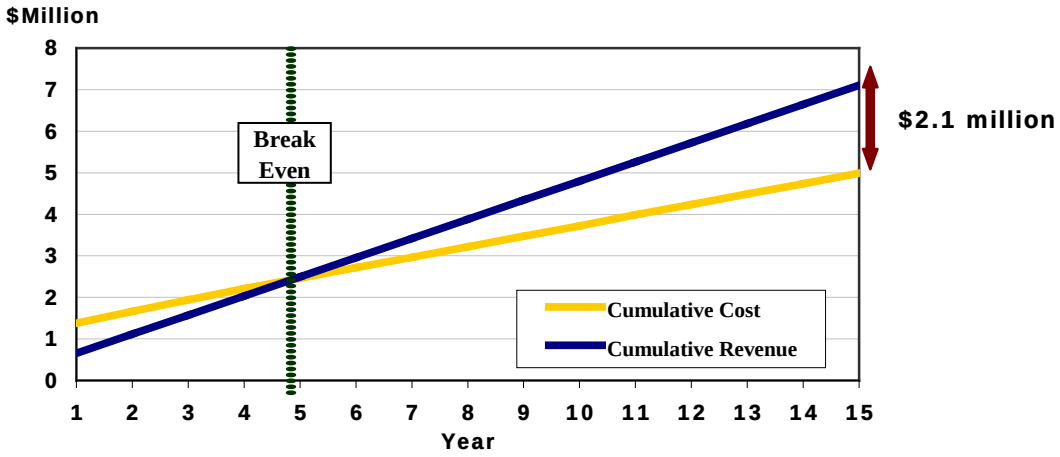
Figure 3.10. Costs Compared to Revenue: 100 Single Family Homes with No Impact Fees



Similarly, in the first year without the use of impact fees, 100 average multifamily housing units constructed in a typical metropolitan area, generate an estimated $653,000 in taxes and other revenue for local governments while requiring approximately $126,000 in current expenditures for local governments to provide public services at current levels to the net new households, and $1.2 million in capital investment for new structures and equipment necessary to serve the needs of new residents. Again, it was assumed that local governments finance the capital investment by borrowing at the current municipal bond rate.

In a typical year after the first, the 100 multifamily housing units result in an additional $461,000 in tax and other revenue for local governments, and $251,000 in local government expenditures needed to continue providing services at current levels. After 15 years, the homes will generate a cumulative $7.1 million in revenue compared to $5.0 million in costs (Figure 3.11).

Figure 3.11 Costs Compared to Revenue: 100 Multifamily Units with No Impact Fees



In *The Local Impact of Home Building in a Typical Metropolitan Area: Income, Jobs, and Taxes Generated*, NAHB showed that, in an average revenue structure (including average impact fees), an average single family house will pay for itself (from the standpoint of local governments in the area) in four years, and an average multifamily housing unit will pay for itself in approximately five years.

Figures 3.10 and 3.11 illustrate that, impact and other construction-related fees are eliminated, the revenues attributable to new growth that remain from Figure 3.7 are sufficient enough for the average single-family and multifamily housing units to pay for themselves within a five-year timeframe. After a breakeven point at approximately five (5) years, the average single-family and multifamily unit begins generating excess revenue that local governments may use to reduce taxes or finance other projects, including the expansion of services to other residents in the area.

Many revenue items in Figure 3.7 result from general expansion of the local economy of a metropolitan area and cannot be assigned with certainty to a particular jurisdiction. This creates fiscal challenges, as many costs (such as those associated with primary and secondary education) are borne entirely by the jurisdiction in which a home is constructed. However, if each jurisdiction ignores the economics of the broader housing and labor market in which it is situated, and considers only revenues that can be documented with certainty when making decisions regarding impact fee policies or other measures with the potential to restrict the supply of housing, the result will be a general shortage of housing that will stifle business growth and create housing affordability problems. The purpose of this chapter was not to trivialize the significant fiscal challenges many local jurisdictions face, but to document the net economic benefits jurisdictions in a market area may realize if they allow an adequate supply of housing to be constructed.

Conclusion

The information presented in this chapter has illustrated how a $1,000 impact fee will typically be passed to the ultimate buyer of the home; how the buyer often ends up paying more than $1,000 extra for the home; and how the increase in the price of the home will create housing affordability issues by reducing consumption of housing in addition to increasing prices for the housing buyers do consume.

Moreover, given the tax and fee structures that prevail throughout the United States, the expanded economic activity resulting from residential construction generates considerable revenue for local governments in the area. In the typical case, after the initial five (5) year period following construction, revenues from various sources, excluding impact fees (or permit, or hook-up, or other construction-related), are adequate to extend existing level of public services the new residences.

Endnotes

1. Higher prices include the case of a house that may sell for the same price but is smaller, on smaller lot, or includes fewer amenities. In this case the buyer may be paying the same price but getting less housing in return, an effective price increase. For simplicity, this chapter describes primarily the case where the characteristics of the house remain constant while the price changes.
2. Richard Greene and Stephen Malpezzi. A Primer on U.S. Housing Markets and Housing Policy. AREUEA Monograph Series No. 3, The Urban Institute Press, Washington (2003). Richard Greene is currently Associate Dean for Graduate Programs and Oliver T. Carr, Jr. Chair of Real Estate Finance at George Washington University. Stephen Malpezzi is Professor, and Lorin and Marjorie Tiefenthaler Distinguished Chair in Real Estate at the University of Wisconsin-Madison.
3. U.S Census Bureau. Houses Sold and for Sale by Stage of Construction and Median Number of Months on Sales Market: http://www.census.gov/const/stageann.pdf, and Length of Time for New Residential Construction: http://www.census.gov/const/www/lengthoftimeindex.html.
4. NAHB, 2006 Cost of Doing Business Study.
5. A substantial portion of the material in this section is adapted from "Metro Area House Prices and Affordability" by Elliot Eisenberg in Housing Economics, July 2007. http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=79606&channelID=311
6. "New Home Prices by State and Metro Areas" by Paul Emrath and Helen Fei Liu in Housing Economics, June 2007: http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=78655&channelID=311
7. "Residential Real Estate Tax Rates in the American Community Survey" by Natalia Siniavskaia in Housing Economics, May 2007: http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=76984&channelID=311
8. See for example "An Empirical Examination of the Effect of Impact Fees on the Housing Market," by Larry D. Singell and Jane H. Lilleydahl in Land Economics, February 1990; "Pricing Implications of Development Exactions on the Existing Housing Stock," by Charles Delaney and Marc Smith in Growth and Change, Fall 1989; or "Do Impact Fees Raise the Price of Existing Housing" by Shishir Mathur in Housing Policy Debate, 2007 (Issue 4).
9. The procedure is explained in detail in the technical appendix to The Local Impact of Home Building in a Typical Metropolitan Area: Comparing Costs to Revenues for Local Governments.
10. Details of the model used to estimate the results are available in NAHB's Local Impact of Home Building Model: Technical Appendix. The document is too large to be downloaded over the internet but can be obtained by contacting NAHB's Housing Policy Department.

Exhibit A

NATIONAL ASSOCIATION OF HOME BUILDERS
Households Priced Out of the Market by a $1,000 Price Increase, 2014

Metropolitan Statistical Area	Median New Home Price	Income Needed to Qualify	Households		
			All	Percent that Can Afford	Priced Out
Abilene, TX MSA	240,384	71,059	62,311	25%	144
Akron, OH MSA	269,153	75,822	293,691	29%	407
Albany, GA MSA	140,973	38,181	56,249	45%	160
Albany-Schenectady-Troy, NY MSA	401,105	117,214	336,867	19%	369
Albuquerque, NM MSA	225,407	57,214	344,294	43%	659
Alexandria, LA MSA	207,636	51,993	69,543	37%	178
Allentown-Bethlehem-Easton, PA-NJ MSA	307,829	87,794	318,081	29%	513
Altoona, PA MSA	349,984	92,322	48,629	17%	44
Amarillo, TX MSA	272,883	83,203	94,499	29%	142
Ames, IA MSA	284,375	78,675	37,083	30%	53
Anchorage, AK MSA	373,186	98,659	131,380	35%	192
Anderson, IN MSA	259,819	70,209	47,967	24%	105
Anderson, SC MSA	230,499	56,789	71,988	39%	110
Ann Arbor, MI MSA	270,400	78,181	143,994	41%	233
Anniston-Oxford, AL MSA	171,771	43,116	48,622	50%	117
Appleton, WI MSA	251,328	72,245	87,202	38%	212
Asheville, NC MSA	240,017	58,015	173,969	40%	333
Athens-Clarke County, GA MSA	228,491	58,608	70,685	35%	128
Atlanta-Sandy Springs-Marietta, GA MSA	221,742	56,955	1,980,222	48%	4,135
Atlantic City-Hammonton, NJ MSA	299,539	90,537	100,674	28%	136
Auburn-Opelika, AL MSA	314,741	78,066	54,042	25%	74
Augusta-Richmond County, GA-SC MSA	208,798	52,477	198,133	44%	407
Austin-Round Rock-San Marcos, TX MSA	232,454	69,043	667,355	45%	1,285
Bakersfield-Delano, CA MSA	241,976	62,459	258,396	40%	479
Baltimore-Towson, MD MSA	228,013	57,989	1,060,179	56%	2,014
Barnstable Town, MA MSA	616,381	151,432	80,879	11%	24
Baton Rouge, LA MSA	226,874	56,548	306,517	48%	530
Battle Creek, MI MSA	241,340	72,350	56,027	26%	114
Bay City, MI MSA	240,615	70,478	45,788	28%	79
Beaumont-Port Arthur, TX MSA	183,574	55,775	142,970	39%	349
Bellingham, WA MSA	293,969	72,746	77,203	35%	145
Bend, OR MSA	326,459	81,842	68,995	31%	101
Billings, MT MSA	247,752	63,972	67,882	35%	153
Binghamton, NY MSA	255,988	82,431	103,527	26%	164
Birmingham-Hoover, AL MSA	263,064	64,348	447,016	38%	681
Blacksburg-Christiansburg-Radford, VA MS	210,790	52,204	67,158	52%	141
Bloomington, IN MSA	205,783	51,066	77,320	42%	147
Bloomington-Normal, IL MSA	207,654	62,994	71,053	51%	172
Boise City-Nampa, ID MSA	269,591	66,056	239,837	33%	474
Boston-Cambridge-Quincy, MA-NH MSA	430,296	111,855	1,749,426	32%	1,829
Boulder, CO MSA	310,031	74,378	128,370	47%	191
Bowling Green, KY MSA	202,515	52,107	53,579	40%	93
Bremerton-Silverdale, WA MSA	293,074	74,090	90,100	41%	167
Bridgeport-Stamford-Norwalk, CT MSA	878,625	240,996	339,772	1%	186
Brownsville-Harlingen, TX MSA	116,704	35,831	126,119	47%	478
Brunswick, GA MSA	289,183	73,721	40,866	29%	59
Buffalo-Niagara Falls, NY MSA	395,105	128,302	469,199	10%	266

NATIONAL ASSOCIATION OF HOME BUILDERS
Households Priced Out of the Market by a $1,000 Price Increase, 2014

Metropolitan Statistical Area	Median New Home Price	Income Needed to Qualify	Households		
			All	Percent that Can Afford	Priced Out
Burlington, NC MSA	155,202	38,966	56,995	54%	154
Canton-Massillon, OH MSA	220,267	60,406	165,387	35%	326
Cape Coral-Fort Myers, FL MSA	292,932	80,100	259,094	26%	279
Carson City, NV MSA	343,367	84,201	22,243	34%	30
Cedar Rapids, IA MSA	146,885	41,106	99,047	64%	218
Champaign-Urbana, IL MSA	254,760	76,429	93,065	29%	141
Charleston-North Charleston-Summerville, S	288,677	72,424	269,643	34%	491
Charlotte-Gastonia-Rock Hill, NC-SC MSA	243,499	62,366	683,782	43%	1,181
Charlottesville, VA MSA	262,901	63,558	78,144	51%	128
Chattanooga, TN-GA MSA	182,679	46,376	210,567	46%	510
Chicago-Joliet-Naperville, IL-IN-WI MSA	308,424	92,108	3,473,022	31%	5,325
Chico, CA MSA	274,636	67,806	89,007	31%	128
Cincinnati-Middletown, OH-KY-IN MSA	244,344	66,318	865,663	41%	1,623
Clarksville, TN-KY MSA	140,513	35,802	103,093	64%	306
Cleveland, TN MSA	159,148	39,165	49,234	56%	138
Cleveland-Elyria-Mentor, OH MSA	272,149	79,010	830,043	28%	1,103
Coeur d'Alene, ID MSA	250,758	60,527	55,100	37%	100
College Station-Bryan, TX MSA	192,998	56,025	88,453	36%	198
Columbia, MO MSA	214,130	54,865	76,589	42%	128
Columbia, SC MSA	213,026	52,771	291,253	44%	670
Columbus, GA-AL MSA	188,924	47,549	114,070	43%	247
Columbus, IN MSA	270,724	69,587	30,780	41%	66
Columbus, OH MSA	254,712	72,249	725,749	38%	1,452
Corpus Christi, TX MSA	192,237	59,548	163,365	38%	405
Dallas-Fort Worth-Arlington, TX MSA	289,824	89,627	2,412,714	31%	3,676
Dalton, GA MSA	168,738	42,291	48,593	40%	122
Danville, IL MSA	130,985	39,651	32,323	54%	106
Danville, VA MSA	167,278	41,519	49,204	42%	168
Davenport-Moline-Rock Island, IA-IL MSA	220,693	64,422	158,920	38%	363
Dayton, OH MSA	291,432	84,249	333,881	24%	411
Decatur, AL MSA	179,407	45,017	61,915	50%	106
Decatur, IL MSA	225,354	69,191	52,324	37%	109
Deltona-Daytona Beach-Ormond Beach, FL	357,650	96,058	213,555	15%	214
Denver-Aurora-Broomfield, CO MSA	306,315	74,688	1,049,652	42%	1,791
Des Moines-West Des Moines, IA MSA	269,083	76,308	245,972	40%	507
Detroit-Warren-Livonia, MI MSA	294,783	91,235	1,666,009	26%	2,434
Dothan, AL MSA	238,111	58,693	53,913	34%	93
Dover, DE MSA	158,002	37,589	65,290	67%	148
Duluth, MN-WI MSA	214,426	56,782	117,200	44%	287
Durham-Chapel Hill, NC MSA	252,354	65,845	216,839	40%	353
Eau Claire, WI MSA	223,405	63,094	64,452	39%	158
El Centro, CA MSA	234,495	59,418	42,914	32%	68
El Paso, TX MSA	171,999	51,310	267,497	39%	694
Elizabethtown, KY MSA	178,046	45,538	48,608	53%	175
Elkhart-Goshen, IN MSA	218,863	57,199	70,981	44%	161
Erie, PA MSA	300,781	88,158	111,662	17%	188
Eugene-Springfield, OR MSA	286,284	73,007	147,425	28%	227

Households Priced Out of the Market by a $1,000 Price Increase, 2014

Metropolitan Statistical Area	Median New Home Price	Income Needed to Qualify	Households		
			All	Percent that Can Afford	Priced Out
Evansville, IN-KY MSA	183,817	47,332	149,798	49%	256
Fairbanks, AK MSA	228,035	61,929	33,892	47%	98
Fargo, ND-MN MSA	223,606	62,807	91,187	41%	195
Farmington, NM MSA	254,662	62,485	35,965	47%	90
Fayetteville, NC MSA	203,097	53,953	147,433	42%	393
Fayetteville-Springdale-Rogers, AR-MO MS	271,763	67,378	182,509	35%	276
Flagstaff, AZ MSA	229,039	54,724	49,607	43%	94
Flint, MI MSA	225,094	71,795	171,869	26%	342
Florence-Muscle Shoals, AL MSA	138,411	34,354	54,083	56%	175
Fond du Lac, WI MSA	244,900	71,637	41,020	38%	105
Fort Collins-Loveland, CO MSA	289,367	70,156	128,382	39%	199
Fort Smith, AR-OK MSA	190,863	48,139	124,807	39%	289
Fort Wayne, IN MSA	238,403	62,176	167,061	38%	338
Fresno, CA MSA	293,061	73,897	304,713	30%	456
Gadsden, AL MSA	170,888	43,165	36,353	43%	62
Gainesville, FL MSA	202,516	53,567	94,526	43%	184
Gainesville, GA MSA	207,524	51,934	61,424	47%	152
Glens Falls, NY MSA	269,828	77,148	51,033	30%	75
Goldsboro, NC MSA	188,687	49,767	45,559	40%	106
Grand Junction, CO MSA	258,995	60,551	56,846	43%	88
Grand Rapids-Wyoming, MI MSA	253,115	71,378	297,890	34%	641
Greeley, CO MSA	269,681	64,966	96,568	40%	189
Green Bay, WI MSA	231,028	65,732	124,309	40%	224
Greensboro-High Point, NC MSA	288,492	74,552	295,059	28%	445
Greenville, NC MSA	184,839	48,872	90,674	44%	204
Greenville-Mauldin-Easley, SC MSA	277,468	67,903	254,703	34%	380
Gulfport-Biloxi, MS MSA	162,576	44,342	108,125	48%	270
Hagerstown-Martinsburg, MD-WV MSA	206,117	51,465	106,312	55%	238
Hanford-Corcoran, CA MSA	189,803	47,603	39,541	55%	114
Harrisburg-Carlisle, PA MSA	323,166	87,531	219,380	30%	310
Harrisonburg, VA MSA	175,588	41,958	47,538	54%	122
Hartford-West Hartford-East Hartford, CT M	319,298	91,708	477,064	37%	723
Hattiesburg, MS MSA	243,791	64,017	52,169	34%	88
Hickory-Lenoir-Morganton, NC MSA	252,219	62,967	150,672	27%	276
Holland-Grand Haven, MI MSA	247,807	67,911	97,057	42%	222
Honolulu, HI MSA	393,669	87,662	307,228	40%	420
Hot Springs, AR MSA	262,134	65,875	46,326	27%	66
Houma-Bayou Cane-Thibodaux, LA MSA	271,420	69,031	72,220	35%	115
Houston-Sugar Land-Baytown, TX MSA	195,144	60,997	2,167,245	47%	4,234
Huntsville, AL MSA	165,823	40,142	171,081	62%	384
Idaho Falls, ID MSA	161,729	40,306	41,575	60%	108
Indianapolis-Carmel, IN MSA	260,699	67,557	697,114	38%	1,312
Iowa City, IA MSA	271,832	76,239	67,287	36%	132
Ithaca, NY MSA	280,564	89,282	36,575	30%	40
Jackson, MI MSA	188,708	52,506	63,934	44%	190

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Jackson, MS MSA	244,997	63,545	192,760	38%	370
Jackson, TN MSA	193,808	49,633	47,158	37%	84
Jacksonville, FL MSA	280,185	73,490	508,999	34%	856
Jacksonville, NC MSA	148,170	37,704	66,124	66%	233
Janesville, WI MSA	213,437	64,369	62,636	38%	152
Jefferson City, MO MSA	224,583	57,677	59,464	46%	126
Johnson City, TN MSA	163,973	40,268	83,177	50%	239
Johnstown, PA MSA	301,932	84,153	60,029	19%	66
Joplin, MO MSA	144,861	37,416	72,896	55%	245
Kalamazoo-Portage, MI MSA	254,025	72,309	135,068	29%	243
Kankakee-Bradley, IL MSA	191,793	58,765	41,504	35%	111
Kansas City, MO-KS MSA	292,243	80,318	814,964	33%	1,194
Kennewick-Pasco-Richland, WA MSA	328,527	85,647	92,841	32%	129
Killeen-Temple-Fort Hood, TX MSA	169,434	50,058	146,822	51%	367
Kingsport-Bristol-Bristol, TN-VA MSA	179,999	45,171	122,105	43%	323
Kingston, NY MSA	377,249	114,249	72,871	19%	74
Knoxville, TN MSA	213,424	52,723	294,901	44%	537
Kokomo, IN MSA	215,884	54,403	39,545	41%	70
La Crosse, WI-MN MSA	219,155	62,946	57,652	37%	92
Lafayette, IN MSA	231,863	58,658	80,628	39%	156
Lafayette, LA MSA	187,491	47,716	110,350	52%	217
Lake Charles, LA MSA	234,773	60,482	81,131	36%	147
Lakeland-Winter Haven, FL MSA	236,300	64,659	235,702	30%	358
Lancaster, PA MSA	269,950	74,049	196,147	35%	413
Lansing-East Lansing, MI MSA	254,683	75,840	184,760	30%	390
Laredo, TX MSA	164,186	50,884	72,117	36%	196
Las Cruces, NM MSA	231,803	57,551	71,069	34%	130
Las Vegas-Paradise, NV MSA	182,564	46,013	755,412	55%	2,044
Lebanon, PA MSA	262,028	71,597	53,811	35%	115
Lewiston, ID-WA MSA	255,924	65,790	26,662	31%	59
Lexington-Fayette, KY MSA	175,954	44,491	194,617	55%	509
Lima, OH MSA	213,974	58,512	40,561	38%	100
Lincoln, NE MSA	229,995	66,939	123,808	38%	266
Little Rock-North Little Rock-Conway, AR M	207,826	52,753	283,816	46%	636
Logan, UT-ID MSA	223,458	53,659	42,138	46%	82
Longview, TX MSA	155,971	44,591	72,341	50%	218
Longview, WA MSA	246,663	65,225	35,426	32%	77
Los Angeles-Long Beach-Santa Ana, CA M	445,105	107,294	4,292,536	22%	3,813
Louisville/Jefferson County, KY-IN MSA	229,997	59,226	533,456	44%	1,140
Lubbock, TX MSA	250,013	76,069	111,958	29%	173
Lynchburg, VA MSA	223,782	54,240	102,347	43%	196
Macon, GA MSA	198,624	52,472	84,446	39%	169
Madera-Chowchilla, CA MSA	271,959	67,513	41,538	36%	73
Madison, WI MSA	293,258	83,743	244,625	35%	381
Manchester-Nashua, NH MSA	323,009	95,042	159,493	28%	230
Mansfield, OH MSA	222,557	61,861	48,355	33%	103
McAllen-Edinburg-Mission, TX MSA	137,758	42,748	237,476	40%	656
Medford, OR MSA	272,536	69,332	74,464	26%	156
Memphis, TN-MS-AR MSA	194,193	52,811	493,575	45%	1,183

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Medford, OR MSA	272,536	69,332	74,464	26%	156
Memphis, TN-MS-AR MSA	194,193	52,811	493,575	45%	1,183
Merced, CA MSA	351,321	88,213	79,793	16%	92
Miami-Fort Lauderdale-Pompano Beach, FL	342,099	97,050	2,058,718	17%	1,953
Midland, TX MSA	240,632	69,973	51,972	45%	111
Milwaukee-Waukesha-West Allis, WI MSA	346,831	100,111	641,192	22%	943
Minneapolis-St. Paul-Bloomington, MN-WI	336,496	89,372	1,327,842	36%	2,009
Mobile, AL MSA	163,596	42,440	154,719	50%	327
Modesto, CA MSA	255,320	64,669	166,773	37%	281
Monroe, LA MSA	196,501	50,170	70,146	37%	106
Monroe, MI MSA	227,025	62,366	57,536	42%	106
Montgomery, AL MSA	199,530	48,515	150,721	49%	276
Morgantown, WV MSA	208,761	51,142	51,113	42%	107
Morristown, TN MSA	203,473	50,167	50,289	38%	100
Mount Vernon-Anacortes, WA MSA	245,286	62,316	42,494	45%	77
Muncie, IN MSA	208,458	55,525	48,842	33%	103
Muskegon-Norton Shores, MI MSA	205,803	60,633	65,952	32%	129
Myrtle Beach-North Myrtle Beach-Conway,	203,843	50,379	137,484	41%	283
Napa, CA MSA	580,197	142,369	44,979	13%	19
Naples-Marco Island, FL MSA	413,389	105,952	123,245	22%	75
Nashville-Davidson--Murfreesboro--Frankli	261,290	65,354	622,873	40%	1,096
New Haven-Milford, CT MSA	318,180	93,482	337,231	29%	514
New Orleans-Metairie-Kenner, LA MSA	248,612	65,357	476,731	36%	750
New York-Northern New Jersey-Long Islanc	407,805	113,408	7,040,717	19%	5,742
Niles-Benton Harbor, MI MSA	355,099	96,306	67,997	17%	80
North Port-Bradenton-Sarasota, FL MSA	290,155	78,160	294,796	27%	371
Ocala, FL MSA	226,250	60,413	134,869	28%	333
Ocean City, NJ MSA	448,406	118,716	39,273	18%	35
Odessa, TX MSA	216,022	62,359	48,352	41%	108
Ogden-Clearfield, UT MSA	285,382	69,601	182,900	45%	391
Oklahoma City, OK MSA	230,816	63,382	487,440	38%	935
Olympia, WA MSA	290,425	74,854	103,069	42%	207
Omaha-Council Bluffs, NE-IA MSA	219,334	65,366	356,329	44%	731
Orlando-Kissimmee-Sanford, FL MSA	323,141	85,927	805,830	23%	955
Oshkosh-Neenah, WI MSA	249,872	72,679	66,752	34%	154
Oxnard-Thousand Oaks-Ventura, CA MSA	391,706	94,599	272,711	41%	343
Palm Bay-Melbourne-Titusville, FL MSA	359,862	98,315	221,973	19%	257
Panama City-Lynn Haven-Panama City Beac	187,641	48,955	66,256	51%	123
Pascagoula, MS MSA	162,073	44,932	55,327	49%	161
Pensacola-Ferry Pass-Brent, FL MSA	171,995	45,705	187,473	53%	489
Peoria, IL MSA	279,063	83,796	154,710	26%	283
Philadelphia-Camden-Wilmington, PA-NJ-D	270,854	75,346	2,240,167	41%	3,914
Phoenix-Mesa-Glendale, AZ MSA	299,444	74,110	1,594,811	34%	2,670

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Pittsburgh, PA MSA	383,844	110,558	1,012,323	16%	934
Port St. Lucie, FL MSA	346,618	99,486	183,423	21%	199
Portland-South Portland-Biddeford, ME MS	321,500	84,074	218,046	34%	281
Portland-Vancouver-Hillsboro, OR-WA MS	324,988	83,386	873,789	33%	1,190
Poughkeepsie-Newburgh-Middletown, NY	315,346	93,615	231,194	35%	383
Prescott, AZ MSA	271,476	65,766	98,451	33%	184
Providence-New Bedford-Fall River, RI-MA	314,448	84,389	623,169	32%	805
Provo-Orem, UT MSA	289,202	68,850	149,368	41%	309
Pueblo, CO MSA	212,056	54,060	62,804	42%	182
Punta Gorda, FL MSA	255,458	72,257	79,495	25%	189
Racine, WI MSA	283,360	83,396	75,451	32%	110
Raleigh-Cary, NC MSA	239,300	60,054	477,113	51%	986
Reading, PA MSA	255,169	74,361	143,350	35%	309
Redding, CA MSA	242,398	60,089	66,329	36%	109
Reno-Sparks, NV MSA	302,827	75,485	173,013	32%	295
Richmond, VA MSA	220,984	54,604	481,937	54%	1,003
Riverside-San Bernardino-Ontario, CA MSA	294,917	74,642	1,269,021	36%	2,050
Roanoke, VA MSA	247,589	61,709	138,319	40%	310
Rochester, MN MSA	289,029	76,208	74,890	46%	139
Rochester, NY MSA	363,279	119,792	421,843	15%	418
Rockford, IL MSA	161,275	52,310	132,629	45%	402
Rocky Mount, NC MSA	197,825	52,868	52,983	38%	107
Rome, GA MSA	233,496	60,762	33,306	34%	73
Sacramento--Arden-Arcade--Roseville, CA	368,853	92,854	796,644	29%	1,004
Saginaw-Saginaw Township North, MI MSA	220,475	64,958	81,456	31%	155
Salem, OR MSA	278,962	72,881	149,861	29%	271
Salinas, CA MSA	336,843	81,481	125,003	32%	156
Salisbury, MD MSA	172,707	43,739	44,757	51%	78
Salt Lake City, UT MSA	286,243	69,358	389,439	42%	777
San Antonio-New Braunfels, TX MSA	227,539	68,643	774,537	36%	1,712
San Diego-Carlsbad-San Marcos, CA MSA	443,256	106,876	1,117,831	27%	912
San Francisco-Oakland-Fremont, CA MSA	441,837	106,571	1,665,167	39%	1,597
San Jose-Sunnyvale-Santa Clara, CA MSA	447,432	107,821	647,818	42%	729
San Luis Obispo-Paso Robles, CA MSA	419,878	100,466	103,348	29%	137
Sandusky, OH MSA	243,727	66,843	32,955	32%	68
Santa Barbara-Santa Maria-Goleta, CA MSA	427,335	101,612	143,151	28%	120
Santa Cruz-Watsonville, CA MSA	287,744	68,260	90,282	47%	151
Santa Fe, NM MSA	180,544	42,743	65,157	62%	119
Santa Rosa-Petaluma, CA MSA	325,692	79,106	191,860	43%	262
Savannah, GA MSA	205,157	53,207	139,421	44%	311
Scranton--Wilkes-Barre, PA MSA	345,255	96,513	222,523	18%	274
Seattle-Tacoma-Bellevue, WA MSA	368,710	94,273	1,397,266	38%	1,775
Sebastian-Vero Beach, FL MSA	433,676	117,492	61,928	11%	37

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Sheboygan, WI MSA	295,862	85,947	48,035	23%	79
Shreveport-Bossier City, LA MSA	199,792	51,275	151,106	48%	284
Sioux City, IA-NE-SD MSA	269,059	78,691	50,974	26%	72
Sioux Falls, SD MSA	180,932	49,784	89,630	56%	283
South Bend-Mishawaka, IN-MI MSA	275,678	72,826	119,914	27%	222
Spartanburg, SC MSA	169,499	42,354	115,152	52%	317
Spokane, WA MSA	358,134	93,874	192,335	21%	244
Springfield, IL MSA	248,178	74,317	87,129	35%	142
Springfield, MA MSA	357,528	97,210	259,426	23%	343
Springfield, MO MSA	210,300	53,752	184,137	39%	450
Springfield, OH MSA	245,947	68,424	53,722	27%	95
St. Cloud, MN MSA	238,803	62,543	71,849	44%	136
St. George, UT MSA	218,646	52,782	52,381	43%	121
St. Joseph, MO-KS MSA	212,137	55,439	50,925	39%	103
St. Louis, MO-IL MSA	263,137	72,040	1,115,669	36%	2,071
State College, PA MSA	261,048	69,018	53,699	44%	88
Stockton, CA MSA	311,589	78,983	219,842	32%	252
Sumter, SC MSA	131,871	33,549	38,919	65%	124
Syracuse, NY MSA	299,007	95,900	268,267	23%	387
Tallahassee, FL MSA	220,666	56,798	137,300	42%	279
Tampa-St. Petersburg-Clearwater, FL MSA	376,565	103,652	1,177,086	17%	842
Terre Haute, IN MSA	203,506	54,299	73,531	42%	173
Toledo, OH MSA	255,682	73,852	260,186	26%	362
Topeka, KS MSA	216,320	62,215	91,646	40%	221
Trenton-Ewing, NJ MSA	446,961	136,243	134,536	23%	88
Tucson, AZ MSA	287,021	73,702	399,026	29%	660
Tulsa, OK MSA	223,880	60,536	375,628	40%	867
Tuscaloosa, AL MSA	248,394	59,158	79,981	37%	120
Tyler, TX MSA	232,175	65,966	74,360	33%	129
Utica-Rome, NY MSA	298,972	94,627	118,949	17%	169
Valdosta, GA MSA	137,268	35,630	54,958	49%	196
Vallejo-Fairfield, CA MSA	255,570	64,307	143,461	53%	259
Vineland-Millville-Bridgeton, NJ MSA	177,370	55,125	50,779	44%	104
Virginia Beach-Norfolk-Newport News, VA-	234,587	59,056	648,268	50%	1,370
Visalia-Porterville, CA MSA	253,824	63,209	134,074	33%	272
Waco, TX MSA	201,313	60,613	87,319	33%	163
Warner Robins, GA MSA	232,089	60,349	53,293	43%	116
Waterloo-Cedar Falls, IA MSA	232,706	64,308	65,726	37%	166
Wausau, WI MSA	243,269	70,353	49,835	39%	111
Wenatchee-East Wenatchee, WA MSA	239,422	60,552	42,564	42%	94
Wichita Falls, TX MSA	223,899	70,763	64,542	30%	159
Wichita, KS MSA	226,945	64,818	245,039	41%	586
Williamsport, PA MSA	289,987	79,994	43,826	22%	70
Wilmington, NC MSA	266,712	66,865	152,944	35%	282
Winchester, VA-WV MSA	233,050	56,203	51,402	41%	62
Winston-Salem, NC MSA	189,420	48,459	201,425	46%	445
Worcester, MA MSA	296,995	79,168	307,142	40%	428
Yakima, WA MSA	276,602	72,065	75,369	26%	135
York-Hanover, PA MSA	265,832	74,801	170,288	37%	352
Youngstown-Warren-Boardman, OH-PA M	232,467	65,474	224,983	30%	405
Yuba City, CA MSA	246,352	63,666	57,492	35%	115
Yuma, AZ MSA	178,173	46,100	69,720	45%	187

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CHAPTER 4

A Closer Look at Impact Fee Technical Studies

- ***Methodology***
- ***Population and Land Use Assumptions***
- ***Levels of Service***
- ***Credits***
- ***Construction and Land Costs***
- ***Offsets***
- ***Credits***
- ***Service Areas***
- ***Transportation-Related Issues***
- ***Legitimacy of Growth-Related Costs***
- ***Proportionate-Share Impact Fees***
- ***Discount Impact Fee Schedules***
- ***Commonly Found Errors***
- ***Revising State Statutes to Address Jurisdictional Overreach***
- ***Conclusion***

When local governments decide to implement impact fees, they will commonly direct either their staff or a consultant to prepare a document that, among other things, analyzes the public costs of constructing capital facilities, calculates the share that is needed to serve new development, and determines the portion of that share which will not be paid from other fees and taxes on new development. This study is called a technical memorandum, fee calculation study, public facility needs assessment, nexus report, or some such similar name (herein termed "technical study").

The technical study is important because it is needed to demonstrate that the impact fees are logically related to a need created by new development and that the amount charged is proportional to the cost of providing public facilities. The technical study is not part of the impact fee ordinance itself but it provides the necessary background and is the source for the schedule of impact fees contained in the ordinance.

In order to determine the fairness and legality of any impact fee charge, it is necessary to illustrate how the impact fees were calculated. The local government should always make the technical study available prior to a public hearing on an impact fee ordinance or at any time after adoption. In rare cases, the technical study is not available or was

never prepared. In these instances, the local government is susceptible to legal challenges on the basis that the impact fee schedule was established arbitrarily. It should be emphasized that impact fee calculation is a complex and subtle matter and even experienced impact fee consultants make errors that can potentially result in overcharges (see Chapter 2, pp. 15-18).

Some state impact fee laws specifically require a technical study and mention particular aspects of the study which must be present. *Technical studies prepared by or for local governments should always be checked against applicable state statutes in order to verify that all requirements of the applicable state statutes have been addressed.* Even in the absence of pertinent state laws, a sound impact fee technical study is essential to establish the validity of impact fees (see Chapter 2, pp. 15-18). This chapter will discuss various technical issues that should be addressed in impact fee studies and point out some common errors made in impact fee methodologies and calculations.

Methodology

The preparation of an impact fee technical study has much in common with the preparation of a fiscal impact study except that the former considers only capital costs, not operating costs. The fiscal consequences of new development must be accounted for because, unless it can be shown that the public cost of providing capital facilities for new development exceeds the amount of revenue generated by new development for capital construction purposes, then impact fees cannot be justified.

Just as there are several different approaches to fiscal impact analysis, there are several different methodologies that may be used to estimate impact fees. The different approaches can produce different results and it can be argued that some are more accurate than others. These methods are referred to by various names, but there are three essential types: the *incremental expansion approach*, the *buy-in approach*, and the *plan-based approach.* All three approaches are commonly employed in the United States.

Incremental Expansion Approach

The key operating assumption in impact fee technical studies that use the incremental expansion approach is that future development will require the same types of capital facilities at existing levels of service and current replacement costs as those capital facilities currently being utilized by existing development.

The incremental expansion approach documents the current level of service using either quantitative or qualitative measures. The incremental expansion approach examines the replacement cost of existing capital facilities within a proposed impact fee category and divides this cost by the population served to produce a figure that is the average cost per capita for a particular type of facility. It is assumed that future costs per capita will maintain existing levels of service and will approximate the current replacement

costs of providing these facilities. Figure 4.1 provides an example of how a fire impact fee may be established utilizing the incremental expansion approach.

Figure 4.1: Sample Impact Fee Calculation Utilizing the Incremental Expansion Approach

Description	Calculation	Amount
Replacement Cost of Fire Station	A	$ 2,000,000
Population Served by Existing Station	B	10,000
Average Replacement Cost per Person	(A / B) = C	$ 200
Persons per Household	D	2.2
Impact Fee per Household	**C * D = E**	**$ 440**

Assuming the cost of maintaining existing levels of service follows current patterns, the incremental expansion approach may give a reasonable approximation of the costs necessary to serve new development. This approach also requires minimal planning on the part of the local community, and is easiest to execute in a technical study.

However, the incremental expansion approach has a serious flaw. It assumes that the cost to provide facilities throughout the community is the same in any particular part of the community. But costs in a particular location depend on local conditions. Using the fire facility fee as an example, the cost of providing fire facilities for a property within the response radius of an existing station will differ substantially from the cost of providing new facilities for properties beyond the reach of existing stations. Properties that can be served by existing fire facilities will not require the expenditure of additional capital funds. The incremental expansion approach makes no distinction between properties that require additional capital spending and properties that don't.

Buy-In Approach

A variation on the incremental expansion approach has been devised which is sometimes referred to as a buy-in approach. The buy-in approach seeks to recoup from new development the cost of the excess capacity present in existing facilities which is available to serve new development. The buy-in approach utilizes the actual cost of the facility when it was constructed. Rather than dividing by the population presently served by the facility, the denominator includes present population plus projected future population of the service area which can be served by the facility in question without additional capital improvements. In this way the government recovers from new development an amount determined to be its fair share of the cost of previously constructed facilities. The rationale for the buy-in approach is that new development will pay its fair share of the remaining capacity of completed facilities.

Plan-Based Approach

The key operating assumption of the plan-based approach is that future development will follow adopted community plans, and future capital facilities needs and costs will vary based on location and types of new development.

The plan-based approach differs from the incremental expansion approach and buy-in approach as it does not rely on replacement costs or the actual costs, respectively, averaged over the entire community's population but rather the plan-based approach relies on specific planned facilities and the populations projected to be served by them. Again using fire facilities as an example, the plan-based approach would begin with the community's comprehensive plan or capital facilities plan to find how many new fire stations were planned for future populations to provide a specified level of service (e.g., minimum response time). The service area of each station would be examined to determine planned densities, land uses, and populations. The cost of providing service in each service area would be obtained from the same kind of engineering cost estimates used to prepare the capital budget (or from the capital budget itself [1]). Presumably, there would be differences in the costs from station-to-station, reflecting differences in equipment needed to address different fire risks associated with the specific mix of land uses in each station's service area. The impact fee calculation would involve dividing the capital cost for each station by the number of units served (dwellings, increments of nonresidential space) and/or projected to occupy each service area.

The technical study may use different unit types for determining impact fees depending upon the infrastructure system in question, such as gallons of demand for water systems or trips generated for roadway systems. The plan-based approach is more time consuming (therefore more expensive) but is thought to be more realistic as it examines individual service areas and their public facility requirements in detail. It should be noted, however, that this approach may drastically over or underestimate service demands for plans with long planning horizons (i.e. a 20-year plan). As such, the plan-based approach is best utilized with a three- to five-year planning horizon.

Special attention must be paid to ensuring that the capital facilities plan maintains a level of service that is consistent with the community's existing levels of service. If higher levels of service are being implemented the technical study must allocate a portion of the costs associated with the higher level of service to existing development and indicate what alternative funding sources will be used by the community (excluding impact fees) to upgrade existing facilities to meet the new proposed increased levels of service (see Level of Service section below).

If a jurisdiction is attempting to implement levels of service that are higher than their current service standards, the jurisdiction must fund the costs associated with increasing the existing level of service with funding sources other than impact fees before it can begin to levy and collect impact fees at the higher level of service. In such situations, the jurisdiction will often designate a funding source for increasing the existing level of service. *In such a situation, care should be taken in subsequent technical study reviews to verify that the jurisdiction did provide the designated funding to finance the higher levels of service.* Past experience has shown that often times the jurisdiction never provided the designated funding to increase the levels of service although they imposed impact fees based upon the higher level of service.

Hybrid or Ad-hoc Approaches

Some communities utilize a hybrid or ad-hoc methodology that combines elements of all of the impact fee approaches. The most important consideration when evaluating a hybrid or ad-hoc approach is whether the state statute is followed. Further, it is important to consider the strengths and weaknesses of the approach utilized compared to other more conventional approaches.

Population and Land Use Assumptions

Many state impact fees enabling laws require the community to specify the population and land use assumptions upon which the impact fee calculation will be based. This is important because the plan-based approach and buy-in methods rely on projections of future population and land use. However, the incremental expansion approach is not typically reliant on these assumptions. Normally, the community's comprehensive plan would be the source for these assumptions and projections. If the community has no comprehensive plan, or is out of date, a separate study may be used. Communities unwilling or unable to commission a comprehensive plan or special study sometimes ignore the issue of growth assumptions by using the incremental expansion approach.

The population and land use assumptions are worth examining in detail because the amount of the impact fee will depend on the number of persons, dwellings, and nonresidential land uses that will share responsibility for capital costs. *A common error in impact fee studies is inadequate consideration of household size trends or failure to consider and evaluate household size and trends at all.* Household size is important because a small change in the average household size can create substantial changes in overall population or in demand for housing. Many studies only consider the community's household size as reported in the most recent census and assume that future families will share the same characteristics as existing families. There is no valid reason to make this assumption. Census data show that household size has been decreasing over time for the U.S. as a whole. NAHB studies indicate that this trend is reflected in many local areas as well. The census data also show that families which have recently moved (the source of most local population growth) have a smaller household size than the national average. This trend has the following implications for impact fee calculations: fewer persons in each household means that the marginal impact of each additional dwelling unit is less; furthermore, a greater number of dwelling units will be needed to house an equivalent population, thus sharing costs over a greater number of units and reducing the per-unit impact fee amount. This is especially true given current demographic trends associated with aging baby boomers who are downsizing and/or Millennials who tend to remain single much longer than previous generations.

Land use assumptions also need to take account of demand from nonresidential land uses in order to avoid over-counting the demands and costs related to population and housing. For example, police and fire capital facilities will be sized to serve both

residential and nonresidential development, so costs should be spread over both types in proportion to the demand generated by each.

Levels of Service

Level of service is a concept for defining the quantity of public facilities that must be provided in order to adequately satisfy citizens' demands for capital facilities. For example, the number of public park acres per capita is a measure of the level of service for park facilities and the average response time is a measure of the level of fire, emergency medical, and police services. When calculating the amount of public facilities that will be required to serve new growth, one must select a specific level of service in order to quantify the required investment. For example, if the selected level of service for park facilities is 0.03 acres per capita and the projected population increase is 10,000 persons, then the required investment is 300 (10,000 x 0.03) additional acres. *Many communities assume, wrongly, that they are free to select the level of service of public facilities for new development.*

A community may not require new development to fund a higher level of service that it did not require for existing development. The only level of service that may be used to quantify the public facility requirements of new development is the level of service currently provided in the community. There is one exception, however: a community may require higher levels of service for new development if it is concurrently implementing a plan to raise the level of service for existing development and is funding the plan with revenues other than impact fees on new development.

If a community plans to increase its levels of service and has indicated in the technical study the source from which the funding will be derived to accomplish this, it is important to periodically verify that the community has in fact utilized those funding sources rather than impact fees to meet this end.

All technical memoranda should address the issue of levels of service explicitly. Many address levels of service implicitly, inappropriately, or not at all. Additionally, many state statutes require that levels of service be disclosed and to the extent that a technical study does not address the levels of service, such a technical study may not be compliant with state statutes leaving the community open to potential legal challenges.

Construction and Land Costs

Replacement costs as utilized in the incremental expansion or plan-based approaches should be based on estimates prepared by qualified state license engineers, actual bids, or data provided by a costing service such as Marshall & Swifts or RS Means. Land values should be supported by recent comparable land sales occurring within the immediate area over the last 6-month period. More times than not, replacement cost estimates lack the supporting documentation necessary to determine the reasonableness of the cost. To the extent that replacement costs are inflated, new growth will fund facility costs in excess of existing levels of service.

If the buy in approach is utilized to estimate impact fees, the actual costs of the facilities should be used as opposed to their current replacement costs. In the *Boa v. Seattle* (Washington 1965)[2] case, the court held that the "value" of facilities must be based on the historical cost rather than the inflated replacement cost of the facility, thereby rejecting a buy-in fee based on the purported replacement cost of the facilities rather than the much lower historical costs. If for whatever reason the replacement cost is utilized in the buy-in approach, allowance for depreciation should be taken to reduce the costs to more closely align with historic costs.

Offsets

Certain state enabling acts, such as Utah and Arizona, require impact fees to be reduced based upon future cash flows generated from new development, including but not limited to: property taxes, construction sales taxes, gas taxes, state shared revenue and other revenue sources that will be utilized to pay for capital facilities (offsets). *The impact fee amount is established to cover the cost of capital facilities less these other revenue collections.*

An equitable impact fee methodology will take offsets into account when estimating impact fee amounts. Technical studies that include offsets recognize that new development provides financial contributions other than impact fees to fund capital facilities. In essence, offsets protect home builders and homebuyers from double-paying for the same capital facilities. Potential offsets include:

- Grants;
- Gasoline taxes;
- Sales taxes;
- User fees;
- Bond repayments (i.e. through property taxes);
- Property taxes dedicated to fund capital facilities;
- Transfer taxes; and,
- State shared revenues.

Credits

An impact fee payer is entitled to a reduction in the amount of the impact fee (a credit) to compensate for contributions he or she has made or will make toward the cost of capital facilities. It is essential that the technical study and/or impact fee ordinance provide developers and builders with a mechanism to receive credits if they are due. *Many technical studies ignore the methodologies of how impact fee credits are to be calculated thus leading to inconsistent impact fee credit calculations.*

There are three key types of credits:

1) *In-Lieu of Impact Fee Credits:* credits provided to developers or home builders in exchange for the construction and/or dedication of infrastructure items that would otherwise be funded through impact fees. For example, a developer should receive credit equal to the cost of constructing and dedicating a sewer treatment plant if a portion of the local community's sewer impact fee is normally utilized to pay for sewer treatment facilities.

2) *Excess Capacity Impact Fee Credits:* credits for dedication of public facilities that provide excess capacity beyond what is required by a particular project that would otherwise by funded by impact fees. For example, a local community may request that a developer build and dedicate a new sewer treatment plant with enough capacity to serve the project in question but also other neighboring projects that will be completed in the future. In this case, the developer is not only given impact fee credits for the developer's immediate project; the developer is also given impact fee credits for the costs of the excess capacity. These excess capacity impact fee credits are the personal property of the developer and may be applied to the developer's future projects or sold to other developers with development projects located within the service area.

3) *Land Use Credits:* credit for a change in land use that results in less impact than the previous land use. Credits are generally addressed in the impact fee ordinance itself. For example, when a large portion of the community's general plan is amended from residential to industrial uses, adjustments to the impact fee ordinance are required.

Consideration should also be given to the interaction between impact fee credits and alternative infrastructure financing tools such as special taxing districts. Special taxing districts in most cases are separate political subdivisions established for the purpose of issuing tax exempt bonds to fund public infrastructure. Special taxing districts vary from state-to-state and are called: Community Facilities Districts (California, Hawaii and Arizona), Municipal Utility Districts (Texas), Community Development Districts (Florida), Public Improvement Districts (Texas, New Mexico) and Special Improvement Districts and General Improvements Districts (Nevada). (See Chapter 6 for more information on this topic). Because special taxing districts are used to finance public infrastructure, to the extent that a special taxing district is financing capital improvements that would otherwise be funded through impact fees, impact fee credits must be given for the cost of the capital improvements funded through the special taxing district.

As a side note, the use of special taxing districts by developers and communities is a very effective way of having growth pay for growth. The use of special taxing districts may dramatically reduce the amount of impact fees required by a community. For more information on the use of special taxing districts as an alternative to impact fees see Chapter 6. Additionally, the NAHB has published a handbook specifically dedicated to

special purpose taxing districts entitled, An Overview of Special Purpose Taxing Districts. The publication may be found on the NAHB website at http://www.nahb.org/en/research/nahb-priorities/land-development/special-purpose-taxing-districts.aspx.

If an ordinance/technical study does not adequately address the issue of impact fee credits, developers and/or home builders may wish to include impact fee credit provisions in their development agreement(s) with the applicable community documenting the understanding of the parties in relation to how impact fee credits will be calculated and administered.

Service Areas

Generally defined, a service area is a geographic area that is served by a public facility. For example, the service area of a neighborhood park is the residential community near the park where the users of the park live. Service areas are generally defined by proximity and accessibility (i.e., areas within the service area are closer to the facility and/or have easier access to the facility than areas outside the service area). The concept of service area does not mean that the facility is reserved exclusively for service area residents or that the facility never provides services to those outside the service area. It means, rather, that the facility was designed and intended primarily to serve a given area.

From the standpoint of fairness and equity, the use of service areas are preferred if a community is implementing or updating an impact fee program. *Service areas allow impact fees to be more closely linked to the actual cost of providing capital facilities in a given service area.*

Service areas are important for a number of reasons. The capacity of existing public facilities is usually inconsistent across a community. Some service areas will have capacity to serve additional development, others will not. Land use, density, topography, and access will vary from one service area to another and this will cause the expense of providing needed capital facilities for new development to vary from one area to another.

Because many states require that impact fees be roughly proportional to capital costs imposed by development, each service area should be examined to determine the capital cost implications of development in that specific area. The capital cost calculations should also take into account the existing levels of service provided in individual service areas. In the administration of the impact fee ordinance, it will be easier to show that impact fees collected from a property are spent to benefit that property if impact fees collected in a service area are placed in an account dedicated exclusively to spending for capital facilities in that service area.

Many communities designate the entire community as a single service area on the theory that individual capital facilities are part of a system, such as the park system, road system, or school system. According to this view, impact fees collected in one area

may be spent on any other part of the system because improvements anywhere in the system benefit the entire system. Communities prefer this method as it also provides them with greater flexibility in spending impact fees. Also, fewer service areas reduce the administrative burden of tracking impact fee revenue and expenditures.

There are several problems caused by communities using just one service area. In general, the benefits of a public facility diminish with distance from it. Therefore, if impact fees collected in one local area are spent to construct a facility in a different area, the area where the fees were paid will not be the principal beneficiary of that capital spending. For example, it is difficult to see the rational nexus between park impact fees collected on the west side of town and a new neighborhood park constructed with those fees on the east side of town. *Courts and State legislatures in some states have determined that new development, though it need not be the sole beneficiary of impact fee spending, must benefit more than other property from spending of the impact fees it has paid.* Unless impact fees are accounted for and spent within the local service area where they are collected, it is difficult to demonstrate the legally required rational nexus (see Chapter 2, pp. 15-16).

If a "systems approach" to impact fee spending is taken, then a new method of impact fee calculation is required. Since new facilities constructed with impact fee revenues are assumed to improve the "system" for the benefit of all system users, impact fee calculations must account for the fact that the majority of system users are existing residents. In other words, new development must not be asked to pay more than its pro rata fair share for system improvements. Given that in any year the amount of new development is a small fraction of the amount of existing development, new development therefore must pay only a fraction of the cost of new capital facilities.

Transportation-Related Issues

There are a number of technical issues related to the calculation of traffic or road impact fees that do not apply to other types of impact fees. These have to do with peak versus average daily traffic volumes, trip diversion, trip substitution, and sources of trip generation data.

Peak Traffic versus Average Daily Traffic

Different land uses generate traffic at different rates. Road impact fee formulas should take this into account by making use of local trip generation studies or data from national sources such as the Institute of Transportation Engineers (ITE). The results of trip generation studies are reported as the number of trip ends generated by an increment of land use (dwelling unit, 1,000 square feet of retail space, number of hospital beds, etc.) expressed as the average number of trips in a 24-hour period and/or the average number of trips during the peak hour(s). Some communities base impact fee calculations on average daily traffic (ADT) and others on peak hour trips. For example, a number of Florida cities and counties use ADT, whereas a number of California and Illinois communities use peak hour traffic as the basis for calculations.

Whether ADT or peak hour traffic should be the basis for road impact fee calculations can be debated. A case can be made, however, that not every trip generated by new development creates a need for additional roadway capacity. Trips added to adjacent roads during off-peak hours in most cases will not add significantly to congestion on those roads. For example, a nightclub that opens at 9:00 p.m. and closes at 2:00 a.m. will add trips to the adjacent roads at a time when roads have more than enough available capacity to absorb these trips. It would be difficult to justify road impact fees for this nightclub use because it does not create a need for additional lane capacity. Road impact fees are justified, however, when trips are added during times when the road is already operating at or near capacity (i.e., peak hours) such that the level of service will be decreased unless additional capacity is added. Most land uses generate traffic throughout the day, but it is the traffic they generate during peak hours, when adjacent roads are least able to accommodate additional trips, that is critical to determining the demand for additional road capacity created by new development for which an impact fee will be charged. Trips generated during off-peak hours, when capacity is ample, have little impact, create no need for additional capital improvements, and should not enter the calculation of road impact fees.

It should be noted that the concepts related to peak versus average daily demand also apply to water and wastewater impact fees.

Trip Diversions

A common but not universal practice is to apply a trip diversion factor in the calculation of road impact fees. This factor accounts for the fact that some trips to a land use are not separate, single-purpose trips but, instead, are diverted from the stream of traffic passing by. For example, the trip diversion factor for a convenience store is high because visits to the store frequently occur while the driver is pursuing another trip purpose, such as returning from work. If the work trip and the store trip were counted separately, over counting would occur. The diversion factor for doctors' offices is low because such trips are usually planned in advance rather than impulsively combined with another trip purpose. The diversion factor is applied as a percentage by which the trips generated by a land use are reduced.

Trip Substitution

Not all trips generated by new development are net new trips. Some trips to a new land use replace existing trips. For example, when a neighborhood convenience store opens, some longer trips to a highway shopping center are replaced by shorter trips to the convenience store. The net result is actually a lower impact on the road system because the new trips are shorter. In general, when new retail uses are added to a saturated market, there is not a proportionate increase in shopping trips. Instead, trip destinations shift from one area to another.

Because of trip diversion and trip substitution effects, at least one locality, Los Angeles, exempts certain land uses from road impact fees. The exempt land uses are generators of local short-distance trips including car washes, gasoline stations, automotive repair shops, walk-in or drive-through banks, convenience stores, free-standing supermarkets, storage facilities, convalescent hospitals, and restaurants. These land uses are not thought to substantially affect the region's transportation infrastructure.[3]

Sources of Trip Generation Data

The best data source for trip generation is a properly conducted study carried out in the community that imposes the impact fees. Such studies can be expensive, so many communities use data derived from studies in other communities such as the Institute of Transportation Engineers (ITE) manual, *Trip Generation.* Use of data from the ITE manual is legitimate, provided the limitations of the data are well understood. The ITE manual compiles trip generation data on a wide variety of different land uses based on local studies conducted throughout the United States. For some land uses, the data is derived from a large number of studies covering a broad range of the independent variables (e.g., number of employees, leasable area, etc.). More confidence can be placed in this data than in the data for other land uses which may be derived from only two or three local studies. Indeed *Trip Generation* contains caveats and warnings about data limitations. While the ITE is certainly a reputable organization, it would be a mistake to uncritically accept their published data. Impact fee payers would be well advised to carefully consider the source and reliability of the trip generation rates on which impact fee schedules are based. In some cases, the commissioning of an independent fee calculation study may result in considerable impact fee savings.

Legitimacy of Growth-Related Costs

An essential part of impact fee calculations is the determination of the cost of capital facilities that new development will require. In an ideal world, the capital facility needs of new growth are set out in a well-considered and duly-approved long-range comprehensive plan. Every year the five-year capital improvement plan that identifies the cost and source of funds for capital projects is updated and adopted. In the real world, however, impact fee ordinances are frequently adopted in the absence of either comprehensive planning or capital improvement planning. In these cases, capital facility cost data may be found in the appendices of impact fee technical memoranda, in separate engineering cost estimates, in consultant reports, or elsewhere. *Like every other aspect of impact fee calculation, cost data should be examined critically.*

Each item that is proposed to be funded with impact fees should be examined to determine if it meets the definition of capital costs for which impact fees may be charged. If state statutes apply, there will be a specific description of legitimate capital costs in the law. The local ordinance itself should contain a definition of "capital cost" or "capital facility." For example, the definition may include buildings, but not furniture, books, computers, or nondurable items with a useful life of three years or less. Generally, some "soft costs" such as legal and engineering costs may be permitted, but

these may be limited.[4] Other noncapital costs such as "contingencies," "administrative costs," and "interest" are questionable. Operating costs, maintenance, repairs, salaries, and other recurring costs should not be included.

Next, it should be determined if the facilities are intended to serve new development, if they will correct an existing deficiency, or if they will principally benefit existing development. A simple test is to assume that there will be no new growth and determine if the facility will still be needed. If the facility is still needed, then it is obviously intended to benefit existing residents and may not be funded with impact fees paid by new development. The capital improvement plan or other documents may provide details that indicate who the principal beneficiaries will be. For example, the budget documents may state that the purpose is to correct a deficiency, or they may indicate that the facility will be located in a developed part of the community, or that it improves or replaces an existing facility. In cases where the principal beneficiary of the facility is existing development, its cost should not be included in impact fee calculations.

Having determined that a capital facility is a type that qualifies for impact fee funding under state and local law and that the principal beneficiary will be new development, the next question concerns whether the amount of spending proposed is commensurate with needs and conforms to existing levels of service in the community. For example, if existing neighborhood parks are less than 10 acres in size, a proposal for a new 35-acre neighborhood park should be questioned. Likewise, a proposal to purchase a ladder truck for a fire station that serves low-density residential land use should raise a red flag.

Unlike general obligation bond issues, which must be approved by taxpayers at referendum, the political threshold for impact fee spending is very low. As a result, there is not as much pressure on the community to contain costs. Under this relaxed spending discipline, municipal departments have a tendency to "gold-plate" their capital requests. This danger is magnified when there is no comprehensive planning or capital budgeting process that requires department managers to justify their capital requests to the legislative body in a public hearing.

Proportionate-Share Impact Fees

At times a jurisdiction may use proportionate-share impact fees. The rationale behind proportionate-share impact fees is that impact fees for new residential units are "proportionate" to unit size. The idea being that larger units have more people with higher incomes who generate greater impacts on public facilities. Accordingly, larger units should pay higher impact fees than smaller units. However, the argument for impact fees graduated by unit size is not convincing and in fact is counterproductive to housing affordability.[5] The more straightforward and cost-effective way to promote affordable housing is to charge one flat impact fee for all housing units and to apply waivers selectively for affordable housing units.

Practitioners who believe impact fees should vary by unit size attempt to calculate impact fees precisely. But impact fees, as opposed to taxes, tend to be regressive. Methodologies designed to establish progressive impact fee structures may undermine their legitimacy as fees; such calculations are not legally mandated. The courts have rarely commented on methodology unless the resulting fee differences were extreme.

In fact, Dolan simply requires "rough proportionality" in setting impact fees that reflect the public facility costs of new residential development. Rough proportionality can be satisfied with the calculation of one impact fee for all residential units. This position is supported by the finding that the difference in persons per household is less than one person in comparing units of less than 1,000 square feet with units of up to 3,000 square feet.[5] Local jurisdictions that develop more complicated methods in an attempt to calculate proportionate-share impact fees will find the resulting fee schedules more difficult to defend and more costly to calculate, and more time consuming to administer, as well as exceeding the "rough proportionality" requirements of Dolan.

If proportionate-share impact fees are used, they should employ the most relevant demand generator to estimate facility impacts, but population (including school-aged children) is the best indicator only in limited applications. Furthermore, the drivers of demand used in public facility planning and capital improvements programming should correspond to the demand generators employed in impact fee calculations. Since impact fees based on unit size reflect needs generated by population (or number of children) but are calculated on the basis of housing characteristics, local jurisdictions would have to reconcile these relationships.

When graduated impact fees for residential units are considered instead of one flat impact fee, one should verify that the best unit characteristic is being utilized. The choices are typically unit type, unit size, or number of bedrooms. Of these factors, unit type is by far the most widely used. Data on single family, multifamily/apartments, and other unit types are publicly available for most local jurisdictions, and practitioners usually can generate defensible impact fees that are specific to housing unit type. Practitioners who prefer unit size to type are more likely to use data on number of bedrooms, because these data are more readily available and accessible than data on unit size. If unit size data is also available, practitioners should select the factor that predicts occupancy most consistently.

One often hears the argument that one level impact fee is inferior to impact fees graduated by unit size. Static impact fees are assumed to be regressive, whereas impact fees graduated by unit size are progressive. Thus, graduated fees are assumed to mitigate the negative impacts of impact fees on affordable housing. This argument ignores four advantages of level impact fees, the most important of

which is that they are inherently progressive. As such, when making a case against proportionate-share impact fees one may want to employ the following arguments.

Household Size – Homes in any size/cost range that pay the same impact fees are occupied by households of different sizes. Smaller households would tend to be more affluent than larger households purchasing houses in the same size cohort. Thus, with the same impact fee charged for these housing units, higher-income households with fewer occupants would overpay whereas lower-income households with more occupants would underpay relative to facility impacts.

Housing Affordability - Although the claim is made that graduated impact fees improve housing affordability, this approach is very crude. Affluent households that opt to purchase smaller units would receive the same benefit as lower-income households occupying units in the same size range.

Impact Fee Sensitivity - Static or flat impact fees are less sensitive to the vagaries of the market than variable fees. Revenues from graduated fees will be more difficult to predict than revenues from flat fees.

Ease of Calculation - Static impact fees require less detailed calculations of revenue credits than graduated impact fees. When unit size is the attribute used to estimate proportionate demand for graduated impact fees, practitioners are obligated to calculate multiple revenue credit streams that relate unit size to revenue generation. With variable fees, ad valorem-based revenue credits must correspond to residential segments of the tax base that pay the taxes. Similarly, sales tax-related credits must be proportionate to taxable spending driven primarily by household income.

Even if there was a flawless logic to justify impact fee calculations based on unit size, the feasibility of the approach has to be evaluated in every case. We have assessed the tasks and questions local practitioners would need to resolve to impose defensible impact fees based on unit size. We found that the amount of data need to do such a calculation properly is voluminous and will be more expensive to implement than a static impact fee calculation.

Additionally, when reviewing proportionate-share impact fee technical studies, one must keep in mind Dolan's rough proportionality test and not ignore the proportionate treatment of revenue credits to ensure that fundamentals of cost accounting as well as the logic of fiscal impact analysis are taken into account. When impact fees are used to raise revenues needed for public facilities, flat residential impact fees can minimize the potentially negative influences on housing affordability. Compared with impact fees graduated by unit size, flat fees are straightforward to estimate, easy to administer, and actually more progressive when revenue credits are taken into account.

For more detailed information related to proportionate-share impact fees see the NAHB's publication Proportionate-Share Impact Fees on the NAHB's website at www.nahb.org.

Discounted Impact Fee Schedules

After calculating the impact fee amount according to a formula that will vary for each type of impact fee, many communities discount this nominal fee amount by a certain percentage. The nominal impact fee amount represents the highest amount that can be legally charged. There are technical, administrative, and political reasons for discounting this fee amount. Impact fee calculation is a complex technical exercise that often requires expert judgment. As a result, technical and judgmental errors are common. To protect a community from liability in the event of a legal challenge to its ordinance, the fee amounts are sometimes discounted to account for the possibility of overcharges due to technical errors. Impact fee ordinances are easier to administer if fee payers accept a simple flat fee rather than insisting on their right to individual fee determinations. Fee schedules will therefore be discounted as an incentive to avoid time-consuming individual fee calculations. For political reasons, such as keeping fees in line with those charged by other communities, a community may decide to charge less than the calculated fee.

Commonly Found Errors

Figure 4.2 on the following page illustrates some of the most common errors found in technical studies relating to the calculation of impact fees.

Figure 4.2: Common Errors with Impact Fee Technical Studies

	Error	Explanation	Example
1	**Construction Cost Estimate and Adopted Capital Improvements Plan Inconsistencies**	Cost estimates utilized in the technical study do not agree to the costs identified in the community budget, capital improvement plan or recently completed projects. In order to verify the reasonableness of costs utilized in the technical study, such costs should be compared to costs from the community budget, capital improvement plan or recently completed projects.	In one community, there was a discrepancy of 24% between school construction costs identified in the technical study and costs identified in the capital improvement plan.
2	**Current Levels of Service Not Properly Documented and/or Applied**	Some communities fail to assess the current levels of service enjoyed by existing residents and do not use the current levels of service as a standard to which new development must be held. As a result, development fee studies may tend to require new development to pay for and operate at higher levels of service than existing residents.	A recent review of impact fees in a community in Virginia revealed that new development was being required to provide a higher level of service for parks than was currently being enjoyed by existing residents. The level of service established as the guideline from which to calculate the park impact fees was 13.8 acres of park land for every 1,000 residents of the county. In reality, the current level of service for park land for the county was found to be 8.8 acres of parkland for every 1,000 county residents.
3	**Funding Offsets Ignored or Improperly Applied**	Technical studies may ignore additional funding sources attributable to new development. Additional funding sources that would offset impact fees must be considered and may include: i) gasoline taxes; ii)sales taxes; iii) user fees; iv) bond repayments (i.e. through property taxes); v) property taxes dedicated to fund capital facilities; and vi) transfer taxes.	A community in Oregon applied a credit for future debt payments that was discounted to arrive at the offset utilized to reduce the fees. The community chose to discount future debt repayments, however, did not discount the cost of infrastructure to be installed in the future. Discounting the future debt repayments and not discounting the infrastructure costs resulted in a decrease in the offsets being applied and consequently an inaccurate increase in the system development charge (impact fee).
4	**Inflated Land and Building Cost Estimates**	Cost estimates for buildings and land utilized in technical studies often do not correspond with construction or land cost indices. Communities may inflate construction and land costs by using cost estimates derived during periods of dramatic growth and increased demand for construction materials and land.	During the boom, Arizona experienced a period of dramatic growth and escalation in land prices. A comparison of land costs in technical studies adopted by an Arizona community revealed an unrealistic increase in the land cost per acre from $76,800 to $370,424 in a four year period and the technical study provided no support for the increase.

	Error	Explanation	Example
5	**Math Errors**	Technical studies often include numerous math errors which affect the final assessed impact fee amount.	One community in Arizona inadvertently doubled the construction cost of a roadway improvement from $25 million to $50 million, resulting in a substantial increase in the impact fees required by the community.
6	**Correcting Existing Deficiencies**	Impact fees must only be established to finance the public infrastructure required to service new development, not to repair or improve the public facilities that provide service to existing residents.	A review of a technical study in one community found that $108 million in sidewalk improvements were to be financed with impact fees in developed areas of the community to make the city compliant with the American with Disabilities Act. This was a clear violation of using impact fees to correct existing deficiencies.
7	**Impact Fee Alternatives Not Considered**	Community officials may be unaware of alternatives that exist to finance public infrastructure. Special taxing districts represent one alternative to the use of impact fees and allow growth to pay for growth. In some states, special taxing districts may be allowed to finance a broader array of eligible infrastructure than the eligible infrastructure that can be financed through development impact fees.	A California community formed a special taxing district, known as a community facilities district (CFD), in response to a public safety funding crisis resulting from rapid growth in residential construction and lagging retail sales. It was determined there would be revenue shortfall in providing police and fire services to accommodate the community's need for the services. Through the use of a CFD, the community was able to ensure the necessary services were provided to its residents while at the same time allowing growth to pay for growth.
8	**State Statute Compliance**	Oftentimes, communities fail to fully conform to the guidelines stipulated in the state enabling impact fee statutes. A review of the requirements of the state statute is important to ensure that they are being met.	An impact fee review for a Montana community found that of the approximately 23 items required by the state statute to be addressed in a technical study, the community failed to fully comply with 6 items.

	Error	Explanation	Example
9	**Misappropriation of Impact Fees**	Impact fees are collected for specific public infrastructure items (e.g. water resources, water transmission lines) and the impact fees can only be spent on the facilities for which the impact fee are collected. Audits of impact fee accounts indicate that jurisdictions often comingle funds and do not spend the impact fees on the infrastructure for which they were collected.	A 2016 audit of a community's impact fee accounts revealed that while the City's impact fee study indicated that the City was supposed to be utilizing 49% of its sewer impact fee collections for water reclamation facilities and 51% for sewer collection lines; the City had expended 91% of its sewer impact fee collections for the water reclamation facilities and only 9% for the collection system.

Revising State Statutes to Address Jurisdictional Overreach

Background

Reviewing impact fee technical studies leads to many questions and concerns related to the assumptions utilized in the technical study. In practice, it is common to meet with the jurisdiction's staff to discuss and hopefully resolve concerns related to the technical study. Often, however, it is not unusual for a jurisdiction to ignore the home building industry's concerns related to a technical study, especially if the changes result in a decrease of impact fees. In such a situation, the builders and/or the local home building association either need to let the issue go unresolved, litigate the issue, or alternatively, revise the state's impact fee enabling legislation.

For example, after years of conflict with Arizona municipalities in relation to the calculation of impact fees, in May 2011, the home builders of Arizona, working through their respective home builders associations (collectively, the HBA), were successful in passing Senate Bill 1525 (SB1525) that made sweeping changes to the way Arizona municipalities must calculate and collect impact fees.

SB1525 was an outgrowth of the HBA attempting to work with Arizona jurisdictions over a number of years to modify their aggressive tactics when estimating impact fees. Some of the challenges that the HBA found when reviewing the jurisdictional impact fee technical studies encompassed all of the challenges outlined in Figure 4.2. More specifically, the HBA was concerned with:

1. Growth paying for non-growth related public improvements (e.g. performing arts centers, town lakes)
2. Construction cost estimates provided by unqualified municipal staff (e.g. a fire chief preparing cost estimates for a fire station).
3. The non-use of service areas to determine levels of service and to estimate infrastructure costs and the impact fees necessary to provide services to new growth at existing service levels.
4. Funding levels of service that are in excess of existing service levels.
5. Challenges with the proportionality of the impact fees versus benefits received.
6. Lack of transparency in the impact fee process.

Key provisions of SB1525

To address the aforementioned challenges with jurisdictional technical studies, SB1525 included the following key provisions:

1. Provided jurisdictions with the ability to continue to collect current impact fee schedules to pay debt service on existing bonds for public improvements either constructed or underway, even if the impact fee would no longer be allowed after the effective date of the Bill, which was January 1, 2012.

2. Introduced the phrase "necessary public services." This is a new definition that narrowed the use of impact fees to address home builder concerns about the improper use of impact fees for general government purposes and certain public facilities, such as public parks over 30 acres or libraries over 10,000 square feet.

3. Limited impact fees to the proportional share of the cost of new infrastructure that is attributable to new development only, and prohibited increasing the level of service that is provided to existing residents.

4. Clarified that offsets against impact fees need only be provided for taxes that are applied to capital costs of infrastructure.

5. Made clear that credits against impact fees are only due when a developer pays for, or is required to provide, infrastructure in an infrastructure-improvements plan (IIP) for which impact fees were assessed.

6. Created new public notice and hearing procedures for assessing, adopting, and amending development fees. Existing fee studies and plans were to be replaced using the new system outlined under SB1525 no later than August 1, 2014, or the municipality would be prohibited from collecting impact fees.

7. Required IIPs to: (i) identify all capital projects that are the subject of impact fees; (ii) disclose existing facilities; (iii) disclose costs to existing facilities not associated with new development; (iv) identify offsets to public infrastructure costs financed by impact fees; and, (v) require construction costs estimates be prepared by Arizona state licensed professionals.

8. Mandated a refund to current property owners of certain impact fees if the infrastructure that is the subject of a impact fee is not built within 10 years or the time identified in the IIP, or 15 years for water and wastewater projects.

9. Required creation of either an advisory committee to provide input on adoption and administration of impact fees or a biennial audit of a municipality's impact fee program.

For more details on SB1525 and to find the complete version of Arizona’s impact fee statute, refer to Appendix D.

Other states with favorable impact fee statutes include Montana and Texas. Montana’s impact fee statute is fairly succinct yet it requires jurisdictions to adhere to common impact fee practices that lead to fair and equitable impact fees. Texas’ statute, while more in depth that Montana’s is fairly comprehensive in its scope. Both the Montana and Texas statutes have been included as part of Appendix D.

Conclusion

Local governments are attracted to impact fees because of their potential to generate revenue at a lower political cost than some other measures such as jurisdictional general obligation bond elections. There is a cost to be paid, however, which is related to the greater complexity and difficulty of setting a truly fair and legal impact fee amount. Unlike taxes which may be set at arbitrary levels, impact fees must be proportional to the actual cost of providing capital facilities. Making these calculations, as the above discussion points out, is neither simple nor straightforward. It is also easy to make mistakes. As a result, the community imposing the fee pays a price in the form of higher administrative costs, consultant fees, and legal fees when the methodology is challenged.

Endnotes

1. For this reason, some state impact fee laws require that the community adopt a capital budget before implementing impact fee legislation.
2. Boe v. Seattle, 66 Wa.2d 152 (Wash. 1965)
3. As reported in *Waukesha County Impact Fee Study* by Barton-Aschman Associates, Inc., Vandewalle & Associates, Whyte Hirschboeck Dudek S.C., Siemon, Larsen & Marsh.
4. The Wisconsin law limits such costs to 10 percent.
5. Emil Malizia and Lucy Gallo, *Proportionate-Share Impact Fees*, (National Association of Home Builders, October 2009)

CHAPTER 5

Administrative Issues

- ***Definition of Capital Costs***
- ***The Use of Impact Fees to Pay Interest Costs***
- ***The Comprehensive Plan and Capital Improvement Plan***
- ***Independent Fee Calculation Study***
- ***When Fees Are Due***
- ***Accounting***
- ***Refunds***
- ***Advisory Panels***
- ***Appeals***
- ***Credits and Reimbursements***
- ***Exemptions***
- ***Grandfathering***
- ***Conclusion***

The local impact fee ordinance is the legal document that establishes a community or county's impact fee program. It should also establish the administrative procedures by which the program will be implemented and cover such issues as when impact fees are paid, how they will be accounted for and spent, independent fee calculation procedures, refunds of fees collected but not spent, administrative appeals, etc. Together with technically correct impact fee calculations, proper administration of the impact fee program is necessary to establish the constitutionality and legality of the impact fee program.

In states where the legislature has enacted impact fee enabling laws, local impact fee ordinances must comply with specific administrative requirements. Whether there are state enabling statutes or not, court decisions may establish requirements that local ordinances must address and adhere to. This chapter will cover administrative aspects of impact fee programs with emphasis on areas where many local ordinances could be improved. Unlike taxes and other revenue sources, local governments do not have as much discretion in the handling of impact fee revenues. Particular care and attention are required in the administration of impact fees to assure fairness and legal sufficiency.

Definition of Capital Costs

The local ordinance should contain a precise definition of the kinds of capital costs that qualify for impact fee funding. If state impact fee laws apply, the local ordinance may

be more restrictive but may not include a broader range of cost items than the state law permits. Generally acceptable cost items include land, buildings, durable equipment and machinery, grading, paving, landscaping, and associated engineering costs. Items that would generally not be considered as capital costs include recurring expenses such as those for consumable supplies, salaries, training, maintenance, repairs, administrative costs, program operating costs, nondurable equipment (less than three years useful life), and the like.

?

Are the allowed uses of impact fees defined in the state enabling statute?

Some items of moderate durability such as vehicles, books, computers, and furniture are questionable as capital expenses. The problem with these items is that they are not fixed in location and are hard to track. For example, computers purchased with impact fee funds and placed in a school serving new development one year may end up in a different school the next year. The portability of these items makes it difficult to assure, or even sometimes to tell, that impact fees are being used to benefit the development that paid the fees.

The Use of Impact Fees to Pay Interest Costs

The use of impact fees to pay the interest portion of debt service for capital facilities is controversial. Unlike taxpayers who pay for capital facilities on the installment plan through bond financing, the impact fee payer pays for his share of needed infrastructure all at once in a lump sum. Many times this payment is made years before the facilities are provided, particularly because the impact fee payer has no control over when facilities are constructed. The impact fee payer starts off with a capital facility principal account balance of zero. In these cases, the impact fee payer is in essence double paying for the infrastructure—first through impact fees, and again through other taxes, i.e. property taxes, which are used to retire debt on the same infrastructure. It is difficult to understand, therefore, how interest on debt can be justified as a capital cost for which impact fees may be expended when the fee payer has paid his share of the principal in full before receiving a building permit. In those situations where a local government has issued ad valorem debt to fund the construction of capital improvements, it is necessary to review the impact fee calculation to determine that a reduction in the impact fee has been made for interest on debt service to avoid the potential of double charging.

The Comprehensive Plan and Capital Improvement Plan

?

Has a comp plan or capital improvement plan been prepared?

In examining an impact fee ordinance, a fundamental question arises as to the source of the assessment of public facility needs which is the basis for the impact fees. The public facility needs assessment should not be a "wish list." The capital facility requirements should be based on a thorough analysis of future growth and appropriate levels of service for each type of facility that establishes a clear and logical connection (rational nexus) between anticipated growth and the type and amount of capital spending that growth will require. It should be emphasized that demonstration of a rational nexus is not merely desirable but is essential to establishing the legality of the ordinance. In some states a report providing the rational nexus is also a statutory requirement (see Chapter 2, pp. 15-18).

The comprehensive plan is the benchmark by which nexus is measured. This plan should include population and land use projections, establish appropriate levels of service for public facilities, examine existing service levels and deficiencies, and identify the capital facilities that will be needed because of new growth.

The capital improvement plan (CIP) or capital budget will attach a cost to the facilities identified in the comprehensive plan and match the facility to an appropriate funding source. The CIP usually covers a five-year period and is updated and approved every year. Other documents may be relied on to provide a public facility needs assessment, but the comprehensive plan and CIP have the advantage and added weight of being officially adopted by the legislative body after a public hearing process.

Some communities have no comprehensive plan (or none that is up-to-date), CIP, or formal capital budgeting process. This has not deterred them from imposing impact fees. Such communities run the risk of having their ordinances overturned because they are not able to document that the fees they charge are rationally related and proportional to the capital costs occasioned by new development.

The impact fee study, capital improvement program, and comprehensive plan must account for differences between the levels-of-service currently provided to existing residents and the levels-of-service proposed for facilities to be financed with impact fees. If current levels-of-service are deemed deficient, then funding sources (other than impact fees) to correct these deficiencies must be identified and detailed to prevent new development from bearing the financial burden of improving service levels for the benefit of existing residents. Annual monitoring is crucial to assure that upgraded levels-of-service enjoyed by existing residents is not financed by impact fee payers, but by other means that assign costs to those who benefit from the improvements.

Independent Fee Calculation Study

?

Does the impact fee ordinance specify how the independent fee study must be conducted?

The impact fee ordinance should outline the process for developers and builders to obtain variances that would reduce or eliminate their need to pay impact fees so as to allow flexibility in cases involving special circumstances. A community should also offer a variance process when the applicant believes that the schedule of fees in the ordinance does not reflect the actual monetary impact of a particular project (many already do this). This is usually accomplished through an independent fee calculation study. Under these procedures the applicant commissions and pays for a study which may entitle the applicant to a reduction in impact fees if it convincingly shows that the project will require less public capital expense than assumed in the impact fee study. For example, a road impact fee may be based on trip generation figures from the Institute of Traffic Engineer (ITE) Trip Generation Handbook. An applicant for a convenience store may question the ITE trip rates for this use because they are based on only a few studies and the range of rates varies widely. An independent study of trip generation specifically targeting the

particular market in question may find lower trip generation rates and justify reduced impact fees.

Some ordinances specify exactly how an independent fee study must be conducted and some even require that the government hire a consultant to conduct an independent impact fee study, although the applicant must pay the consultant's fees. In fairness to the applicant, there should be few restrictions on the methods used to conduct the study. The applicant should be free to present their case in his or her own way. In the end the independent fee study must stand or fall on its own merits. A rigorously logical and competent study based on a defensible methodology should be acceptable to any reasonable person. The applicant should also be free to hire the consultant of his choice. Only the applicant has an incentive to control the cost of the study, and the interposition of the government between the applicant and the consultant would make cost control impossible.

When Fees Are Due

The most convenient way to administer an impact fee program is to withhold some permit or approval needed for development or occupancy until the impact fee is paid. Impact fee payment can therefore be made a condition of plat approval, of issuance of a building permit, or of a certificate of occupancy. Probably the most common practice is to make impact fees due at the time the building permit is issued. *From the building industry's point of view, it is preferable for the impact fee amount to be determined at the earliest possible time (i.e. development agreement or plat map recordation) but to fall due and payable at the latest possible time (i.e., certificate of occupancy).*.

The earlier a developer or builder knows what his project's impact fee liability will be, the easier it will be to make adjustments. If this information is known too late, it may be impossible to adjust the product or the price to compete in the marketplace. If the ordinance relies on a schedule of standard impact fee charges, then the information can be obtained at any time. If, however, impact fees are determined on a case-by-case basis, or if calculations of credits are involved, then these calculations should be performed well in advance of the time that the fee amounts are actually due, say, at the time of plat approval.

Because development does not actually cause impacts until a land use commences or a building is occupied, the fees should not be payable until as close to the time that a use or occupancy begins. A more practical reason is that a builder must carry the financial burden of the impact fee from the time of payment until closing, incurring finance charges during this period which are passed on in the form of higher home prices. If impact fees were paid at time of issuance of the certificate of occupancy (if applicable) or at settlement, carrying costs would ordinarily be minimized.

Accounting

Unlike tax revenues, which are deposited in a general fund to be spent with broad discretion, impact fees must be separately accounted for and expended for the specific purposes for which they were collected. Impact fees must not be freely transferred to other accounts to be spent for other purposes. For example, a park impact fee should be credited to a park capital improvement account in a subaccount for the particular park service area where it was collected. Interest earned on impact fee funds should be credited to the proper accounts. In general, impact fees must be spent for the intended purpose within a definite period of time or else be refunded to the fee payer. Therefore, records must be kept of the amounts paid, the identity of the fee payers, the dates the fees are paid into the accounts, and the dates the fees are spent. A frequently established rule is that fees are spent in the same order that they were deposited in the account.

The government has little discretion in disposing of the funds in impact fee accounts. The funds must be spent for the particular capital facilities listed in the capital improvement plan which formed the basis for the fee calculations, or they must be refunded to the fee payers. Over the years, accounting for impact fees and their expenditure has become an essential topic, with the payers of impact fees wanting assurances that impact fees are being expended for their intended purpose. The state of Arizona has even gone so far as to require a biennial audit of the impact fee accounts to ensure that impact fees are being properly utilized.

Refunds

?

Does the state enabling statute require impact fees to be refunded with interest if not used within a reasonable timeframe?

When the government collects an impact fee for a specific purpose but does not spend it for that purpose, it has no choice but to refund the fee because it may not be used for any other purpose. Therefore, all impact fee ordinances should contain refund provisions. Most ordinances permit impact fees to be held for five to ten years before they are eligible to be refunded. We would argue that, since most capital improvement plans cover a five-year period, any impact fees not spent in one five-year capital budget cycle should be refunded. It hardly needs to be mentioned that impact fees should be refunded with interest. The interest rate should be the same as that which the government receives on its long-term deposits.

The fact that a refund is due indicates that the government erred in collecting the impact fee. Therefore, the government has an affirmative obligation to identify the impact fee payers who are due a refund and to make the refunds promptly. Unfortunately, most impact fee ordinances put the burden on the impact fee payers to prove to the government that they are owed refunds. Few ordinances address the issue of unclaimed or undeliverable refunds. These should probably remain in the original impact fee account for the class of infrastructure to which they were originally dedicated rather than be transferred to the general fund.

Some ordinances impose an administrative fee that is deducted from refunds. Given that the government erred in collecting the fee or in failing to spend funds in a timely manner, the fee payer should not be charged for the government's errors. In addition, expending impact fee dollars on administration violates the principle that impact fees must not be used for operating expenses but only for the capital facilities for which they were collected.

Advisory Panels

To ensure fairness in the administration of the impact fee program, oversight should be provided by an independent, objective citizen advisory panel. This is needed because government has a vested interest in the revenue produced by the program and therefore cannot provide objective and unbiased oversight. This panel should be composed of citizens appointed by the legislative body, and at least 40 percent of its members should represent those most affected by the program, including builders, developers, real estate agents, architects, engineers, etc. No elected or hired official of the local government should sit on the panel.

The panel should conduct an annual audit of impact fee accounts, review the administration of the program, and assess impact fee calculations and fee schedules annually. The panel should advise the legislative body on the operation of the impact fee program by publishing an annual report. The advisory panel can also play a role in the appeals process by hearing appeals in the first instance and issuing a nonbinding, advisory opinion.

Participation in an advisory panel provides an important opportunity to voice issues and concerns related to the planning and/or implementation of impact fees.

Appeals

An impact fee payer who believes he or she has been unfairly treated should have access to an appeals process. The ordinance should provide the impact fee payer the opportunity to seek relief by submitting alternative fee calculation studies or other evidence to the agency administering the fee program. The administrative agency's decision could be appealed to the citizen advisory panel or (if established) a hearing examiner or board of administrative appeals. From this point, further appeals could be taken to the local legislative body or, if still unresolved, to the courts. Alternatively, some states are exploring whether disputes over impact fees should be resolved by an arbitration panel that is independent of the courts. The reasoning behind this strategy is that an arbitration panel provides the opportunity to resolve conflict much more quickly and with fewer legal costs than the court system.

Credits and Reimbursements

In most cases the impact fee amount due can be determined from schedules in the ordinance. In some instances, however, adjustments will need to be made on an

individual basis. For example, a developer may agree to provide land or to construct facilities of the type for which impact fees would be charged. In such cases the developer is entitled to receive a credit or reimbursement equal to the market value of the land or facilities provided which is subtracted from his impact fee bill. In cases where the value of land or facilities exceeds the amount of impact fees due, the developer might receive the difference in cash or in the form of transferable credit against future impact fee liabilities. The latter could be limited to apply only to the specific category of fees for which credit was originally granted.

However, many ordinances do not address credits or reimbursements. In all cases, developers and builders should attempt to include language in their development agreements with the community's charging impact fees that provide for credits and/or reimbursements as a safeguard.

Credits should also apply when there is a change in existing land use. For example, if a land use is changed from residential to commercial, there will be an impact due to increased traffic. But the impact fees should not be based on the total number of trips generated by the commercial use but on the *net increase in* trips. The residential trips that were taken off the roads by the change of land use are the basis for the credit.

Sometimes land use changes from a more intense use to a less intense use. The reduction of impact on public infrastructure is thus a benefit to the community. A case can be made that, if developers whose actions increase the impact on infrastructure must pay a fee for that impact, then developers whose actions reduce impacts should receive something (a reverse impact fee) from the government. Government may resist making cash payments in such cases but transferable impact fee credits are certainly appropriate.

Exemptions

For reasons of public policy, government may wish to make some uses exempt from the payment of impact fees. One example of exempt land use might be affordable housing for low- and moderate-income households. It would not be fair, however, to burden new development with increased fees because some categories are exempt. Capital facilities for exempt land uses should be funded from a source of revenue other than impact fees on new development.

Exemptions can raise constitutional concerns about equal protection because some properties are charged impact fees and some are not. A valid public purpose can justify unequal treatment but some communities take the extra step of establishing administrative procedures whereby impact fees are paid on behalf of exempt categories by general revenues passed through a nonprofit organization (see Chapter 2, pp. 15-18).

Grandfathering

When first implementing an impact fee program the question arises about which properties, if any, should be grandfathered, i.e., deemed to have established a prior right to proceed with development without paying impact fees. For example, on the effective date of the impact fee ordinance there may be projects in the approval pipeline which were accepted for processing or for which development agreements have been reached before an impact fee program was either contemplated or announced and whose feasibility relies on financial assumptions that did not include payment of impact fees. Depending on the fee levels, these projects may fail if required to pay impact fees. In fairness, projects accepted for processing before announcement of an impact fee requirement should be grandfathered. Some states such as Texas have strong vesting statutes. Verify state and local laws regarding vesting when addressing grandfathering issues.

Conclusion

Just as an impact fee is difficult to correctly calculate, impact fee programs are difficult to design and administer so that all legal criteria are met. Unlike the administration of programs funded by general revenues, administration of impact fee programs is complicated by the fact that impact fee revenue accounts have many strings attached. Bureaucrats accustomed to exercising broad discretion over general funds may not fully appreciate that they have practically no discretion over the disposition of impact fee revenues. For this reason, it is important that impact fee ordinances be very carefully drafted to provide strict control of impact fee accounts.

CHAPTER 6

Alternatives to Impact Fees

- ***Infrastructure Financing Objectives***
- ***Methods of Financing Infrastructure***
- ***Alternatives to Impact Fees***

The United States is presently confronting an infrastructure crisis of historic proportions. While the problems related to infrastructure finance have grown, the creative application of appropriate financing vehicles has not. Impact fees are viewed by many local communities as an inevitable solution to finance infrastructure due to the declining availability of state, federal, and local general fund revenues. In truth, the United States' use of impact fees is relatively young—and cannot be viewed as a "one size fits all" solution. There are viable alternatives to impact fees that may, in some cases, offer a more fair, equitable, expedient or politically viable mechanism to address a community's infrastructure deficits.

This section outlines the different methods of public and private financing of new infrastructure, describes the equity and efficiency attributes of each, and poses possible alternatives to impact fees.

Infrastructure Financing Objectives

The fundamental purpose of any infrastructure financing vehicle is to enable local governments to deliver infrastructure that is needed to serve new demand. However, every infrastructure financing vehicle presents some tradeoffs as there are multiple and sometimes conflicting objectives that must be weighed as well.

Comparisons of different methods of financing new infrastructure inevitably involve discussions of achieving expediency, equity, economic efficiency, ease of administration, and political acceptability. There is no ideal method for all possible scenarios because each method involves trade-offs between these objectives.[1]

Expediency

Since the basic purpose of infrastructure improvements is to meet the demand of existing and new users, infrastructure improvements should be constructed prior to or concurrent with new development. Achieving this important objective ensures that existing infrastructure systems are not overwhelmed by new demand. Further, this is one objective that all major stakeholders (local governments, residents and homebuilders) can agree is important.

Economic Efficiency

An infrastructure financing vehicle is "economically efficient" when the capacity of public facilities is expanded up to the point where the cost of increasing the capacity to produce one more unit of service (marginal cost) is equal to the cost to the user for using an additional unit of service (price of the service). Efficiency criteria also imply that the method(s) employed to finance new infrastructure promote efficiency in housing production and consumption, and orderly development. It is generally assumed that residential housing is competitively produced and, therefore, infrastructure financing should not unduly distort the decisions of housing consumers regarding the size and type of house desired nor unduly interfere with home builders' methods of production. New development should be located near already developed land to minimize the cost of providing additional public services if near-in locations offer residents similar benefits in terms of comparable housing and other amenities. If new residents have strong preferences for locations away from existing development, are willing to pay the additional cost of being provided with public services, and are charged the additional cost, remote development can be considered orderly and economically efficient.

Equity

Equity considerations in public service provision revolve around two principles: the benefits principle and the ability-to-pay principle (or vertical equity principle). The benefits principle requires that those who benefit from a public service should be the ones who pay for the service. In this regard, the benefits principle is analogous to the efficiency criterion of public service provision. This principle can be best applied to cases where it is important to conserve resources (e.g., water), access to the service is not considered a basic need (e.g., a municipal golf course, performing arts center, equestrian center, town lake, etc.), and it is administratively feasible to charge users directly.

In cases where it is not feasible to charge users directly (e.g., local streets) or the service is considered a basic need (e.g., police and fire protection), the cost of providing for these services has generally been allocated to the members of the community according to their ability to pay. That is, higher-income or wealthier individuals, the most commonly used measures of ability-to-pay, pay more toward the cost of providing public services than do poorer individuals.[2] The decision to finance public services according to ability-to-pay or benefits received is difficult when it is possible to charge users of the service directly but the service is considered to be so important that access to the service cannot be based on ability to pay. Public elementary and secondary education are examples of services that are provided through the tax system (ability-to-pay principle) but could hypothetically be financed by charging registration fees or tuition to families with children in the public school system.

Ease of Administration

All public infrastructure financing solutions require some form of public administration. Potentially, the administration of a financing vehicle that fully meets all of the other objectives might be so administratively burdensome to the local community that it would be impractical. Alternatively, it is conceivable that an infrastructure financing vehicle would be structured to facilitate ease of administration at the cost of expediency, equity, and efficiency.

Political Acceptability

Local communities usually must weigh conflicting public interests when making policy decisions related to infrastructure finance. Sometimes existing residents view their interests and needs as at odds with those of new residents. Policymakers should look to find solutions that offer broad political acceptability, while providing equal protection to minority members of the community such as new entrants.

Methods of Financing Infrastructure

Methods of financing new infrastructure may be classified *as* either public or private. The more traditional or public method consists of the local (or state) government issuing bonds to finance the construction and installation of the infrastructure and then using a portion of the locality's revenues to service the debt (i.e., pay interest to bondholders and amortize the principal). Another method, although not always feasible or desirable, is to charge the users of the infrastructure directly through tolls, user fees, or other charges. In some instances, the fees can be set high enough to cover the debt service and current operating and maintenance costs. Under public financing methods, the entire community pays something toward the use of new capital facilities. Under private financing methods, the cost of providing new capital facilities is borne by those individuals and businesses that benefit directly, or are considered the underlying cause of the need for new capital. Impact fees are one form of private financing of new infrastructure, although in some aspects they are similar to property taxes.[3]

The following provides a description of infrastructure financing methods that may be used as alternatives to impact fees. These descriptions are general in nature. The tools summarized in this chapter may vary widely from state-to-state in terms of their applicability and even the terminology used to describe them.

Table 6.1: Summary of Alternatives to Impact Fees

	Expediency	Efficiency	Equity	Administration	Political Acceptability
Taxes	❍	❍	●	●	❍
General Obligation Bonds	●	❍	●	●	❍
Revenue Bonds	●	❍	●	●	❍
User Fees	●	●	-	❍	-
Special Taxing Districts	●	●	●	-	●
Local Improvement Districts	●	●	●	-	-
Special Service Districts	-	-	-	❍	-
Tax Increment Financing	-	●	●	❍	❍
Private Exactions (Including Impact Fees)	-	-	-	-	-

Key:
❍ Inferior to Impact Fees
- Neutral/Varies
● Superior to Impact Fees

Taxes

Property taxes, general sales taxes, and personal income taxes are traditionally the major sources of revenues for local governments to directly finance additions to infrastructure, or to service general obligation bonds.

Expediency

Property taxes, general sales taxes, and personal income taxes are typically collected in annually recurring increments. These revenue sources are usually dependent on having development in place to provide a tax base. Therefore, these revenue sources do not provide an extremely expedient funding source for infrastructure in advance of new development; however, if sufficient tax revenue sources are available, they can be a more expedient method of constructing public infrastructure than that of impact fees.

Efficiency

Because these tax revenues are derived from the public at large, there is no direct link or sometimes even no link at all, between those who pay for the infrastructure and those who use it. [4]

Although they are considered two distinct forms of revenues, there are instances in which taxes can behave like user fees. For example, special excise taxes such as motor fuels taxes, hotel/motel room occupancy taxes, motor vehicle registration fees, and other specific taxes are similar to user fees if they are dedicated to restricted uses rather than placed in the community's general fund. For example, gasoline taxes and motor vehicle registration fees dedicated to funding transit and road construction and improvements act like user fees insofar as they attempt to charge only the users of certain publicly provided services.

Equity

There are cases where it is not feasible to charge individual users directly for their use of the public service (e.g., police and fire protection, local streets), thus tax financing is the only feasible method of providing these services. In contrast, services such as public schools, libraries, and parks can be financed by charging the users directly for their use of the services, but it is considered poor social policy to deny anyone access to these services because of their inability to pay. For these types of services, equity considerations usually outweigh efficiency considerations, and thus the services and their underlying infrastructure are generally tax-financed.

Administration

Virtually all local and state communities already have the administrative capacity to manage taxes.

Political Acceptability

The use of taxes to fund infrastructure offers important advantages to local communities and homebuilders, when compared to impact fees. Because taxes are generally collected from a broad-base of the citizenry, they are an appropriate source of funding for infrastructure that provides a broad benefit. However, the public is often resistant to new taxes and there are often statutory limitations that cripple a local community's ability to use them to advance major capital programs.

General Obligation Bonds

Another traditional method of financing new public infrastructure is for the local government to issue general obligation (GO) bonds and to service the debt from local general revenue sources. GO bonds are backed by the "full faith and credit" of the issuing locality and serviced by local general revenues, usually tax revenues and sometimes from grants from higher levels of government. GO bondholders are guaranteed that the locality will use any general revenue source available to pay the interest due and to repay principal on maturing bonds. These bonds usually carry the lowest rate of interest because of these guarantees.

Expediency

GO bonds allow a local community to spend money on infrastructure by borrowing against future revenues of the community. This provides communities with an expedient mechanism to implement new infrastructure that will attract new development and thereby increase the overall tax base available to repay bonds in the future.

Efficiency

The efficiency of GO bonds depends on infrastructure being paid for with the bonds providing an equal benefit to everybody paying taxes into the community that issues them. For example, if a city issued GO bonds that were only used to pay for a neighborhood park benefiting a small area, it would not be considered efficient, because residents outside of the area would not be equally responsible for paying debt service but would not receive benefits. Alternatively, if the GO bonds were used to make improvements to a regional or community park that provided an equal benefit to all residents, then their use would be considered efficient.

Equity

In contrast to impact fees, new development is not singled out to pay for infrastructure and, therefore, GO bonds would be considered more equitable if they provide a broad community-wide benefit.

Administration

GO bonds are different from impact fees in that their use is not subject to the same constitutional and statutory protections given to homebuilders. It is not necessary for a community to establish rational nexus or fulfill many of the administrative or technical burdens of impact fees (i.e. an impact fee technical study would not be required). However, most states have adopted limitations on the amount of bonded indebtedness that may be created, and on the types of infrastructure that GO bond debt may be used for.

Political Acceptability

In order for GO bonds to be backed by the "full faith and credit" of the issuing locality, the locality must have sufficient taxing authority to service the debt. To ensure that localities can indeed back their GO bonds, most states restrict the issuance of GO bonds. A frequent restriction imposed by states is limiting the bonded indebtedness of any locality to a set proportion of the locality's assessed property value.

There is great variation among the states concerning which types of local governments must obtain voter approval (e.g., cities, counties, townships, school districts) and the majority needed to obtain approval (i.e., a simple majority or a super majority).

GO bonds can be difficult to implement as they must typically be voted on by the qualified electors of a community. *Since they are backed by the full faith and credit of that community, GO bonds must provide a direct and tangible benefit to existing residents if they are to pass the election.*

GO bonds carry lower interest rates than revenue bonds and are, therefore, the least costly to the locality. Governments are bound by constitutional and statutory imposed limits on the maximum GO bond amounts allowed to be issued. These limits are often expressed as a percentage of the value of the property within the community.[5]

Revenue Bonds

Revenue bonds are an infrastructure financing vehicle that has also traditionally been used by local communities. *Revenue bonds are public indebtedness that is serviced from specific revenue streams such as a certain percentage of the revenues from property taxes, sales taxes, income taxes, or through user fees.* Because the dedicated revenue streams are not as constant or predictable as the total stream of general revenues, they usually carry a higher rate of interest than GO bonds to compensate the bondholders for the higher risk.

Revenue bonds carry fewer restrictions regarding the volume of indebtedness a locality may incur because they are not backed by the "full faith and credit" of the issuing locality. These instruments are more flexible than GO bonds in financing public infrastructure because they can be used to publicly finance capital expenditures when they

are backed by tax revenues and to privately finance capital expenditures when they are backed by user charges, special assessments, tax increments, and, in some instances, impact fees.

Revenue bonds offer similar advantages and disadvantages as GO bonds when compared to impact fees (see above).

User Fees

User fees are direct charges to infrastructure users related to the amount of services used. They can be used for a type of infrastructure that can be metered such as water, sewer, gas, electricity, and telecommunications systems. The most common forms of general user charges for local governments are hospital room charges, school lunch sales, parking fees, and sewer fees.[6]

Expediency

User fees are commonly used in combination with revenue bonds, providing an expedient source of revenues that can be used for infrastructure improvements.

Efficiency

Properly structured, user charges are an efficient method of servicing revenue bonds and paying for the operating and maintenance costs of certain public services. Because users of public services are faced with the cost of using the service, user fees promote more efficient use of the public capital stock than do taxes.[7]

Equity

User charges may violate some people's concept of equity because access to public services is limited by an individual's ability to pay. Despite the possibility of inequitable treatment of some individuals, user charges are appropriate where the cost of administering the system is low relative to total revenues and where conservation of resources and alleviation of congestion is of paramount importance. The use of user charges to service revenue bonds for toll roads, municipal golf courses, water treatment plants, and sewer systems is usually considered appropriate.

Administration

Depending on the service, user fees can be more difficult and costly to administer than impact fees as the local community or other infrastructure operators must regularly meter infrastructure use and collect revenues.

Political Acceptability

The political acceptability of implementing user fees generally depends on the infrastructure type that fees are being proposed. Most citizens will balance questions of efficiency and equity in determining whether to support user fees. As mentioned earlier, primary and secondary school education is seen as too important for children to be subject to user fees when some families may not be able to afford to pay them. Alternatively, most households inherently recognize the appropriateness of paying only for the water or electricity used – giving them the flexibility to use more if they can afford it and protecting them from their neighbors' excessive use.

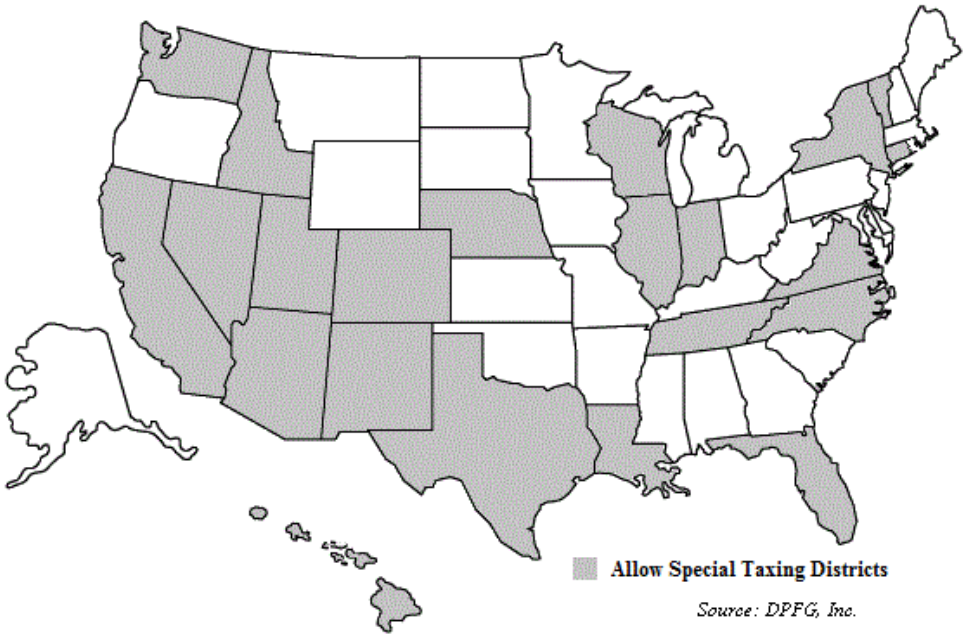
Special Taxing Districts

A special taxing district is typically a separate political subdivision separate and distinct from the county or community that established it. *The sole purpose of special taxing districts is to finance, construct and/or acquire public improvements through the use of tax-exempt bonds, user fees, and property tax levies, special tax levies, etc.* Depending on the state statute, these districts may utilize tax-exempt special assessment bonds, GO bonds, or revenue bonds. Bonds are typically repaid over a 20 to 30 year period by property owners, residing within the boundaries of the special taxing district, making special assessment or ad valorem property tax payments—rather than as upfront impact fees paid by the homebuilder.

Special taxing districts are established over areas which benefit from the public improvements constructed, and usually require a vote or petition of land owners and/or resident electors. Currently, 21 states allow special taxing districts.[8] Examples of special taxing districts include:

- Community Development Districts (Florida)
- Community Facilities Districts (Arizona, California, Hawaii)
- Community Infrastructure Districts (Idaho)
- General Improvement Districts (Nevada)
- Metropolitan Districts (Colorado)
- Municipal Utility Districts (Texas)
- Public Infrastructure Districts (New Mexico, Texas)
- Special Improvement Districts (Nevada)
- Special Service Districts (Utah)

Figure 6.1: States that Allow Special Taxing Districts



Special taxing districts typically require that the developer and local community agree on a General Plan and District Development Agreement. This provides both the developer and local community more flexibility and control over how infrastructure funds are spent – and can help ensure that infrastructure funds result in a direct benefit to development within the district.

Expediency

Special taxing districts provide for more expedient delivery of public infrastructure than impact fees as bonds are issued early in the development process to fund the construction of public improvements in advance of growth. With special taxing districts, the timing of bond issuances is typically coordinated with project development milestones. This feature of special taxing districts reduces the risks of funding excess infrastructure system capacity far in advance of new development.

Efficiency

Special taxing districts are more economically efficient than impact fees because only those public improvements that specifically benefit the residents residing within the boundaries of the special taxing districts can be financed. Additionally, public infrastructure constructed by a special taxing district is funded utilizing tax-exempt bonds that carry a lower cost of financing than that of private debt and/or equity as is typically the case with impact fees, thereby potentially resulting in lower home prices and/or carrying costs for homeowners.

Equity

The use of special taxing districts is considered very equitable as the public improvements being demanded by the residents residing within the boundaries of the special taxing district are being funded and paid for by these residents. Often, impact fees may be utilized to find public improvements for which residents receive little or no perceived benefit.

Administration

Special taxing districts create some administrative challenges because a new political subdivision of the state must be established and organized in order to use this financing vehicle. However, property tax levies or special assessments are typically collected via the county treasurer which poses few administrative challenges. In addition, most states allow special taxing districts to collect a special administrative tax levy to compensate for these costs, thus, special taxing districts become fully self-sustaining.

Special taxing districts are not necessarily more complicated to administer compared to impact fees. For example, it is not necessary to establish level-of-service standards or complete a defensible impact study in order to use this financing vehicle.

Political Acceptability

Special taxing districts are frequently used because they are more acceptable to both the developer and the public at large. *Obligations of a special taxing district are non-contingent liabilities to the local community. Therefore, the local community may be more willing to establish a special taxing district than other mechanisms that may require the community to pledge its full faith and credit.*

In addition, only new and future residents in a special taxing district must pay for the infrastructure constructed or acquired by the district; therefore existing residents would not have to pay higher taxes as a result of new development.

For more information on special purpose taxing districts, go to the NAHB's website and download NAHB's publication at http://www.nahb.org/en/research/nahb-priorities/land-development/special-purpose-taxing-districts.aspx.

Local Improvement Districts

Local Improvement Districts (LIDs) are special purpose districts created by communities and/or counties to allow for the imposition of special assessments or property tax levies in a specific area. These funds may be used to pay for infrastructure that provides a direct benefit to the area or as debt payment for special assessment or GO bonds. Depending on the state, the debt of a LID may be secured by the underlying land within the district or by the full faith and credit of the local community that formed it.

LIDs have many applications. *They are commonly used to complete infrastructure improvements in an area that has fragmented property ownership.* For example, a LID could be formed in a rural community to pave a gravel road that would provide service to several individual farm owners. Alternatively, LIDs have been used to construct streetcar improvements benefiting dozens of individual property owners in an urban community.

Typically, LIDs require a petition or election of property owners within the district before the governing body of the local community can establish them.

They key distinction between a LID and a special taxing district is that LIDs are typically formed and controlled by the community or county in which they are formed, while the establishment of special taxing districts is initiated by property owners and are usually overseen by a governing board.

LIDs generally offer similar advantages and disadvantages when compared to impact fees as special taxing districts. The only key differentiation is in states where the debt of a LID is a contingent liability of the local community, in which case it may be more difficult to attain political acceptance.

Special Service Districts

Another method of financing infrastructure and providing public services is the creation of special service districts. These are autonomous units of government, created by local governments, with the permission of state governments to provide a single or very narrow range of related public services. *The key distinction between special service districts and special taxing districts is that special service districts have an ongoing role in maintaining and operating infrastructure facilities, while special taxing districts typically finance, construct and/or acquire the public improvements and then dedicate the public improvements to other public entities for ongoing operations and maintenance.* Within the limits set by the state enabling provisions, these units of local government can issue debt and levy taxes, or impose user charges to service the debt and to finance current operations without the interference of other local governments. The most common form of independent district is the school district. Other special service districts include mass transit, roads, water supply and treatment, and other public utilities. Special service districts have also been created to provide police and/or fire protection, health care, and housing. In 2007 there were 13,051 independent school districts and 37,381 other special service districts.[9]

The boundaries of special service districts may coincide with the boundaries of the local government that created them, or, in the case of areas with many small local governments, the special district boundaries may include a number of small local units of general governments.

Special service districts may utilize impact fees to raise revenues for new infrastructure construction.

There are vast differences in the types and organizational structures of special service districts. Therefore, it is difficult to make general comparisons between this method of infrastructure financing and impact fees.

Equity

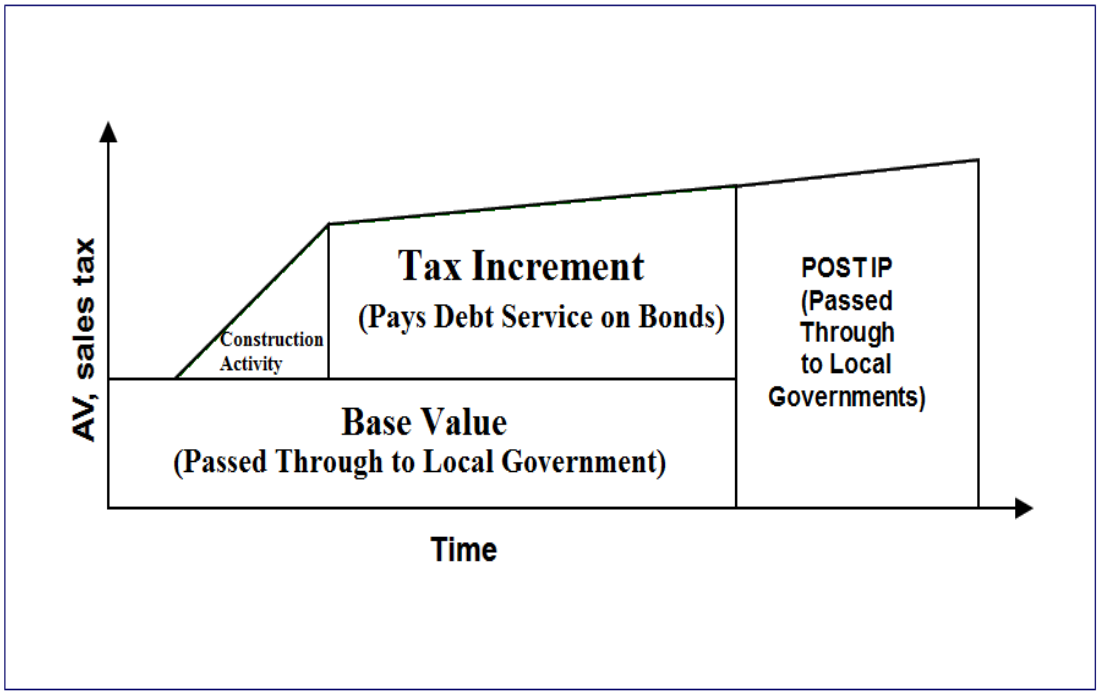
It should be noted, however, that one of the benefits of large special districts is that the financial and other costs associated with rapid population growth and commercial and industrial development are spread over a large population base and geographic area, rather than concentrated in small areas where the burdens of growth can be overwhelming.

Administration

Local governments may, at times, be reluctant to create special service districts because of potential administrative difficulties. The major disadvantage is that creation of too many special service districts fragments decision making and coordination among local governments.

Tax Increment Financing

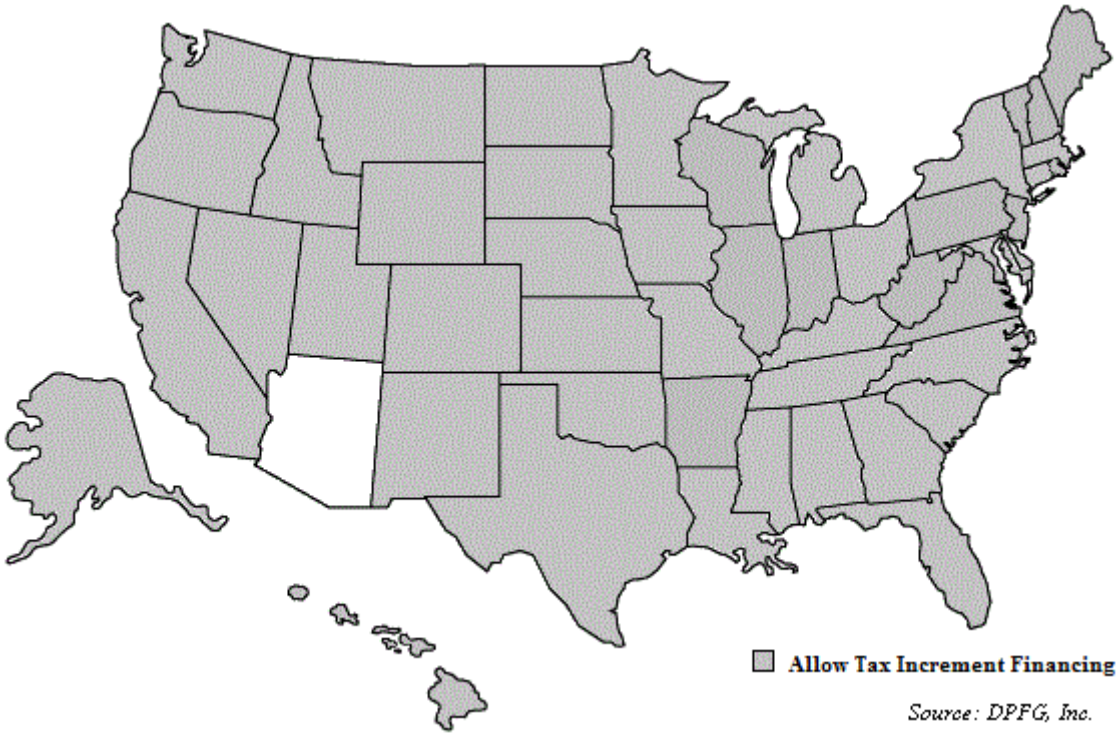
Tax Increment Financing Districts (TIF) capture the tax increment resulting from the increase in the assessed valuation as the result of new development activities or property appreciation for the purpose of making local public infrastructure improvements. The tax increment is the difference between total tax revenues after development and an established "baseline" level of tax revenues prior to development. The tax increment, or a portion of the increment, is diverted from general fund revenues to service revenue bonds issued by the parent community to finance new capital investment and/or provide increased services within the district.[10] Once the tax increment period (IP) has expired, all revenues are returned to the appropriate agencies. A diagram of a typical TIF is shown below:



Most often, TIF is utilized in conjunction with redevelopment and as such boundaries of TIF districts mirror those of redevelopment areas designated by the community. One exception to this rule is New Mexico, which allows the creation of a Tax Increment Development District (TIDD) to be used to capture the incremental sales tax and property tax revenues within a TIDD to finance the construction and/or acquisition of public improvements related to Greenfield development provided the TIDD will create jobs and utilize sustainable development techniques.

Forty-nine states and the District of Columbia allow the use of tax increment financing as a vehicle to finance public infrastructure. Only Arizona does not allow tax increment financing.[11]

Figure 6.2: States that Allow Tax Increment Financing



Expediency

As TIF financing is reliant upon an increase in property tax revenues from new development, TIF financing is on par with that of impact fees related to expediency.

Efficiency

TIF tends to be more efficient than impact fees because those who are bearing the cost of the infrastructure investment, new and current owners in the financing district, have a voice in determining the service levels they want and therefore the amount of new capital needed.

Equity

The use of TIF supports the objective of inter- generational equity. Because tax bases and rates are uniform throughout the community, new entrants and established residents are treated identically.[12] If impact fees are set on a uniform basis, or if impact fees or special assessments are based on physical characteristics of the properties, then TIF would also be superior to those financing mechanisms according to the ability-to-pay principle. However, impact fee financing, may be superior to TIF according to the benefit principle. With impact fee financing, there is a linkage, however tenuous, between the cost to an individual and the benefits received.

Administration

TIF tends to be fairly complicated from an administrative standpoint, because the local government has to complete complex technical studies when establishing a TIF district. Additionally, the local government has to participate in the on-going administration of a district.

Political Acceptability

While TIF is currently allowed in the majority of states, the use of this financing mechanism has increasingly come under political fire. For many, TIF is inexorably linked to the unpopular use of eminent domain—though it need not be. TIF may also spur battles among local units of government, who may object to the establishment of a TIF district because of the fiscal stress caused by reduced tax revenues captured by the district combined with increased service demands. However, this issue has been resolved in some states which require that a fiscal impact analysis is completed in tandem with the TIF financial study. The fiscal impact analysis is completed to identify what mitigation measures would be necessary to ensure that public services will be fully funded in the future.

Private Exactions

The most direct forms of private infrastructure finance are locally imposed exactions on builders and developers, either to directly construct and install infrastructure, or to dedicate land for the construction of infrastructure. Impact fees are a form of exaction in which the developer pays a fee to the locality and the locality uses the proceeds to construct and install the infrastructure. The builder or developer must borrow to finance land development, construction, and new capital facilities. The developers or builders will, to the extent possible, pass all costs forward to the ultimate buyer or backward to landowners. As a result of the added costs of developer-financed infrastructure, the ultimate purchaser must put up more cash for closing and borrow more to purchase the property (see Chapter 3).

Expediency

Private exactions may or may not be expedient depending on how they are implemented. A local community will often require an exaction to be complete in advance of new development in order to ensure that adequate facilities are available. Alternatively, impact fees are technically a form of exaction and are not expedient given that they are collected in arrears.

Efficiency

Private financing of infrastructure is more costly than public financing because private borrowers almost invariably bear higher interest rates than public borrowers, especially if the public authority issues debt with interest that is exempt from federal

(and possibly state) income taxes. Because mortgage interest payments are deductible from federal, and possibly state, income taxes, the difference in *effective* interest rates paid by private borrowers and public borrowers is not as great as the difference in nominal interest rates. However, not all private borrowers can take full advantage of the mortgage interest deduction; itemized deductions for mortgage interest are of full value only if other tax deductions, including real estate property taxes, are at least equal to the standard deduction ($12,600 for married couples filing joint returns and $6,300 for single individuals in 2016).[13]

Despite the higher cost of private borrowing versus public borrowing, it may be argued that exactions on developers and builders are efficient. Downing and McCaleb (1987, p. 53) argue that sophisticated exactions (including impact fees) *do* possess the attributes of efficient prices because those who are considered to be the proximate cause of the need for new infrastructure, or are the primary beneficiaries, pay the cost of the facilities.[14] Conversely, Snyder and Stegman (1986, p. 31) argue that development fees and other forms of private financing of public capital facilities, where exclusion is possible, promote inefficiency in the use of public facilities by reducing user fees and charges to cover only short-run costs rather than long-run costs. Furthermore, Snyder and Stegman argue that development fees *do not* promote efficiency because the ultimate payers do not determine what they pay for, or the size and amount of infrastructure that is to be built.[15] In addition, if impact fees are set on a uniform basis and therefore do not reflect the actual cost to the locality for providing public services, the fees may encourage inefficient development if new development occurs at locations that are not near existing development.[16] Impact fees that are based on the number of bedrooms, acreage, or front-footage are another source of inefficiency in that they force builders, in their attempt to minimize fees, to produce housing units that are not the ones most desired by home buyers.[17]

Equity

A key issue with exactions is that they are often implemented by local communities on an ad-hoc basis. Further, exactions may violate the ability-to-pay concept of equity. Lower-income households pay more, relative to their income, than do higher-income households for the same capital facilities. Exactions are particularly burdensome to buyers of low-income households if they are used to finance infrastructure for roads, police and fire protection, schools, libraries, parks, or other public services from which it is either difficult or impossible to exclude anyone, or which are deemed so socially important that no one should be excluded on the basis of the ability-to-pay.

Private financing of new infrastructure and public financing of replacement infrastructure, often based on ability to pay, involve a double standard in the treatment of new entrants compared to the treatment of established residents. Although current residents may believe it is fair to force new entrants to privately finance new infrastructure and to publicly finance replacement infrastructure, there may be a downside for current residents if new entrants can thwart moves to publicly finance

replacement infrastructure (e.g., refurbishing and modernizing older schools) that primarily benefit established residents.[18]

Administration

The use of exactions, including impact fees, can be challenging for local communities to administer. Specifically, all development projects have different impacts on public infrastructure systems. Administering a fair and balanced exaction or impact fee program is difficult when there are so many nuances in various development projects. Chapter 5 of this handbook includes a detailed description of the challenges related to impact fee programs, which can be broadly understood to relate to exactions in general.

Political Acceptability

While the use of exactions and impact fees may be more politically acceptable than other forms of infrastructure financing to existing residents—it does pose some complicated political questions for local communities regarding their fairness to new residents. Chapter 7 of this Handbook includes a detailed discussion of political issues associated with impact fees, which can be understood to broadly address all forms of exactions.

Endnotes

1. A complete presentation of equity, efficiency, administrative, and political criteria for infrastructure finance can be found in Snyder and Stegman, *Paying for Growth,* pp. 27-38.
2. Wealth is usually measured by the amount of assessed real property owned by an individual.
3. Paul P. Downing and Thomas S. McCaleb, "The Economics of Development Exactions," in Nelson, ed., *Development Exactions,* 1988, p. 53, *op. cit.*
4. T.R. Lakshmanan, P. Nijkamp, E.T. Verhoef and P. Rietveld, *Benefits and Costs of Transport, Classification, Methodologies and Policies,* 2001.
5. David R. Berman, *Local Government and the States: Autonomy, Politics, and Policy*, 2003.
6. U.S. Bureau of the Census, *Total State and Local Government Finances in 1992-93,* pp. 1, 2.
7. Thomas P. Snyder and Michael A Stegman, 1986, p. 31.
8. National Association of Home Builders, *Infrastructure Series: Part II: Infrastructure Finance, Does your state encourage innovation?*
9. U.S. Bureau of the Census, *Statistical Abstract of the United States 2007*.
10. Opponents of tax increment financing argue that these programs may require cost subsidization from taxpayers outside of the tax increment district. David B. Lawrence and Susan C. Stephenson, "The Economics and Politics of Tax Increment Financing," *Growth and Change* (Winter 1995), p. 106.
11. National Association of Home Builders, *Infrastructure Series: Part II: Infrastructure Finance, Does your state encourage innovation?*
12. National League of Cities, *Financing Infrastructure: Innovations at the Local Level* (Washington, DC, 1987).

13. Commerce Clearing House, 1996 *U.S. Master Tax Guide*, p. 85. For a discussion of the interaction between the standard deduction and the mortgage interest deduction, see Paul Emrath, "Cost of Finance and Taxes for New and Old Homes," *Housing Economics* (September 1993), pp. 5-8. Internal Revenue Service for 2016 Standard Deduction Amounts.
14. Paul P. Downing and Thomas S. McCaleb, "The Economics of Development Exactions," in Nelson, ed., *Development Exactions*, 1987.
15. Thomas P. Snyder and Michael A. Stegman, *op. cit.*
16. Ibid.
17. Ibid.
18. Thomas P. Snyder and Michael A. Stegman, *op. cit.*, p. 30.

CHAPTER 7

Public Affairs Strategies

- ***Arguments and Strategies to be Utilized to Defeat Fee Proposals***
- ***What to do if an Impact Fee Seems Inevitable***
- ***Groups Likely to Support the Home Builders Association Position***
- ***Groups Likely to Oppose the Home Builders Association Position***

A sound public affairs strategy which is carried out in a successful manner will benefit the home builders association by influencing legislation and public actions. As the implementation of impact fees and impact fee increases are typically the result of political rather than economic motivations, home builder associations may successfully address these issues through a solid public affairs strategy.

HBAs must adopt a strategy to influence impact fee public policy. If impact fees are not currently being discussed in your community, it may only be a matter of time before they are considered as a method to finance new or expand existing infrastructure. Impact fee use has steadily increased across the country since originating in Florida and California decades ago and impact fee enabling legislation has now been adopted in 28 states.

Chapter 7 focuses on identifying key policy issues that should be considered by governments when creating or increasing impact fees. The chapter outlines arguments and strategies that rely on these policy issues and have been successful in defeating or modifying impact fees.

Additionally, a list of provisions HBAs should urge governments to consider for inclusion in impact fee legislation and ordinances is included in this chapter. The protections and provisions found within impact fee ordinances play an important role in ensuring that the money collected for a purpose is actually spent on that project or service. Certain provisions, if included in the impact fee legislation or ordinance, not only protect the home builder but also the home buyer, local government and existing tax payers. Examples of what issues should be considered in an impact fee have stature has been included as Appendix C. Arizona's impact fee statute has been included as Appendix D. The Arizona Statute was updated in 2011 to address the continued challenges that the Arizona HBAs were experiencing with jurisdictional technical studies and the public sector's reluctance to address the HBA's concerns. The resulting legislation is one of the most comprehensive impact fee statutes in the country and one that other HBAs may want to consider utilizing in whole or in part to prevent jurisdictional overreach. The Montana and Texas impact fee statutes have also been included as additional impact fee statutes that provide many of the checks noted within this publication to prevent jurisdictional abuses.

As HBAs work to defeat or negotiate an impact fee, it is always best to form a coalition which supports the HBA's position. A sound strategy may include building a coalition with mutual interest groups, e.g., business, labor, civil rights, and housing organizations. Prepare materials that may be provided to the media and other key decision makers that detail the economic and social costs of impact fees. Be sure to meet with the media throughout the process to advance their understanding of this financing mechanism.

Arguments and Strategies to Utilize to Defeat Fee Proposals

Impact fees are proposed in a community for many reasons. A HBA's public affairs strategy should be dynamic enough to address the varied reasons for using the impact fee as a tool to finance infrastructure and public services.

Cost of Infrastructure

Many communities simply lack the funds or think they lack the funds to finance infrastructure improvements and expand services. Often, the lack of financing is caused by either a cap imposed upon property taxes or voter resistance to increased taxes. In these cases, it is essential to identify the economic sensitivity of impact fees as an infrastructure finance mechanism. And HBAs should always examine their community's budget to check the validity of the budget shortfall or limitations. Many local jurisdictions try to make up for seriously deferred maintenance of existing infrastructure by charging fees to new growth. HBA's should be prepared to challenge this practice when encountered as discussed in earlier chapters.

The cyclical nature of housing construction makes impact fees an unreliable revenue source. The amount of revenue generated through assessment and collection of impact fees may fluctuate dramatically during times of high and low growth, making fiscal planning based on impact fee revenues unpredictable and difficult. Additionally, the goal of raising additional revenue through impact fees may be attained only in the short term in a growing community. The use of impact fees may result in stifled economic development and limited growth.

If growth is limited by impact fees, the direct and indirect benefits of growth—such as a larger property tax base, increased employment opportunities, increased disposable income, increased sales and other tax revenues—will also be limited. And in regions where communities are competing for growth, impact fees can push to the growth to other areas if the fees are high enough and the market is sensitive.

In communities that are suffering from declining new home construction, impact fees are a naïve way to address the community's infrastructure needs. To the extent that the community is financing the construction of infrastructure through bonds supported by impact fees, the community will not likely receive the funds necessary to retire the bonds as impact fee financing depends on a reliable source of revenue.

If the cost to construct public infrastructure or provide public services is a challenge faced in a community then the following arguments may be useful:

- Ensure the community has explored all of the alternative financing mechanisms available such as its statutory bonding capacity, special taxing districts, tax increment financing, public/private partnerships, grants, etc. Information relating to infrastructure finance solutions may be found in the NAHB's three part series available at www.nahb.org/infrastructurefinance. These publications are:

    - *Building for Tomorrow: Innovative Infrastructure Solutions* (2003): This is a 32-page report that explains more than 20 innovative financing and delivery mechanisms and presents case studies on how those tools have been applied successfully.
    - *Infrastructure Solutions—Best Practices from Results-Oriented States* (2007), features research from the NCSL regarding the best state enabling legislation for some of 11 infrastructure finance alternatives. NCSL looked at statutory language from all the states authorizing the use of these finance tools and highlighted the best-written laws – those that showed the most promise for helping local governments make effective use of those tools.
    - *Infrastructure Finance: Does Your State Encourage Innovation?* (Updated 2012) features a matrix of all 50 states, showing which states authorize the use of the 12 most commonly used infrastructure finance tools discussed in *Building for Tomorrow*. It highlights a more in-depth research report written by the National Conference of State Legislatures (NCSL) that summarizes state enabling authority for these tools and includes links to the relevant statutes.
    - *An Overview of Special Purpose Taxing Districts (2014)* features an in-depth study of the benefits of special purpose taxing districts and how the districts may be used to finance public infrastructure in advance of growth.

- Identify the economic sensitivity of impact fees as an infrastructure financing mechanism.

- Describe the long term impacts on housing affordability and economic development (more detail under "slow growth or no growth").

Slow Growth or No Growth

Oftentimes communities propose impact fees aiming to discourage or prevent growth. Housing affordability is not considered an issue when no-growth is the goal as the policy makers intend to create barriers to housing construction.

If the slow growth or no growth argument is at the forefront of impact fee issues, or even masquerading behind them, then an HBA should consider making the following points:

- **Create a constituency for affordable housing.** Note that impact fees are included within the sale price of new homes and thus are amortized over the life of the mortgage. Amortizing impact fees significantly adds to the cost of the home, which decreases the ability of many people to purchase a home. For example, as a point of reference, a $6,000 impact fee on a $275,000 home, with a 4.50 percent 30-year mortgage, increases the total closing and financing costs of the home by $8,220. If fewer people can afford to buy new homes, then fewer new homes will be built; if housing is limited, so too will be the property tax base—and as such impact fee revenues. Please refer back to Chapter 3 for more information on NAHB's priced-out model.

- **Impact fees place a disproportionate burden on lower-income households.** For example, suppose a household with an annual income of $48,000 is buying a $200,000 house with a $180,000 mortgage at 5.0 percent. A $5,000 increase in house price due to an impact fee would require an increase of 2.5 percent in down payment and $325 more annually in house payments, which is 0.7 percent of the family's income. In a household with an income of $69,000 buying a $300,000 house with the same mortgage terms, the same rise in price would cause the same increase in annual payments, an increase equaling only 0.5 percent of that family's income.

- **Argue the equity issue.** Costs for the construction of infrastructure has traditionally been paid from general revenues of the community. When a local government is benefiting from a budget surplus, there is little justification for turning to new revenue sources such as impact fees. Why should a builder or home buyer pay for the basic needs of a community when the community itself can afford them?

- **Check the motives of the impact fee proponents.** Ensure impact fees are being assessed as a means of raising needed revenue and not for exclusionary purposes.

- **Identify the negative effect impact fees will have on a community.** If your community is competing for new or expanded businesses with neighboring communities that have no such fees, the economic development and growth will simply move next door.

- ***Impact fees not only lead to an increase in the price of new homes but also an increase in the prices of existing homes, as both new and existing homes are close substitutes.*** If the cost for new homes is more expensive than existing homes, demand for existing homes will increase, resulting in an increase in existing home prices. The increase in home values will make housing less

affordable for existing homes at the expense of buyers of both new and existing homes.

- **Advocate paying the impact fee at the latest point in the construction process.** The later the impact fee is paid, the lower the impact on the housing price. One suggestion is to pay the impact fee upon the receipt of the certificate of occupancy. Alternatively, in some communities, impact fees have been financed as an annual special assessment amortized over a twenty year period.

Political Expediency/No New Taxes

Elected community officials may utilize impact fees as a method to address infrastructure issues without raising taxes. Due to the long build-out schedule for constructing public infrastructure, it is incumbent upon successors to manage the tax decisions made by current elected community officials if impact fee revenues fail to meet growth projections. Residents of new construction are a constituency of the future and are often only represented by the HBA.

For communities utilizing impact fees as a way to hide the real costs of infrastructure, you may want to influence community officials with the following arguments:

- **Provide alternative mechanisms for the financing of public infrastructure.** This is outlined in more detail in Chapter 6.

- ***Verify that impact fees represent only the actual costs of providing public services to the new home buyer.*** *It is also important to make sure that the community is capable of maintaining the facility (or service) after the facility is constructed.* In the future, a fiscal crisis may occur and the community may find that revenue funds are insufficient to operate and maintain the facilities.

- **Argue that a majority of new homes are purchased by the existing residents who have already been financing infrastructure through property taxes, etc.** These new home owners are already living in the community and create no new burden on the public infrastructure of the community.

Equity Issue/Growth Pays for Itself

In many communities, elected community officials and residents believe that it is fair for new growth to pay for itself. If a community believes that growth should always pay its own way, the following arguments for opposing impact fees may be helpful:

- **Impact fees imposed for public infrastructure services that benefit and serve both new and existing residents are discriminatory if they are levied only on new homeowners.** Alternative sources of funding, such as gasoline taxes to pay for roads, are available and more fairly distribute the cost of services among those who use them.

- **When impact fees are designated to pay for the construction of future planned facilities, the buyer is paying not just for available facilities, but also for projected infrastructure**. Impact fees are often collected from a constituency that may not enjoy the benefits for which the impact fee paid. The average turnover in home ownership is six years. Many times it takes longer than six years to build infrastructure and develop services.

- **Make sure that impact fees earmarked for building certain infrastructure are used for that purpose and in the community or service area they were intended to support.** Impact fee monies should not be commingled with the funds in the general fund, and to the extent that impact fees are not expended for their intended use over a reasonable time period, they should be returned to the homeowners.

- ***Impact fees may result in "double taxation" of buyers of new housing as new residents may be charged twice for a portion of the public infrastructure; once through the payment of an impact fee and second through the repayment of bonds.***

What to do if an Impact Fee Seems Inevitable

If it is apparent that an impact fee proposal will be approved, there are several options that may minimize the effect of the fees and ensure they are being spent for the purpose they were collected:

- Work to establish specific procedures for enacting local fee ordinances, including requirements for public hearings and legal notice.

- Suggest alternative mechanisms for the financing of public infrastructure (Chapter 6).

- Review the impact fee study to ensure that: (i) the impact fee study is compliant with the requirements of the impact fee statute; (ii) the impact fee study is mathematically accurate; (iii) the impact fee study is in agreement with supporting documents and studies (e.g. CIP); (iv) the impact fee study allocated costs to multiple service areas; (v) the impact fee study is supported by reasonable growth estimates; (vi) construction costs are provided by licensed professionals; (vii) impact fees are reduced by funding offsets; and (viii) the impact fee study is based on existing levels of service..

- Provide economic data to demonstrate the influence that impact fees have on housing affordability in an effort to lower the impact fee and/or transfer the timing of the payment of the impact fee further in the development and building process.

- *Conduct a detailed legal and technical review of the ordinance or statute especially the portion that applies to the rational nexus test. Ensure the assessment of the impact fees conforms to the requirements of the ordinance or statute.* NAHB's Land Use & Design Department provides technical and policy assistance through its ordinance reviews. NAHB's Legal Services can provide assistance and advice on legal issues with the ordinance or statute.

- In the case where a state does not currently regulate impact fees, make sure the community has established administrative guidelines. Many communities fail to comply with the administrative requirements and accounting that must occur when utilizing impact fees as a method of financing public infrastructure.

- HBAs in states with adopted impact fee statutes must be knowledgeable of the provisions contained therein. Most state statutes have specific requirements for communities to follow when adopting impact fees. Make sure the local ordinance is in compliance with the requirements of the impact fee statute. In communities where no state statute has been adopted, confirm the impact fee is in line with established criteria as outlined in other chapters of this handbook.

- Certify that the community commits to conducting an annual capital project update. Doing so will help eliminate completed projects from the impact fee schedule, add new projects if needed and document expenditures for constructed facilities. The purpose of the annual capital project update is to ensure the home buyer receives the infrastructure and services for which the impact fees were paid and that the community is both planning ahead and being accountable.

- *Ensure the ordinance requires the community to perform a periodic update of the impact fee program. Provisions in many state statutes have a schedule for periodic impact fee program updates. The goal of these updates is to make sure that the plans and fees for new infrastructure and services are realistic and accurately represent the burden imposed by new development.*

- As an integral component of the fee program update, communities must also include a timeframe to update development projections. A sound ordinance should require the community to regularly update the base year and planning horizon as well as provide a new analysis of facility standards and needs (since these can change over time) and, most importantly, provide updated and realistic facility costs. Material cost fluctuations may greatly impact the construction costs of capital facilities.

- Ensure that credits and reimbursements are part of a consistent documentation process. HBAs can add significant value to the building and development community in this field. It is prudent to ensure the community is required to adequately track fee payments and projects so that in the event impact fee funds are not spent, refunds can be made. Credits should also be given in the case of changes in land use that reduce demands on infrastructure.

- Communities assessing impact fees must properly account for the fees received from new development. Ensure the community ordinance requires funds for fee programs to be deposited into separate interest-bearing accounts. The accounts typically should also use multiple categories for fees and projects. And a public accounting of how the funds were spent needs to be a requirement for the local jurisdiction.

- Push to have impact fees paid as late in the homebuilding process as possible, such as the receipt of the certificate of occupancy

- Suggest a gradual phasing of the bill's fee requirements. Phasing in the assessment of impact fees results in a less abrupt change in the functioning of builders, developers, and consumers.

Groups Likely to Support the Home Builders Association Position

As stated earlier, HBAs have a stronger ability to influence impact fee legislation when part of a broader coalition. As such, it is important to garner support through communication with other organizations early on regarding the provisions of the impact fee proposal. It may also be advantageous to proactively communicate with business clubs, labor, housing, civil rights, and property owner groups. Local commercial and residential homebuilders and developers may also be a source of support.

Enlisting the support of recent and potential new home buyers will likely play an important role in challenging impact fee proposals. Home buyers elect the officials of the governing body and may represent a powerful source of support as decreasing the affordability of housing will likely be important to home buyers.

Maintain an open line of communication with support groups and ensure that efforts to challenge impact fee proposals are coordinated. Effectively challenging impact fee proposals requires a consistent coordination of efforts between supportive groups.

Groups Likely to Oppose the Home Builders Association Position

While some groups will support the position of HBAs, there will also be groups in support of the impact fee proposals. Communicating with groups that may not share the same perspective on impact fees can be an effective way to learn how to formulate a strategy and arguments that would be tenable to all parties and for the HBA to be viewed as an effective advocate for rational development.

As impact fees represent an additional revenue source to communities, the imposition or increase of impact fees will likely be supported by community officials. It becomes increasingly difficult to effectively influence the implementation of impact fees as the capital budgeting and planning processes progress. Whenever possible, early

involvement in the budgeting and capital planning processes of the community will provide the best opportunity for HBAs to influence the impact fees being proposed.

It is likely that in an effort to discourage or limit community growth, antidevelopment organizations and groups may strongly oppose the efforts of HBAs. It is prudent to stay abreast of the current events of these groups and communicate periodically with the leaders of antidevelopment groups.

Conclusion

Developing a political and public relations strategy to affect an impact fee proposal is essential to building broad-based support in the community that will give additional weight to the building industry's position. Garnering the support of community organizations, professional groups and potential home buyers early in the capital budgeting and planning process will provide a better opportunity to effectively influence the implementation of the proposed impact fees. Following public hearings and the adoption of the fee ordinance, successfully challenging the impact fees without litigation becomes increasingly difficult.

APPENDICES

A Case Studies

B State Impact Fee Enabling Legislation Summary Chart

C General Impact Fee Statute Considerations

D Arizona, Montana, and Texas Impact Fee Statutes

E Resources

APPENDIX A

Case Studies

Home Builders Associations (HBAs) throughout the United States continue to experience challenges related to jurisdictions' implementation of development impact fees. In order to show case the actions a number of HBAs have taken in relation to such challenges, case studies have been included that include dealing with issues of: (i) changing impact fee consultants; (ii) statutory authority to implement Fees; (iii) the timed payment of Fees; (iv) the misappropriation of Fees; and (v) levels of service. Although some of the case studies may be dated, the logic and approach of the actions taken by the HBAs is still relevant today.

I. CHANGING IMPACT FEE CONSULTANTS AND UNINTENDED CONSEQUENCES

(Note: For political sensitivity, the names of the county and the consultants in question have been omitted.)

BACKGROUND

ABC County's (County) Impact Fee Ordinance (Ordinance) requires impact fees to be used only for capital facility costs for which the impact fees are levied and that add capacity needed to serve new development. Furthermore, the Ordinance requires the County to encumber the impact fees six years from the date the impact fees are paid and spend the impact fee within nine years from the date the fees are paid. Otherwise, the fee payer is entitled to a refund.

The County's impact fees have been updated on a biennial basis since 1994. Consultant A prepared the 2012 update and for many years prior, and Consultant B prepared the 2014 update. Consultant A and Consultant B are credentialed impact fee consulting firms. Both firms calculated the fees using the consumption-based methodology.

Although the overall methodology did not change, the 2014 update recommended a $15,888 (or 384 percent) increase in impact fees for a single-family detached, 2,000 square foot home. This case study explores how underlying approaches used by impact fee consultants can affect the fee calculations.

2012 and 2014 Impact Fee Comparison

Single Family (Detached) 2,000 sq ft	2012	2014	$ Increase	% Increase
Schools	$ 1,964	$ 15,305	$ 13,341	679%
Parks & Recreation	905	2,418	1,513	167%
Public Libraries	309	289	(20)	-6%
Fire & Rescue	-	324	324	N/A
Law Enforcement	135	192	57	42%
Public Buildings	826	1,499	673	81%
Total	$ 4,139	$ 20,027	$ 15,888	384%

Schools

As described in the 2012 update, the School District has been implementing an aggressive capital improvement program resulting in marginal additions to existing schools rather than constructing new schools to meet enrollment demand. No capacity-adding projects were included in the School District's current Five-Year Work Plan.

The capital cost per student station of $11,170 in the 2012 update was based on the marginal cost of expanding capacity in existing schools. In the 2014 update, the capital cost per student station of $39,846 was assumed, which reflects the cost of building new schools.

Differences in the application of the consumption-based (e.g. incremental expansion) methodology and interpretation of the County's Ordinance in determining the capital cost per student station were key factors in the $13,341 increase in school impact fees.

Parks and Recreation

In the 2012 Study, the cost of park land was excluded from the Parks and Recreation impact fee calculation because at that time and for the foreseeable future, the County had no plans to increase its inventory of park land. Instead, the County will be developing park land that is already in inventory.

The 2014 Study included calculations demonstrating how the County's achieved level of service for park land exceeded the adopted level of service, consistent with findings in the 2012 Study. The County still has no plans to acquire additional park land. However, the 2014 Study included the cost of park land, at achieved levels of service, in the cost component of the impact fee calculation. Park land accounts for 52 percent of the 2014 impact fee cost component, with park land improvements and facilities accounting for the remainder.

Differences in the application of the consumption-based methodology and interpretation of the County's Ordinance in determining the capital cost for parks and recreation were key factors in the $1,513 increase in parks and recreation impact fees.

Fire and Rescue

The 2012 Study recommended the Fire and Rescue Fee be set at zero as the County's Capital Improvement Plan (CIP) did not propose any capacity-adding improvements. However, the 2014 Study noted three new stations have been included in the current CIP, so a Fire and Rescue impact fee was recommended for adoption.

Initially, the 2014 Study included a $14.6 million Training and Administrative Facility in the land and buildings inventory used in calculating the cost component of the fee. However at the County's request, the cost of this facility was later removed, as there is no need for a similar facility in the future.

Law Enforcement

The 2012 Study allocated capital costs on a per call basis[2] and used the existing inventory of vehicles and equipment in determining the cost component of the law enforcement impact fee. The 2014 Study allocated costs on a functional population basis and used a flat capital cost per officer based on information obtained from other jurisdictions. The level of service in the 2014 Study was based on the number of officers per 1,000 functional residents.

A comparison of the two approaches, calculated on a per capita basis, highlights certain anomalies between the two approaches. For example, the overall capital cost was $10.8 million less in 2014 compared to 2012, and the service area population increased by 86,318 persons (or 12 percent) from 2012 to 2014. In total, the per capita cost declined by $25.50 per person over the biennial period.

2012 and 2014 Law Enforcement Capital Cost Comparison

Description		Figure
2014 Law Enforcement Impact Fee Study		
Service Area Functional Population		699,882
Cost per Functional Resident	$	106.50
Total Equipment and Vehicle Value	$	74,537,433
Service Area Peak Population		818,439
Per Capita Cost	$	91.07
2012 Law Enforcement Impact Fee Study		
Total Equipment and Vehicle Value	$	85,341,771
Unincorporated Peak Population Served		732,121
Per Capita Cost	$	116.57

In spite of the decreases noted above, the 2014 Law Enforcement impact fee increased significantly across all land uses, as illustrated below.

- Office (50,000 sq. ft. and less) increased 1,325 percent
- Retail (50,000 sq. ft. and less) increased 335 percent
- Fast Food Restaurant increased 1,480 percent

Persons per housing unit increased slightly in 2014, which affected the residential land use fees, but different approaches in calculating functional population in the 2012 and 2014 studies accounts for the majority of the nonresidential land use increases.

For example, the peak population in the 2014 study was 1,443,996; however, the peak population in the 2012 study was 1,640,084—a decrease of 196,088. The primary difference appears to be in the transient population assumption, which affects the Parks & Recreation, Fire and Rescue, Law Enforcement and Public Building impact fee calculations.

[1] The 2012 Study also included the Law Enforcement impact fee calculated on a per capita basis.

Furthermore, the functional population coefficient for many nonresidential land uses differed in the 2014 Study compared to the 2012 Study due to methodologies developed and applied by the two consulting firms.

2012 and 2014 Functional Population Coefficient Comparison

Land Use	Functional Population Coefficient Per 1,000 Sq Ft	
Drive-in Bank	1.815	2.280
Quality Restaurant	2.231	6.820
High Turnover Sit-Down Restaurant	2.375	6.780
Office (<= 50,000 sq ft)	0.801	1.410
Retail (<= 50,000 sq ft)	2.050	2.450
Fast Food Restaurant	3.699	8.900

Public Buildings

A significant amount of debt associated with existing public buildings was paid off between 2012 and 2014, which decreased the credit component in the 2014 Study. However, the increase in Public Building impact fees was also affected by the differences in functional population and functional population coefficients described above.

OUTCOME

Because impact fees are not subject to a regulatory body that establishes standardization in practice, a wide variety of approaches are used even when applying the primary methodologies: plan-based (or improvements-driven) and standards-based (or incremental expansion or consumption-based). It is important for local governments to fully understand the assumptions and methodologies included in the impact fee study and to take the steps necessary to limit inequitable (and unintended) inconsistencies that may arise with a change in the impact fee preparer.

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II. STATUTORY AUTHORITY LAWSUIT

Bozeman, Montana

BACKGROUND

In December of 1995, the City of Bozeman (City) voted to adopt fees for streets, fire, water and wastewater, without permission through state enabling legislation. The fees voted upon became effective March 23, 1996. At this time, the City only had "general governing powers" not "self-governing powers" and as such, would need state legislation to pass ordinances. Self-governing power, which is the power to enact any measure not expressly forbidden by state laws, was granted to the City in July 2001.

In 1998, following the narrow approval of Initiative 19 by voters, the City sought to substantially increase the existing amounts being assessed for fees. The fee schedule increase was enough for members of the Southwest Montana Building Industry Association (SWMBIA) to begin questioning the authority of the City to collect fees. The local building industry (Building Industry) and the SWMBIA formed a coalition to fight the implementation of the increased fees. In 1999, the City and the SWMBIA entered a lawsuit relating to the City's fee ordinance on the grounds that the City did not have statutory authority to impose fees. The lawsuit was later certified as a class action lawsuit in 2000. The SWMBIA and its members were highly involved in all aspects of the lawsuit and formed a committee of builders to administer and oversee the lawsuit and to keep the SWMBIA informed of the status and progress, including fundraising, identifying necessary plaintiffs, and overall supervision as the lawsuit progressed.

Prior to and at the time of the fee issue, the state of Montana had not enacted state-enabling legislation for the implementation of fee programs. As state-enabling legislation had not been given, the SWMBIA believed the City had no authority to impose fees, to say nothing of the authority to collect or arbitrarily increase the unfounded fees without industry input or the preparation of a technical fee study. A highly important factor that contributed to the substantiality of the SWMBIA's case was not straying from the central argument that the city lacked the statutory authority to impose the fees. Years later in 2005, the passing of State Bill 185 allowed jurisdictions to implement fee programs on the legal basis of Montana Code 7-6-1601 et. seq.

City officials and other supporters for higher fees consistently used media channels to purport that any and all infrastructure problems or deficiencies were the result of the Building Industry's pursuing litigation over fees. Accordingly, the SWMBIA routinely used the local media to combat the misinformation and mischaracterization of the Building Industry and focused the public relations effort on educating the public about the SWMBIA's position and the importance of challenging the City's existing fee study. Allies of the SWMBIA included numerous members of the local and state building associations as well as state and local realtors. Efforts were focused on educating allies of the need for litigation and formally requesting their financial support to challenge the fees. By maintaining open lines of communication with allies throughout the process, the SWMBIA was able to receive additional funding when necessary.

OUTCOME

In February 2001, the lawsuit was settled and the City agreed to:

- Return a total of $5.1 million to approximately 1,000 fee payers resulting in a refund of approximately $5,000 per residential dwelling.

Bozeman Fee Refund

Fee Category	Amount Refunded
Street and Fire	$ 2,231,410
Water	1,293,369
Sewer	1,606,555
Total	$ 5,131,334
Residential Dwellings [1]	1,000
Refund per Residential Dwelling	$ 5,131

Footnote:

(1) Figure is approximate.

- Reduce the existing fee schedule by 10 percent until a new study could be completed.
- Allow local builders reasonable participation in the preparation of the new fee study.

After settlement was reached, the SWMBIA continued its public relations approach by providing the public with detailed information about the settlement and the parties eligible to receive fee refunds. The SWMBIA and the class were very pleased with the outcome of the lawsuit, however, the reasonable participation in the preparation of the new fee studies never really materialized.

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III. TIME PAYMENT OF FEES

Hillsborough County, Florida

BACKGROUND

The water and sewer systems for Hillsborough County, Florida (County) had substantial excess capacity within certain service areas caused by a combination of overly optimistic population projections, housing market down turns, down planning, and reluctance on the part of the County to approve rezonings involving higher residential densities.

The County was having difficulty meeting its bond payment obligations, and bond rating agencies threatened to downgrade the County to "junk bond" status. The reclassification would make it difficult for the County to successfully finance any future capital improvements through the issuance of bonds.

The water and sewer development impact fees (fees) in the County were structured to meet the needs of providing necessary capital infrastructure and were some of the highest utility fees in Florida. At the time of receiving certificate of occupancy, homebuilders paid fees of $3,665 per single family residence for water and sewer.

As a means of generating revenue, the County sought to implement a "stand-by" charge, which the Tampa Bay Builders Association (TBBA) felt was arbitrarily chosen and did not meet the provisions of rational nexus tests. As such, the TBBA threatened legal action.

The TBBA participated in a task force offering suggestions on how to increase revenues and cut expenses and suggested allowing the County to adopt the stand-by charge as a way to raise revenue and to allow the stand-by charge and fees to be financed by home buyers over a period of time. As a result of the concept of allowing the homebuilder to finance both the stand-by charge as well as the Fees through the use of special assessment bonds was created. The goal of the time payment of fees program was to accelerate the collection of funds by the County and to shift the burden of fees from the home builder to the home buyer and to protect the County's bonding ability and rating.

To accomplish the implementation of a time payment system, the County proposed a new fee, called the Accrued Guarantee Revenue Fee (AGRF), to reimburse the cost of the unused water and wastewater capacity in the utility system. Following extensive discussion, it was agreed that the County would adopt an AGRF of $445 for water and $645 for wastewater for a total AGRF of $1,090. Fees now due for water and wastewater were increased from the average of $3,665 per single family residence to a total of $4,755. The fee increase is illustrated in the table on the following page.

County Water and Wastewater Fees

Description of Fee	Amount
AGRF [(1)]	$ 1,090
Average Fee	3,665
Total Fee	$ 4,755

Footnote:

(1) The acronym represents the Accrued Guarantee Revenue Fee.

By participating in the time payment program, the home builder paid $2,500 known as the Builder Payment. The time payment fee is paid prior to the issuance of a certificate of occupancy while the home buyer, as part of their property tax bill, pays the remaining $2,255 over 20 years, amounting to approximately $230 per year.

Time Payment of Fees Example

Fee Breakdown	Amount	When Paid
Homebuilder	$ 2,500	Certificate of Occupancy
Homebuyer	2,255	Amortized over 20 years.
Total	$ 4,755	

Participation in the time payment system is voluntary and home builders have the option to participate in the time payment program or to pay the fees themselves and include them in the cost of the home. Home buyers who purchase homes participating in the time payment system have the option to pay the annual assessments or to prepay the fees at any time without penalty.

OUTCOME

The time payment program of water and sewer fees has been in effect since 1997 and has been beneficial to the county government as well as the building industry. Following the adoption of the initial program, the County performed a rate/services study that concluded additional funds would be necessary to support the time payment system. The County agreed to maintain the builder fee at $2,500 but increase the AGRF to $5,865, with the home buyer paying $3,365 over 20 years.

Since the adoption of the time payment system, several rate adjustments have been made based on the results of annual studies conducted by the County. In 2002, the home builder payment was **reduced** to $2,170, and the total fees for a single family residence were $5,495, with home buyers financing $3,325 over 20 years. Without the implementation of the time payment program, home builders in the County would pay a total of $5,495 in water and sewer Fees. The time payment system reduces the Fees paid by the home builder by $3,325 per single family residence and allows the home buyer to finance the balance through a tax assessment, potentially at lower interest rates than conventional home mortgages.

The development of the time payment system offers the following benefits:
* Reduces home builder's direct costs.
* Passes some fees to the home buyer and potentially at lower interest rates.
* Provides an alternative to conventional fees.

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IV. LEVELS OF SERVICE

Yuba City, California

BACKGROUND

In October 2006, the North State Building Industry Association (BIA), working with an outside consulting firm, began reviewing the proposed development impact fees (fees) prepared by consultants on behalf of the City of Yuba City, California (City). As the City offered a variety of public services, the fees and nexus studies covered the following categories:

1) Community Services (police, fire, corporation yard and city hall)
2) Roads
3) Parks & Recreation
4) Library
5) Levee
6) Sewer
7) Water
8) Storm Drainage

The initial fees circulated by the City had increased the single-family rate from $24,270 to $64,193.

Fees within the State of California are controlled by Government Code 66000-6605 (Mitigation Fee Act) which was adopted in 1987 as AB 1600. The power to collect fees is contained in the city's police powers to protect the public health, safety and welfare of the citizens. Section 66001(a) of the Government Code requires any imposition of a Fee as part condition of development must show the following nexus:

- Identify the purpose of the fee;
- Identify how the fee is to be used;
- Determine how a reasonable relationship exists between the fee's use and the type of development project on which the fee is imposed;
- Determine how a reasonable relationship exists between the need for the public facility and the type of development project on which the Fee is imposed.

The nexus findings are typically made in a fee program's corresponding fee study (Nexus Study) or must be made in the ordinance that establishes the fee program. Additionally, AB 2751 created Section 66001(g) in 2007, which clearly states new development is not responsible for curing any existing deficiency in the current fee program. Understanding AB 1600 and the nexus requirements are critical in negotiating with any jurisdiction regarding fees.

As such, the BIA and their outside consultant focused on the following key assumptions: population build-out, interest rates, existing deficiencies, level of service standards, residential equivalency rates

and construction cost contingencies. For example, the City had originally estimated design, engineering and construction contingency as 65 percent of the hard construction costs. This is 30 to 40 higher than most jurisdictions typically estimate in any fee program. Additionally, the City utilized the fee program to increase the de-facto level of standard from 4.06 acres per 1,000 residents to 10.0 acres per 1,000 residents. Adjustments made to these two assumptions reduced the proposed fees by more than $15,000 per residential unit.

The goal was to ensure that development paid its fair share of future infrastructure needs, recognizing the temporal economic conditions currently facing business interest in the City. In addition to negotiating with key the City staff members, an Ad Hoc committee was created which included two members of the City council to provide input on key level of service standards, existing deficiencies and interest rate assumptions associated with financing infrastructure improvements. Through this process the BIA and their outside consulting group were able to significantly reduce the fees to be paid by new development.

OUTCOME

In September 2007, the City council adopted revised fees that were substantially reduced from the originally proposed fees proposed in October 2006. The revised fees reflect a position that provides for development paying its fair share of future infrastructure cost and ensures that the proposed fees are justifiable under state guidelines while meeting the City's desired level of service standards. The table below illustrates the results realized by the BIA working with their outside consultants upon the completion of the fee review and subsequent adoption by the City:

Yuba City Fee Update

				Numerical Variance			Percentage Variance		
Fee Category	Existing Fee	Oct 2006 Proposed Fee	September 2007 Adopted Fee	Existing - Proposed	Proposed - Adopted	Existing - Adopted	Existing - Proposed	Proposed - Adopted	Existing - Adopted
Police	$ 593	$ 1,876	$ 1,196	$ 1,283	$ (680)	$ 603	216%	-36%	102%
Fire	749	1,587	1,361	838	(226)	612	112%	-14%	82%
Roads	3,583	14,117	9,094	10,534	(5,023)	5,511	294%	-36%	154%
Corporation Yard	-	934	814	934	(120)	814	0%	-13%	0%
Parks & Recreation	2,692	9,320	6,160	6,628	(3,160)	3,468	246%	-34%	129%
Library	954	1,082	912	128	(170)	(42)	13%	-16%	-4%
Levee	-	5,366	2,874	5,366	(2,492)	2,874	0%	-46%	0%
City Hall	-	667	516	667	(151)	516	0%	-23%	0%
Sewer	4,990	7,826	5,261	2,836	(2,565)	271	57%	-33%	5%
Drainage	-	6,575	3,061	6,575	(3,514)	3,061	0%	-53%	0%
Water	7,209	10,644	5,796	3,435	(4,848)	(1,413)	48%	-46%	-20%
Administration	-	699	496	699	(203)	496	0%	-29%	0%
Affordable Housing	3,500	3,500	1,750	-	(1,750)	(1,750)	0%	-50%	-50%
Total	$ 24,270	$ 64,193	$ 39,291	$ 39,923	$ (24,902)	$ 15,021			

When there are substantial increases in fees, there is a good chance that a jurisdiction may be attempting to increase its levels of service standards or to remedy existing deficiencies with Fee revenues generated by new growth. Special attention needs to be placed on construction cost estimates, as these costs are often times significantly higher than those currently being experienced in the market place. Lastly, consideration should be given to bringing in outside fee consultants who work solely for the private sector to augment the BIA review team.

V. SIZE-BASED RESIDENTIAL FEE ASSESSMENTS

BACKGROUND

It is common among jurisdictions to assess fees for residential dwellings based upon unit type. For example, a flat fee is charged for all single family residences, without taking into consideration the size of the residence. In recent years, the notion of assessing residential fees based upon the size of the unit (square footage or the number of bedrooms) has become popular throughout jurisdictions in the United States. Several communities, such as Missoula, Montana; Baton Rouge, Louisiana; Palo Alto, California; Burlington, Vermont; and Hillsborough and Manatee County, Florida, have adopted size-based residential fee programs.

For example, the Manatee County, Florida impact fee schedule for single-family detached homes is presented below.[2] Except for public education, the fees are based on unit size. The square footage ranges for most categories are minor (300 to 500 square feet); however, the methodology assumes demand for public facilities, other than schools, is homogenous for all homes greater than 2,200 square feet.

			Multi-Modal Transportation							
Single-Family Detached	Law Enforcement	Libraries	NE District	NW District	SE District	SW District	Parks & Natural Resources	Public Safety	Public Education	Admin Surcharge
1,000 sq ft or less	$ 178	$ 95	$ 2,290	$ 2,185	$ 1,686	$ 1,335	$ 430	$ 96	$ 3,238	$ 44
1001 - 1300 sq ft	$ 276	$ 148	$ 3,564	$ 3,400	$ 2,623	$ 2,078	$ 669	$ 149	$ 3,238	$ 69
1301 - 1700 sq ft	$ 378	$ 202	$ 4,874	$ 4,650	$ 3,588	$ 2,833	$ 915	$ 204	$ 3,238	$ 94
1701- 2200 sq ft	$ 477	$ 255	$ 6,126	$ 5,843	$ 4,509	$ 3,560	$ 1,154	$ 257	$ 3,238	$ 119
2201 or more sq ft	$ 595	$ 319	$ 7,633	$ 7,282	$ 5,619	$ 4,434	$ 1,441	$ 321	$ 3,238	$ 149

Total Single-Family Fee	NE District	NW District	SE District	SW District
1,000 sq ft or less	$ 6,371	$ 6,266	$ 5,767	$ 5,416
1001 - 1300 sq ft	$ 8,113	$ 7,949	$ 7,172	$ 6,627
1301 - 1700 sq ft	$ 9,905	$ 9,681	$ 8,619	$ 7,864
1701- 2200 sq ft	$ 11,626	$ 11,343	$ 10,009	$ 9,060
2201 or more sq ft	$ 13,696	$ 13,345	$ 11,682	$ 10,497

An impetus to the emergence of this approach to assessing fees is the argument revolving around the regressive nature of impact fees. Fees that are regressive increase as a percentage of residential dwelling size as the residential dwelling size decreases. Therefore, the fee remains the same without regard to the size of the unit.

The purpose of this discussion is to emphasize the primary arguments of proponents and opponents to this method of calculating residential fees.

PROPONENTS

Proponents of square foot and number of bedroom based residential fee assessments argue that assessing fees based on unit size provides a more equitable assessment of fees as smaller residences are not paying a proportionately higher share of fees compared to larger residences. Basing the

assessment of fees on the size of a residential dwelling or the number of bedrooms in that dwelling makes the fee less regressive than assessing fees based upon unit type.[1]

The central premise of the argument is that, in general, larger residences house more people, and with a greater number of people, there results a greater demand for public services. On the other hand, small residences house fewer people and as such would require fewer public services. It is argued that the dwelling does not have an impact on the demand for public services, but it is the people residing in the dwelling that have the impact, and assessing fees based upon housing size proportionately places the burden of paying the fees on those who create the greatest demand for public infrastructure and services.

OPPONENTS

Opponents to the assessment of residential fees based upon square footage and number of bedrooms argue that it is not feasible to transform fees from something regressive to something that is not regressive.

The difficulty in assessing residential fees based upon unit size is that the assumption that larger residences house a greater number of people does not always follow the aspects of the argument set forth by proponents of this approach. As a simple example, some households nearing retirement or with fewer dependents may purchase housing that is much larger than is necessary to provide space for visiting relatives or entertaining guests. Additionally, the definition of what constitutes a "bedroom" varies from source to source. A room may be defined as a "den" to one person, while the very same room may be considered a "bedroom" by another.

It is important that home builder associations stay abreast of the developments in this approach as it is likely that this method of calculating residential fees will become more common in the future.[3]

For further information on recent fee trends and ways to deal with fee proposals, it may be helpful to work with the NAHB to ascertain how HBAs in other parts of the United States manage impact fees.

Endnote

1. Nicholas, James C. 1992. "On the Progression of Impact Fees," *Journal of the American Planning Association* 58: 517–525
2. This schedule reflects impact fees in effect for the period April 18, 2016 to April 17, 2017.
3. National Association of Home Builders, *Proportionate-Share Impact Fees*

APPENDIX B

State Impact Fee Summary Chart

		Fees May Be Imposed For											Requirements					
State	Legislative Reference	Roads	Water	Sewer	Storm Water	Parks	Fire	Police	Library	Solid Waste	School	Utilities	Improvements Plan	Interest Bearing Account	Spend Within "X" Years	Waiver for Affordable Housing	Advisory Committee	Stage for Payment (1)
Alabama																		
Alaska																		Anytime
Arizona (Cities)	AZ Rev. Stat. Ann., § 9-463.05	X	X	X	X	X	X	X	X				X	X	10		X	BP/CO
Arizona (Counties)	AZ Rev. Stat. Ann., § 11-1102 et seq.	X	X	X	X	X	X	X					X	X	10		X	BP/CO
Arkansas	AK Code, § 14-56-103 (cities only)	X	X	X	X	X	X	X	X				X	X	7			CO
California	CA Gov't Code, § 66000 et seq. (mitigation fee act); § 66477 (Quimby Act for park dedication/fee-in-lieu); § 17620 et. seq. (school fees)	X	X	X	X	X	X	X	X	X	X	X	Yes		6			Certificate of occupancy
Colorado	CO Rev. Stat., § 29-20-104.5; § 29-1-801804 (earmarking requirements); § 22-54-102 (school fee prohibition)	X	X	X	X	X	X	X	X	X		X		X		X		
Connecticut																		
Delaware																		
Florida	FL. Stat., § 163.31801	X	X	X	X	X	X	X	X	X	X							Anytime
Georgia	GA Code Ann., § 36-71-1 et seq.	X	X	X	X	X	X	X	X				X	X	6	X	X	BP
Hawaii	HI Rev. Stat., § 46-141 et seq.; § 264-121 et seq.	X	X	X	X	X	X	X	X	X	X	Yes	X	X	6			BP
Idaho	ID Code, § 67-8201 et seq.	X	X	X	X	X	X	X					X	X	8 (2)	X	X	BP
Illinois	605 Ill. Comp. Stat. Ann., § 5/5-901 et seq.	X											X	X	5		X	BP/CO
Indiana	ID Code Ann., § 36-7-4-1300 et seq.	X	X	X	X	X							X	X	6	X	X	BP
Iowa																		
Kansas																		
Kentucky																		
Louisiana																		
Maine	ME. Rev. State. Ann., Title 30-A, § 4354	X	X	X		X	X			X			X					
Maryland	MD Code, Art. 25B, § 13D	X	X	X	X	X	X	X	X	X	X							
Massachusetts																		
Michigan																		
Minnesota																		
Mississippi																		
Missouri																		
Montana	MT Code Annotated, Title 7, Chapter 6, Part 16	X	X	X	X	X	X	X	X	X	X	X	X	X			X	BP
Nebraska																		
Nevada	NV. Rev. Stat., § 278B	X	X	X	X	X	X	X					X	X	10		X	BP/CO
New Hampshire	NH Rev. Stat. Ann., § 674:21	X	X	X	X	X	X	X	X	X	X		X		6			CO
New Jersey	NJ Perm. Stat., § 27:1C-1 et seq.; § 40:55D-42	X	X	X	X								Yes					BP
New Mexico	NM. Stat. Ann., § 5-8-1 et seq.	X	X	X	X	X	X	X					X	X	7	X	X	BP
New York																		
North Carolina																		
North Dakota																		
Ohio																		
Oklahoma	OK Statutes, § 62-895	X	X	X	X	X	X	X		X								
Oregon	OR Rev. State, § 223.297 et seq.	X	X	X	X	X							X					
Pennsylvania	PA Stat. Ann., Title 53, § 10502-A et seq.	X											Yes			Yes		BP
Rhode Island	General Laws of RI, §45-22.4	X	X	X	X	X	X	X	X	X	X			X	8			CO
South Carolina	Code of Laws of SC, § 6-1-910 et seq.	X	X	X	X	X	X	X					X	X	3	X		BP
South Dakota																		
Tennessee																		
Texas	TX Local Gov't Code Ann., Title 12, § 395.001 et seq.	X	X	X	X								X	X	10	X	X	BP/CO
Utah	UT Code, § 11-36-101 et. seq.	X	X	X	X	X	X	X				X	X (3)	X	6	X		
Vermont	VT Stat. Ann., Title 24, § 5200 et seq.	X	X	X	X	X	X	X	X	X	X	X	X		6	X		
Virginia	VA Code Ann., § 15.2-2317 et seq.	X											X	X	15		X	CO
Washington	WA Rev. Code Ann., § 82.02.050 et seq.	X				X	X				X		X	X	6	X		
West Virginia	WV Code, § 7-20-1 et seq.	X	X	X	X	X	X	X			X		X	X	6	X		
Wisconsin	WI Stats., § 66.0617	X	X	X	X	X	X	X	X	X			X	X	7	X		BP/CO
Wyoming																		

Source: National Impact Fee Survey, 2015

Footnotes:

(1) BP = Building Permit; CO = Certificate of Occupancy.

(2) Idaho - 20 years for wastewater and drainage.

(3) Political Subdivisions serving populations under 5,000 as of the last federal census need not comply with the capital facilities plan requirements.

APPENDIX C

General Impact Fee Statute Considerations

The following document aims to serve as a reference for homebuilders to review common issues discussed in impact fee statutes. While all state impact fee statutes are unique, the majority of impact fee statutes share the following common characteristics.

- Definitions
- Minimum Standards for Development Impact Fee Ordinances
- Advisory Committee
- Service Areas
- Imposition of Development Impact Fees
- Proportionate Share of Improvement Costs Determination
- Capital Improvements Plan
- Credits
- Accounting for Collected Development Impact Fees
- Refunds
- Collection

A thorough discussion about the characteristics outlined above can be found in its respective section below.

DEFINITIONS

- The definitions section should include a detailed list of the public facilities for which impact fees are assessed.
- Examples of public facilities may include: Water supply production, treatment, storage and distribution facilities, wastewater collection, treatment and disposal facilities roads, streets and bridges, including rights-of-way, traffic signals, storm water collection, retention, detention, treatment and disposal facilities, flood control facilities, parks, open space and recreation areas, public safety facilities, including law enforcement, fire, emergency medical and rescue and street lighting facilities.

MINIMUM STANDARDS FOR DEVELOPMENT IMPACT FEES ORDINANCES

Minimum standard requirements for development impact fee ordinances may include:

- Should be based upon the proportionate share of the cost of system improvements. Development impact fees shall be based on actual system improvement costs or reasonable estimates of such costs.

- Should be calculated on the basis of levels of service for public facilities in the development impact fee applicable to existing development as well as new growth and development. The construction, improvement, expansion or enlargement of new or existing public facilities for which a development impact fee is imposed must be attributable to the capacity demands generated by the new development.
- Should specify the time in the development process at which the development impact fee is to be collected. Times for the collection of the development impact fee may include: (i) the commencement of construction of the development, (ii) the issuance of a building permit or (iii) as may be agreed by the developer and the governmental entity.
- Should include a provision for credits in accordance with the requirements of the "Credits" section.
- Should include a provision prohibiting the expenditure of development impact fees except in accordance with the requirements of the "Earmarking and Expenditure of Collected Development Impact Fees" section.
- Should make a determination as to whether one service area or more than one service area is necessary to establish a correlation between impact fees and benefits.
- May exempt all or part of a particular development project from development impact fees provided that such project is determined to create affordable housing.
- Should provide that development impact fees shall only be spent for the category of system improvements for which the fees were collected and either within or for the benefit of the service area in which the project is located.
- Should provide for a refund of development impact fees in accordance with the requirements of the "Refunds" section.
- Should provide for appeals regarding development impact fees in accordance with the requirements of the "Appeals" section.
- Should provide a detailed description of the methodology by which costs per service unit are determined.
- Should include a schedule of development impact fees for various land uses per unit of development.
- Should not subject any development to double payment of impact fees. (i.e. Homebuilder should not be responsible to pay impact fees and also pay to retire the debt to pay for the infrastructure)
- May exempt from development impact fees for the following activities:
    (i) Rebuilding the same amount of floor space of a structure, which was destroyed by fire or other catastrophe, providing the structure is rebuilt and ready for occupancy within two (2) years of its destruction;
    (ii) Remodeling or repairing a structure which does not increase the number of service units;
- Should include a description of acceptable levels of service for system improvements.

DEVELOPMENT IMPACT FEE ADVISORY COMMITTEE

- The governmental entity should establish a development impact fee advisory committee.
- The composition of the advisory committee should have representatives from the home building community. It would be wise to have no less than 40% of the committee members

selected from the building community. An example composition may include a total of five (5) members appointed by the governing authority of the governmental entity, where two (2) or more members are active in development, building or real estate and are not employees of the governmental entity.

- The advisory committee should:
  (i) Monitor and evaluate implementation of the capital improvements plan;
  (ii) Recommend to the governmental entity that the capital improvements plan and development impact fees be updated or revised periodically.

SERVICE AREAS

- Service areas are defined as geographic areas identified by a governmental entity or by intergovernmental agreement in which specific public facilities provide service to development within the area. An important note on service areas is that impact fees collected for the intent to be spent on public facilities located within a specific service area should be separately accounted for to ensure that the impact fees are appropriately spent on public facilities located within the service area.

IMPOSITION OF DEVELOPMENT IMPACT FEES

- The advisory committee should be consulted on the development of the capital improvements plan.
- The public should be notified, through a public hearing, of any changes to be made to the capital improvements plan. Notification should be made by circulation in a recognized county newspaper.
- The public should be notified, through a public hearing, of the governmental entity's intent to consider adoption of an ordinance for the imposition of development impact fees.

PROPORTIONATE SHARE OF IMPROVEMENT COSTS DETERMINATION

- The impact fees should be based on a reasonable and fair formula or method, so that the impact fees do not exceed a proportionate share of the costs of the improvements to serve the new development.
- The following should be considered in the determination of proportionate share and accounted for in the calculation of the impact fee:
  (i) Any offsets, credits, contribution of money, dedication of land, or construction of system improvements;
  (ii) Payments anticipated to be made in the form of user fees and debt service payments;
  (iii) The portion of general taxes or other revenues allocated to system improvements;
  (iv) The cost of existing system improvements within the service area or areas;
  (v) The extent to which new development will contribute to the cost of system improvements through taxation, assessment, or developer or landowner contributions, or has previously contributed to the cost of system improvements through developer or landowner contributions.
  (vi) The extent to which the new development is required to contribute to the cost of existing system improvements in the future.

(vii) The extent to which the new development should be credited for providing system improvements, without charge to other properties within the service area or areas;
(viii) The availability of other sources of funding system improvements. (user charges, general tax levies, intergovernmental transfers, and special taxation)

CAPITAL IMPROVEMENTS PLAN

It is recommended that a capital improvements plan be prepared and that it be included as an element of the comprehensive plan. The capital improvements plan may contain the following:

(i) A general description of all existing public facility deficiencies within the service area or areas and a reasonable estimate of all costs and a plan to develop the funding resources related to curing the existing deficiencies.
(ii) Means by which the governmental entity will use revenue sources other than impact fees to cure existing system deficiencies.
(iii) An analysis of the total capacity, the level of current usage, and commitments for usage of capacity of existing capital improvements to ascertain the current level of service.
(iv) The capital improvements plan should provide a table establishing the specific level or quantity of use of a service unit for each category of system improvements as well as an equivalency ratio of a service unit to various types of land uses, including residential, commercial, agricultural and industrial.
(v) A description of all system improvements and their costs necessitated by new development in the service area, to provide a level of service not to exceed the level of service adopted in the development impact fee ordinance.
(vi) The total number of service units necessitated by and attributable to new development within the service area.
(vii) The projected demand for system improvements required by new service units projected over a reasonable period of time. (The longer the timeframe, the less accurate the projected demand)
(viii) Identification of all sources available to the governmental entity for the financing of the system improvements.
(ix) A schedule setting forth estimated dates for commencing and completing construction of all improvements identified in the capital improvements plan.

- There should be a provision that the capital improvements plan will be periodically updated.

CREDITS

Provisions for impact fee credits may include:

- A credit or reimbursement for the present value of any construction of system improvements or contribution or dedication of land or money.
- Amount of Credit or the amount, time and form of reimbursement.
- A credit on future impact fees or reimbursement at the developer's choice for excess construction, funding or contribution from development impact fees.
- A credit on future impact fees for the amount in excess of the development’s proportionate share.

ACCOUNTING/EXPENDITURE OF COLLECTED DEVELOPMENT IMPACT FEES

Suggestions for the allocation and expenditure of collected impact fees can be found below:

- Impact fees should be maintained in interest-bearing accounts. This could be further delineated by category of system improvements and the service area in which the fees are collected.
- Interest earned should be considered funds of the account, and should be subject to all restrictions placed on the use of development impact fees.
- Expenditures of development impact fees should be made only for the category of system improvements of the service area shown in the capital improvements plan.
- Annual reports should be produced that describe the amount of all development impact fees collected, or spent during the preceding year delineated by category of public facility and service area.
- A timeframe for the expenditure of development impact fees that have been collected should be specified. If the funds are not expended within the prescribed timeframe they should be refunded.

REFUNDS

Suggestions for impact fee refund language:

- Development impact fees that have been paid should be refunded if:
    (i) The governmental entity, has failed to appropriate and expend the collected development impact fees.
    (ii) The impact fees are paid under protest and a review of the fee paid determines that it exceeded the proportionate share.
- Refunds should be sent to the owner of record within a specified timeframe after it is determined that a refund is due.
- Interest accrued from the date on which the fee was originally paid should also be refunded.

COLLECTION

The collection of development impact fees primarily occurs at one of the following two stages in the construction process:

(i) The issuance of a building permit; or
(ii) The issuance of a certificate of occupancy.

For an example of how many of the aforementioned concepts were implemented into law by the home builders of Arizona, See Arizona's Impact Fee Statute included as Appendix D.

APPENDIX D

Arizona, Montana, and Texas Impact Fee Statutes

ARIZONA

Arizona's Response to Development Impact Fee Abuses

In 2011, after years of being on the receiving end of abusive development impact fee ordinances imposed by some of the rapidly growing cities in Arizona, the home building industry in Arizona, led by the Home Builders Association of Central Arizona, drafted Senate Bill 1525 (SB1525). This bill not only addressed these abuses but enacted comprehensive requirements for municipalities in Arizona that charge impact fees.

Background

During the housing boom years some of the fastest growing communities in Arizona began enacting development impact fee ordinances based on development impact fee studies that were lacking in many respects. Some of the more common challenges with these impact fees studies included:

- Inclusion of non-essential public improvements (e.g. cultural centers) in eligible costs;
- No delineation of service areas;
- Incomplete analysis of existing levels of service;
- Use of inconsistent levels of service;
- Using development fees to address existing infrastructure deficiencies;
- No consideration of funding offsets, or credits;
- Inaccurate cost estimates, and
- Logic and mathematical errors.

The result of these errors was to force new growth to fund more than its proportionate share of the public infrastructure burden.

SB 1525

As a result, the building industry drafted, lobbied for, and passed SB1525 in 2011. Among other things, this bill:

- Immediately required municipalities to remove "unnecessary public services" from their impact fee programs;
- Required existing municipal impact fee programs to be replaced with impact fees estimated pursuant to the tenets of SB 1525;

- Established strict deadlines for the adoption of impact fees which, if not met, required municipalities to stop collecting impact fees;
- Adopted constitutional "proportionality" requirements based on standardized service units;
- Required use of service areas in which there is a "substantial nexus" between public services and demand;
- Necessitated the preparation of infrastructure improvement plans by Arizona licensed engineers pursuant to approved land use assumptions;
- Required a detailed existing level of service analysis;
- Defined "necessary public services" and the facilities that would be eligible for funding through development impact fees;
- Required an offset to public service costs for other fees and taxes paid by new growth which will be used by the jurisdiction to fund public infrastructure costs, including but not limited to construction sales taxes, state shared revenues, existing municipal general obligation bonds, grants, etc.;
- Increased the amount of time and frequency of public hearings and industry input into the impact fee process; and
- Required a bi-annual audit of the impact fee program if the jurisdictions did not work with an impact fee advisory panel during the preparation of the impact fee program.

Result

As result of the enactment of SB1525, many jurisdictions' impact fees were reduced by as much as 20 percent as they were forced to remove "unnecessary public services" from their impact fee calculations. Other jurisdictions decided to abandon their impact fee programs altogether given the amount of time and cost involved in revising the fees to be compliant with SB1525. Still other municipalities followed the tenets of SB1525, which led to a much more transparent and reasonable allocation of public service costs to new growth. In all, SB1525 was a huge success in reining in the jurisdictional abuses related to impact fee calculations and serves as a good model for other state impact fee statutes. Arizona's full impact fee statute follows.

9-463.05. Development fees; imposition by cities and towns; infrastructure improvements plan; annual report; advisory committee; limitation on actions; definitions

A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development, including the costs of infrastructure, improvements, real property, engineering and architectural services, financing and professional services required for the preparation or revision of a development fee pursuant to this section, including the relevant portion of the infrastructure improvements plan.

B. Development fees assessed by a municipality under this section are subject to the following requirements:

    1. Development fees shall result in a beneficial use to the development.

    2. The municipality shall calculate the development fee based on the infrastructure improvements plan adopted pursuant to this section.

3. The development fee shall not exceed a proportionate share of the cost of necessary public services, based on service units, needed to provide necessary public services to the development.

4. Costs for necessary public services made necessary by new development shall be based on the same level of service provided to existing development in the service area.

5. Development fees may not be used for any of the following:

    a) Construction, acquisition or expansion of public facilities or assets other than necessary public services or facility expansions identified in the infrastructure improvements plan.
    b) Repair, operation or maintenance of existing or new necessary public services or facility expansions.
    c) Upgrading, updating, expanding, correcting or replacing existing necessary public services to serve existing development in order to meet stricter safety, efficiency, environmental or regulatory standards.
    d) Upgrading, updating, expanding, correcting or replacing existing necessary public services to provide a higher level of service to existing development.
    e) Administrative, maintenance or operating costs of the municipality.

6. Any development for which a development fee has been paid is entitled to the use and benefit of the services for which the fee was imposed and is entitled to receive immediate service from any existing facility with available capacity to serve the new service units if the available capacity has not been reserved or pledged in connection with the construction or financing of the facility.

7. Development fees may be collected if any of the following occurs:

    a) The collection is made to pay for a necessary public service or facility expansion that is identified in the infrastructure improvements plan and the municipality plans to complete construction and to have the service available within the time period established in the infrastructure improvement plan, but in no event longer than the time period provided in subsection H, paragraph 3 of this section.

    b) The municipality reserves in the infrastructure improvements plan adopted pursuant to this section or otherwise agrees to reserve capacity to serve future development.

    c) The municipality requires or agrees to allow the owner of a development to construct or finance the necessary public service or facility expansion and any of the following apply:

        i. The costs incurred or money advanced are credited against or reimbursed from the development fees otherwise due from a development.

ii. The municipality reimburses the owner for those costs from the development fees paid from all developments that will use those necessary public services or facility expansions.

iii. For those costs incurred the municipality allows the owner to assign the credits or reimbursement rights from the development fees otherwise due from a development to other developments for the same category of necessary public services in the same service area.

8. Projected interest charges and other finance costs may be included in determining the amount of development fees only if the monies are used for the payment of principal and interest on the portion of the bonds, notes or other obligations issued to finance construction of necessary public services or facility expansions identified in the infrastructure improvements plan.

9. Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Monies received from a development fee identified in an infrastructure improvements plan adopted or updated pursuant to subsection D of this section shall be used to provide the same category of necessary public services or facility expansions for which the development fee was assessed and for the benefit of the same service area, as defined in the infrastructure improvements plan, in which the development fee was assessed. Interest earned on monies in the separate fund shall be credited to the fund.

10. The schedule for payment of fees shall be provided by the municipality. Based on the cost identified in the infrastructure improvements plan, the municipality shall provide a credit toward the payment of a development fee for the required or agreed to dedication of public sites, improvements and other necessary public services or facility expansions included in the infrastructure improvements plan and for which a development fee is assessed, to the extent the public sites, improvements and necessary public services or facility expansions are provided by the developer. The developer of residential dwelling units shall be required to pay development fees when construction permits for the dwelling units are issued, or at a later time if specified in a development agreement pursuant to section 9-500.05. If a development agreement provides for fees to be paid at a time later than the issuance of construction permits, the deferred fees shall be paid no later than fifteen days after the issuance of a certificate of occupancy. The development agreement shall provide for the value of any deferred fees to be supported by appropriate security, including a surety bond, letter of credit or cash bond.

11. If a municipality requires as a condition of development approval the construction or improvement of, contributions to or dedication of any facilities that were not included in a previously adopted infrastructure improvements plan, the municipality shall cause the infrastructure improvements plan to be amended to include the facilities and shall provide a credit toward the payment of a development fee for the construction, improvement, contribution or dedication of the facilities to the extent that the facilities

will substitute for or otherwise reduce the need for other similar facilities in the infrastructure improvements plan for which development fees were assessed.

12. The municipality shall forecast the contribution to be made in the future in cash or by taxes, fees, assessments or other sources of revenue derived from the property owner towards the capital costs of the necessary public service covered by the development fee and shall include these contributions in determining the extent of the burden imposed by the development. Beginning August 1, 2014, for purposes of calculating the required offset to development fees pursuant to this subsection, if a municipality imposes a construction contracting or similar excise tax rate in excess of the percentage amount of the transaction privilege tax rate imposed on the majority of other transaction privilege tax classifications, the entire excess portion of the construction contracting or similar excise tax shall be treated as a contribution to the capital costs of necessary public services provided to development for which development fees are assessed, unless the excess portion was already taken into account for such purpose pursuant to this subsection.

13. If development fees are assessed by a municipality, the fees shall be assessed against commercial, residential and industrial development, except that the municipality may distinguish between different categories of residential, commercial and industrial development in assessing the costs to the municipality of providing necessary public services to new development and in determining the amount of the development fee applicable to the category of development. If a municipality agrees to waive any of the development fees assessed on a development, the municipality shall reimburse the appropriate development fee accounts for the amount that was waived. The municipality shall provide notice of any such waiver to the advisory committee established pursuant to subsection G of this section within thirty days.

14. In determining and assessing a development fee applying to land in a community facilities district established under title 48, chapter 4, article 6, the municipality shall take into account all public infrastructure provided by the district and capital costs paid by the district for necessary public services and shall not assess a portion of the development fee based on the infrastructure or costs.

C. A municipality shall give at least thirty days' advance notice of intention to assess a development fee and shall release to the public and post on its website or the website of an association of cities and towns if a municipality does not have a website a written report of the land use assumptions and infrastructure improvements plan adopted pursuant to subsection D of this section. The municipality shall conduct a public hearing on the proposed development fee at any time after the expiration of the thirty day notice of intention to assess a development fee and at least thirty days before the scheduled date of adoption of the fee by the governing body. Within sixty days after the date of the public hearing on the proposed development fee, a municipality shall approve or disapprove the imposition of the development fee. A municipality shall not adopt an ordinance, order or resolution approving a development fee as an emergency measure. A development fee assessed pursuant to this section shall not be effective until seventy-five days after its formal

adoption by the governing body of the municipality. Nothing in this subsection shall affect any development fee adopted before July 24, 1982.

D. Before the adoption or amendment of a development fee, the governing body of the municipality shall adopt or update the land use assumptions and infrastructure improvements plan for the designated service area. The municipality shall conduct a public hearing on the land use assumptions and infrastructure improvements plan at least thirty days before the adoption or update of the plan. The municipality shall release the plan to the public, post the plan on its website or the website of an association of cities and towns if the municipality does not have a website, including in the posting its land use assumptions, the time period of the projections, a description of the necessary public services included in the infrastructure improvements plan and a map of the service area to which the land use assumptions apply, make available to the public the documents used to prepare the assumptions and plan and provide public notice at least sixty days before the public hearing, subject to the following:

1. The land use assumptions and infrastructure improvements plan shall be approved or disapproved within sixty days after the public hearing on the land use assumptions and infrastructure improvements plan and at least thirty days before the public hearing on the report required by subsection C of this section. A municipality shall not adopt an ordinance, order or resolution approving the land use assumptions or infrastructure improvements plan as an emergency measure.

2. An infrastructure improvements plan shall be developed by qualified professionals using generally accepted engineering and planning practices pursuant to subsection E of this section.

3. A municipality shall update the land use assumptions and infrastructure improvements plan at least every five years. The initial five year period begins on the day the infrastructure improvements plan is adopted. The municipality shall review and evaluate its current land use assumptions and shall cause an update of the infrastructure improvements plan to be prepared pursuant to this section.

4. Within sixty days after completion of the updated land use assumptions and infrastructure improvements plan, the municipality shall schedule and provide notice of a public hearing to discuss and review the update and shall determine whether to amend the assumptions and plan.

5. A municipality shall hold a public hearing to discuss the proposed amendments to the land use assumptions, the infrastructure improvements plan or the development fee. The land use assumptions and the infrastructure improvements plan, including the amount of any proposed changes to the development fee per service unit, shall be made available to the public on or before the date of the first publication of the notice of the hearing on the amendments.

6. The notice and hearing procedures prescribed in paragraph 1 of this subsection apply to a hearing on the amendment of land use assumptions, an infrastructure improvements

plan or a development fee. Within sixty days after the date of the public hearing on the amendments, a municipality shall approve or disapprove the amendments to the land use assumptions, infrastructure improvements plan or development fee. A municipality shall not adopt an ordinance, order or resolution approving the amended land use assumptions, infrastructure improvements plan or development fee as an emergency measure.

7. The advisory committee established under subsection G of this section shall file its written comments on any proposed or updated land use assumptions, infrastructure improvements plan and development fees before the fifth business day before the date of the public hearing on the proposed or updated assumptions, plan and fees.

8. If, at the time an update as prescribed in paragraph 3 of this subsection is required, the municipality determines that no changes to the land use assumptions, infrastructure improvements plan or development fees are needed, the municipality may as an alternative to the updating requirements of this subsection publish notice of its determination on its website and include the following:

    a) A statement that the municipality has determined that no change to the land use assumptions, infrastructure improvements plan or development fee is necessary.
    b) A description and map of the service area in which an update has been determined to be unnecessary.
    c) A statement that by a specified date, which shall be at least sixty days after the date of publication of the first notice, a person may make a written request to the municipality requesting that the land use assumptions, infrastructure improvements plan or development fee be updated.
    d) A statement identifying the person or entity to whom the written request for an update should be sent.

9. If, by the date specified pursuant to paragraph 8 of this subsection, a person requests in writing that the land use assumptions, infrastructure improvements plan or development fee be updated, the municipality shall cause, accept or reject an update of the assumptions and plan to be prepared pursuant to this subsection.

10. Notwithstanding the notice and hearing requirements for adoption of an infrastructure improvements plan, a municipality may amend an infrastructure improvements plan adopted pursuant to this section without a public hearing if the amendment addresses only elements of necessary public services in the existing infrastructure improvements plan and the changes to the plan will not, individually or cumulatively with other amendments adopted pursuant to this subsection, increase the level of service in the service area or cause a development fee increase of greater than five per cent when a new or modified development fee is assessed pursuant to this section. The municipality shall provide notice of any such amendment at least thirty days before adoption, shall post the amendment on its website or on the website of an association of cities and towns if the municipality does not have a website and shall provide notice to the

advisory committee established pursuant to subsection G of this section that the amendment complies with this subsection.

E. For each necessary public service that is the subject of a development fee, the infrastructure improvements plan shall include:

1. A description of the existing necessary public services in the service area and the costs to upgrade, update, improve, expand, correct or replace those necessary public services to meet existing needs and usage and stricter safety, efficiency, environmental or regulatory standards, which shall be prepared by qualified professionals licensed in this state, as applicable.

2. An analysis of the total capacity, the level of current usage and commitments for usage of capacity of the existing necessary public services, which shall be prepared by qualified professionals licensed in this state, as applicable.

3. A description of all or the parts of the necessary public services or facility expansions and their costs necessitated by and attributable to development in the service area based on the approved land use assumptions, including a forecast of the costs of infrastructure, improvements, real property, financing, engineering and architectural services, which shall be prepared by qualified professionals licensed in this state, as applicable.

4. A table establishing the specific level or quantity of use, consumption, generation or discharge of a service unit for each category of necessary public services or facility expansions and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial and industrial.

5. The total number of projected service units necessitated by and attributable to new development in the service area based on the approved land use assumptions and calculated pursuant to generally accepted engineering and planning criteria.

6. The projected demand for necessary public services or facility expansions required by new service units for a period not to exceed ten years.

7. A forecast of revenues generated by new service units other than development fees, which shall include estimated state-shared revenue, highway users revenue, federal revenue, ad valorem property taxes, construction contracting or similar excise taxes and the capital recovery portion of utility fees attributable to development based on the approved land use assumptions, and a plan to include these contributions in determining the extent of the burden imposed by the development as required in subsection B, paragraph 12 of this section.

F. A municipality's development fee ordinance shall provide that a new development fee or an increased portion of a modified development fee shall not be assessed against a development for twenty-four months after the date that the municipality issues the final approval for a commercial, industrial or multifamily development or the date that the first building permit is issued for a

residential development pursuant to an approved site plan or subdivision plat, provided that no subsequent changes are made to the approved site plan or subdivision plat that would increase the number of service units. If the number of service units increases, the new or increased portion of a modified development fee shall be limited to the amount attributable to the additional service units. The twenty-four month period shall not be extended by a renewal or amendment of the site plan or the final subdivision plat that was the subject of the final approval. The municipality shall issue, on request, a written statement of the development fee schedule applicable to the development. If, after the date of the municipality's final approval of a development, the municipality reduces the development fee assessed on development, the reduced fee shall apply to the development.

G. A municipality shall do one of the following:

1. Before the adoption of proposed or updated land use assumptions, infrastructure improvements plan and development fees as prescribed in subsection D of this section, the municipality shall appoint an infrastructure improvements advisory committee, subject to the following requirements:

    a) The advisory committee shall be composed of at least five members who are appointed by the governing body of the municipality. At least fifty per cent of the members of the advisory committee must be representatives of the real estate, development or building industries, of which at least one member of the committee must be from the home building industry. Members shall not be employees or officials of the municipality.

    b) The advisory committee shall serve in an advisory capacity and shall:

        i. Advise the municipality in adopting land use assumptions and in determining whether the assumptions are in conformance with the general plan of the municipality.
        ii. Review the infrastructure improvements plan and file written comments.
        iii. Monitor and evaluate implementation of the infrastructure improvements plan.
        iv. Every year file reports with respect to the progress of the infrastructure improvements plan and the collection and expenditures of development fees and report to the municipality any perceived inequities in implementing the plan or imposing the development fee.
        v. Advise the municipality of the need to update or revise the land use assumptions, infrastructure improvements plan and development fee.

    c) The municipality shall make available to the advisory committee any professional reports with respect to developing and implementing the infrastructure improvements plan.

    d) The municipality shall adopt procedural rules for the advisory committee to follow in carrying out the committee's duties.

2. In lieu of creating an advisory committee pursuant to paragraph 1 of this subsection, provide for a biennial certified audit of the municipality's land use assumptions, infrastructure improvements plan and development fees. An audit pursuant to this paragraph shall be conducted by one or more qualified professionals who are not employees or officials of the municipality and who did not prepare the infrastructure improvements plan. The audit shall review the progress of the infrastructure improvements plan, including the collection and expenditures of development fees for each project in the plan, and evaluate any inequities in implementing the plan or imposing the development fee. The municipality shall post the findings of the audit on the municipality's website or the website of an association of cities and towns if the municipality does not have a website and shall conduct a public hearing on the audit within sixty days of the release of the audit to the public.

H. On written request, an owner of real property for which a development fee has been paid after July 31, 2014 is entitled to a refund of a development fee or any part of a development fee if:

1. Pursuant to subsection B, paragraph 6 of this section, existing facilities are available and service is not provided.

2. The municipality has, after collecting the fee to construct a facility when service is not available, failed to complete construction within the time period identified in the infrastructure improvements plan, but in no event later than the time period specified in paragraph 3 of this subsection.

3. For a development fee other than a development fee for water or wastewater facilities, any part of the development fee is not spent as authorized by this section within ten years after the fee has been paid or, for a development fee for water or wastewater facilities, any part of the development fee is not spent as authorized by this section within fifteen years after the fee has been paid.

I. If the development fee was collected for the construction of all or a portion of a specific item of infrastructure, and on completion of the infrastructure the municipality determines that the actual cost of construction was less than the forecasted cost of construction on which the development fee was based and the difference between the actual and estimated cost is greater than ten per cent, the current owner may receive a refund of the portion of the development fee equal to the difference between the development fee paid and the development fee that would have been due if the development fee had been calculated at the actual construction cost.

J. A refund shall include any interest earned by the municipality from the date of collection to the date of refund on the amount of the refunded fee. All refunds shall be made to the record owner of the property at the time the refund is paid. If the development fee is paid by a governmental entity, the refund shall be paid to the governmental entity.

K. A development fee that was adopted before January 1, 2012 may continue to be assessed only to the extent that it will be used to provide a necessary public service for which development fees can

be assessed pursuant to this section and shall be replaced by a development fee imposed under this section on or before August 1, 2014. Any municipality having a development fee that has not been replaced under this section on or before August 1, 2014 shall not collect development fees until the development fee has been replaced with a fee that complies with this section. Any development fee monies collected before January 1, 2012 remaining in a development fee account:

1. Shall be used towards the same category of necessary public services as authorized by this section.

2. If development fees were collected for a purpose not authorized by this section, shall be used for the purpose for which they were collected on or before January 1, 2020, and after which, if not spent, shall be distributed equally among the categories of necessary public services authorized by this section.

L. A moratorium shall not be placed on development for the sole purpose of awaiting completion of all or any part of the process necessary to develop, adopt or update development fees.

M. In any judicial action interpreting this section, all powers conferred on municipal governments in this section shall be narrowly construed to ensure that development fees are not used to impose on new residents a burden all taxpayers of a municipality should bear equally.

N. Each municipality that assesses development fees shall submit an annual report accounting for the collection and use of the fees for each service area. The annual report shall include the following:

1. The amount assessed by the municipality for each type of development fee.

2. The balance of each fund maintained for each type of development fee assessed as of the beginning and end of the fiscal year.

3. The amount of interest or other earnings on the monies in each fund as of the end of the fiscal year.

4. The amount of development fee monies used to repay:

    a) Bonds issued by the municipality to pay the cost of a capital improvement project that is the subject of a development fee assessment, including the amount needed to repay the debt service obligations on each facility for which development fees have been identified as the source of funding and the time frames in which the debt service will be repaid.
    b) Monies advanced by the municipality from funds other than the funds established for development fees in order to pay the cost of a capital improvement project that is the subject of a development fee assessment, the total amount advanced by the municipality for each facility, the source of the monies advanced and the terms under which the monies will be repaid to the municipality.

5. The amount of development fee monies spent on each capital improvement project that is the subject of a development fee assessment and the physical location of each capital improvement project.

6. The amount of development fee monies spent for each purpose other than a capital improvement project that is the subject of a development fee assessment.

O. Within ninety days following the end of each fiscal year, each municipality shall submit a copy of the annual report to the city clerk and post the report on the municipality's website or the website of an association of cities and towns if the municipality does not have a website. Copies shall be made available to the public on request. The annual report may contain financial information that has not been audited.

P. A municipality that fails to file the report and post the report on the municipality's website or the website of an association of cities and towns if the municipality does not have a website as required by this section shall not collect development fees until the report is filed and posted.

Q. Any action to collect a development fee shall be commenced within two years after the obligation to pay the fee accrues.

R. A municipality may continue to assess a development fee adopted before January 1, 2012 for any facility that was financed before June 1, 2011 if:

1. Development fees were pledged to repay debt service obligations related to the construction of the facility.

2. After August 1, 2014, any development fees collected under this subsection are used solely for the payment of principal and interest on the portion of the bonds, notes or other debt service obligations issued before June 1, 2011 to finance construction of the facility.

S. Through August 1, 2014, a development fee adopted before January 1, 2012 may be used to finance construction of a facility and may be pledged to repay debt service obligations if:

1. The facility that is being financed is a facility that is described under subsection T, paragraph 7, subdivisions (a) through (g) of this section.

2. The facility was included in an infrastructure improvements plan adopted before June 1, 2011.

3. The development fees are used for the payment of principal and interest on the portion of the bonds, notes or other debt service obligations issued to finance construction of the necessary public services or facility expansions identified in the infrastructure improvement plan.

T. For the purposes of this section:

1. "Dedication" means the actual conveyance date or the date an improvement, facility or real or personal property is placed into service, whichever occurs first.

2. "Development" means:
    a) The subdivision of land.
    b) The construction, reconstruction, conversion, structural alteration, relocation or enlargement of any structure that adds or increases the number of service units.
    c) Any use or extension of the use of land that increases the number of service units.

3. "Facility expansion" means the expansion of the capacity of an existing facility that serves the same function as an otherwise new necessary public service in order that the existing facility may serve new development. Facility expansion does not include the repair, maintenance, modernization or expansion of an existing facility to better serve existing development.

4. "Final approval" means:

    a) For a nonresidential or multifamily development, the approval of a site plan or, if no site plan is submitted for the development, the approval of a final subdivision plat.
    b) For a single family residential development, the approval of a final subdivision plat.

5. "Infrastructure improvements plan" means a written plan that identifies each necessary public service or facility expansion that is proposed to be the subject of a development fee and otherwise complies with the requirements of this section, and may be the municipality's capital improvements plan.

6. "Land use assumptions" means projections of changes in land uses, densities, intensities and population for a specified service area over a period of at least ten years and pursuant to the general plan of the municipality.

7. "Necessary public service" means any of the following facilities that have a life expectancy of three or more years and that are owned and operated by or on behalf of the municipality:

    a) Water facilities, including the supply, transportation, treatment, purification and distribution of water, and any appurtenances for those facilities.
    b) Wastewater facilities, including collection, interception, transportation, treatment and disposal of wastewater, and any appurtenances for those facilities.
    c) Storm water, drainage and flood control facilities, including any appurtenances for those facilities.
    d) Library facilities of up to ten thousand square feet that provide a direct benefit to development, not including equipment, vehicles or appurtenances.
    e) Street facilities located in the service area, including arterial or collector streets or roads that have been designated on an officially adopted plan of the municipality, traffic signals and rights-of-way and improvements thereon.
    f) Fire and police facilities, including all appurtenances, equipment and vehicles. Fire and police facilities do not include a facility or portion of a facility that is used to replace services that were once provided elsewhere in the municipality, vehicles and equipment used to provide administrative services, helicopters or airplanes or a facility that is used for training firefighters or officers from more than one station or substation.

g) Neighborhood parks and recreational facilities on real property up to thirty acres in area, or parks and recreational facilities larger than thirty acres if the facilities provide a direct benefit to the development. Park and recreational facilities do not include vehicles, equipment or that portion of any facility that is used for amusement parks, aquariums, aquatic centers, auditoriums, arenas, arts and cultural facilities, bandstand and orchestra facilities, bathhouses, boathouses, clubhouses, community centers greater than three thousand square feet in floor area, environmental education centers, equestrian facilities, golf course facilities, greenhouses, lakes, museums, theme parks, water reclamation or riparian areas, wetlands, zoo facilities or similar recreational facilities, but may include swimming pools.

h) Any facility that was financed and that meets all of the requirements prescribed in subsection R of this section.

8. "Qualified professional" means a professional engineer, surveyor, financial analyst or planner providing services within the scope of the person's license, education or experience.

9. "Service area" means any specified area within the boundaries of a municipality in which development will be served by necessary public services or facility expansions and within which a substantial nexus exists between the necessary public services or facility expansions and the development being served as prescribed in the infrastructure improvements plan.

10. "Service unit" means a standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated pursuant to generally accepted engineering or planning standards for a particular category of necessary public services or facility expansions.

Montana Impact Fee Statute

7-6-1601. Definitions. As used in this part, the following definitions apply:

(1) (a) "Capital improvements" means improvements, land, and equipment with a useful life of 10 years or more that increase or improve the service capacity of a public facility.

(b) The term does not include consumable supplies.

(2) "Connection charge" means the actual cost of connecting a property to a public utility system and is limited to the labor, materials, and overhead involved in making connections and installing meters.

(3) "Development" means construction, renovation, or installation of a building or structure, a change in use of a building or structure, or a change in the use of land when the construction, installation, or other action creates additional demand for public facilities.

(4) "Governmental entity" means a county, city, town, or consolidated government.

(5) (a) "Impact fee" means any charge imposed upon development by a governmental entity as part of the development approval process to fund the additional service capacity required by the development from which it is collected. An impact fee may include a fee for the administration of the impact fee not to exceed 5% of the total impact fee collected.

(b) The term does not include:

(i) a charge or fee to pay for administration, plan review, or inspection costs associated with a permit required for development;
(ii) a connection charge;
(iii) any other fee authorized by law, including but not limited to user fees, special improvement district assessments, fees authorized under Title 7 for county, municipal, and consolidated government sewer and water districts and systems, and costs of ongoing maintenance; or
(iv) onsite or offsite improvements necessary for new development to meet the safety, level of service, and other minimum development standards that have been adopted by the governmental entity.

(6) "Proportionate share" means that portion of the cost of capital system improvements that reasonably relates to the service demands and needs of the project. A proportionate share must take into account the limitations provided in 7-6-1602.

(7) "Public facilities" means:

(a) a water supply production, treatment, storage, or distribution facility;

(b) a wastewater collection, treatment, or disposal facility;

(c) a transportation facility, including roads, streets, bridges, rights-of-way, traffic signals, and landscaping;

(d) a storm water collection, retention, detention, treatment, or disposal facility or a flood control facility;

(e) a police, emergency medical rescue, or fire protection facility; and

(f) other facilities for which documentation is prepared as provided in 7-6-1602 that have been approved as part of an impact fee ordinance or resolution by:

(i) a two-thirds majority of the governing body of an incorporated city, town, or consolidated local government; or
(ii) a unanimous vote of the board of county commissioners of a county government

7-6-1602. Calculation of impact fees -- documentation required -- ordinance or resolution -- requirements for impact fees.

(1) For each public facility for which an impact fee is imposed, the governmental entity shall prepare and approve a service area report.

(2) The service area report is a written analysis that must:

(a) describe existing conditions of the facility;

(b) establish level-of-service standards;

(c) forecast future additional needs for service for a defined period of time;

(d) identify capital improvements necessary to meet future needs for service;

(e) identify those capital improvements needed for continued operation and maintenance of the facility;

(f) make a determination as to whether one service area or more than one service area is necessary to establish a correlation between impact fees and benefits;

(g) make a determination as to whether one service area or more than one service area for transportation facilities is needed to establish a correlation between impact fees and benefits;

(h) establish the methodology and time period over which the governmental entity will assign the proportionate share of capital costs for expansion of the facility to provide service to new development within each service area;

(i) establish the methodology that the governmental entity will use to exclude operations and maintenance costs and correction of existing deficiencies from the impact fee;

(j) establish the amount of the impact fee that will be imposed for each unit of increased service demand; and

(k) have a component of the budget of the governmental entity that:

(i) schedules construction of public facility capital improvements to serve projected growth;
(ii) projects costs of the capital improvements;
(iii) allocates collected impact fees for construction of the capital improvements; and
(iv) covers at least a 5-year period and is reviewed and updated at least every 5 years.

(3) The service area report is a written analysis that must contain documentation of sources and methodology used for purposes of subsection (2) and must document how each impact fee meets the requirements of subsection (7).

(4) The service area report that supports adoption and calculation of an impact fee must be available to the public upon request.

(5) The amount of each impact fee imposed must be based upon the actual cost of public facility expansion or improvements or reasonable estimates of the cost to be incurred by the governmental entity as a result of new development. The calculation of each impact fee must be in accordance with generally accepted accounting principles.

(6) The ordinance or resolution adopting the impact fee must include a time schedule for periodically updating the documentation required under subsection (2).

(7) An impact fee must meet the following requirements:

(a) The amount of the impact fee must be reasonably related to and reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the new development.

(b) The impact fees imposed may not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity in accommodating the development. The following factors must be considered in determining a proportionate share of public facilities capital improvements costs:

(i) the need for public facilities capital improvements required to serve new development; and
(ii) consideration of payments for system improvements reasonably anticipated to be made by or as a result of the development in the form of user fees, debt service payments, taxes, and other available sources of funding the system improvements.

(c) Costs for correction of existing deficiencies in a public facility may not be included in the impact fee.

(d) New development may not be held to a higher level of service than existing users unless there is a mechanism in place for the existing users to make improvements to the existing system to match the higher level of service.

(e) Impact fees may not include expenses for operations and maintenance of the facility.

7-6-1603. Collection and expenditure of impact fees -- refunds or credits -- mechanism for appeal required.

(1) The collection and expenditure of impact fees must comply with this part. The collection and expenditure of impact fees must be reasonably related to the benefits accruing to the development paying the impact fees. The ordinance or resolution adopted by the governmental entity must include the following requirements:

(a) Upon collection, impact fees must be deposited in a special proprietary fund, which must be invested with all interest accruing to the fund.

(b) A governmental entity may impose impact fees on behalf of local districts.

(c) If the impact fees are not collected or spent in accordance with the impact fee ordinance or resolution or in accordance with 7-6-1602, any impact fees that were collected must be refunded to the person who owned the property at the time that the refund was due.

(2) All impact fees imposed pursuant to the authority granted in this part must be paid no earlier than the date of issuance of a building permit if a building permit is required for the development or no earlier than the time of wastewater or water service connection or well or septic permitting.

(3) A governmental entity may recoup costs of excess capacity in existing capital facilities, when the excess capacity has been provided in anticipation of the needs of new development, by requiring impact fees for that portion of the facilities constructed for future users. The need to recoup costs for excess capacity must have been documented pursuant to 7-6-1602 in a manner that demonstrates the need for the excess capacity. This part does not prevent a governmental entity from continuing to assess an impact fee that recoups costs for excess capacity in an existing facility. The impact fees imposed to recoup the costs to provide the excess capacity must be based on the governmental entity's actual cost of acquiring, constructing, or upgrading the facility and must be no more than a proportionate share of the costs to provide the excess capacity.

(4) Governmental entities may accept the dedication of land or the construction of public facilities in lieu of payment of impact fees if:

(a) the need for the dedication or construction is clearly documented pursuant to 7-6-1602;

(b) the land proposed for dedication for the public facilities to be constructed is determined to be appropriate for the proposed use by the governmental entity;

(c) formulas or procedures for determining the worth of proposed dedications or constructions are established as part of the impact fee ordinance or resolution; and

(d) a means to establish credits against future impact fee revenue has been created as part of the adopting ordinance or resolution if the dedication of land or construction of public facilities is of worth in excess of the impact fee due from an individual development.

(5) Impact fees may not be imposed for remodeling, rehabilitation, or other improvements to an existing structure or for rebuilding a damaged structure unless there is an increase in units that increase service demand as described in 7-6-1602(2)(j). If impact fees are imposed for remodeling, rehabilitation, or other improvements to an existing structure or use, only the net increase between the old and new demand may be imposed.

(6) This part does not prevent a governmental entity from granting refunds or credits:

(a) that it considers appropriate and that are consistent with the provisions of 7-6-1602 and this chapter; or

(b) in accordance with a voluntary agreement, consistent with the provisions of 7-6-1602 and this chapter, between the governmental entity and the individual or entity being assessed the impact fees.

(7) An impact fee represents a fee for service payable by all users creating additional demand on the facility.

(8) An impact fee ordinance or resolution must include a mechanism whereby a person charged an impact fee may appeal the charge if the person believes an error has been made.

7-6-1604. Impact fee advisory committee.

(1) A governmental entity that intends to propose an impact fee ordinance or resolution shall establish an impact fee advisory committee.

(2) An impact fee advisory committee must include at least one representative of the development community. The committee shall review and monitor the process of calculating, assessing, and spending impact fees.

(3) The impact fee advisory committee shall serve in an advisory capacity to the governing body of the governmental entity.

Texas Impact Fee Statute

Sec. 395.001. DEFINITIONS.

In this chapter:

(1) "Capital improvement" means any of the following facilities that have a life expectancy of three or more years and are owned and operated by or on behalf of a political subdivision:

> (A) water supply, treatment, and distribution facilities; wastewater collection and treatment facilities; and storm water, drainage, and flood control facilities; whether or not they are located within the service area; and
>
> (B) roadway facilities.

(2) "Capital improvements plan" means a plan required by this chapter that identifies capital improvements or facility expansions for which impact fees may be assessed.

(3) "Facility expansion" means the expansion of the capacity of an existing facility that serves the same function as an otherwise necessary new capital improvement, in order that the existing facility may serve new development. The term does not include the repair, maintenance, modernization, or expansion of an existing facility to better serve existing development.

(4) "Impact fee" means a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development. The term includes amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, and any other fee that functions as described by this definition. The term does not include:

> (A) dedication of land for public parks or payment in lieu of the dedication to serve park needs;
>
> (B) dedication of rights-of-way or easements or construction or dedication of on-site or off-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks, or curbs if the dedication or construction is required by a valid ordinance and is necessitated by and attributable to the new development;
>
> (C) lot or acreage fees to be placed in trust funds for the purpose of reimbursing developers for oversizing or constructing water or sewer mains or lines; or
>
> (D) other pro rata fees for reimbursement of water or sewer mains or lines extended by the political subdivision.

However, an item included in the capital improvements plan may not be required to be constructed except in accordance with Section 395.019(2), and an owner may not be required to construct or dedicate facilities and to pay impact fees for those facilities.

(5) "Land use assumptions" includes a description of the service area and projections of changes in land uses, densities, intensities, and population in the service area over at least a 10-year period.

(6) "New development" means the subdivision of land; the construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure; or any use or extension of the use of land; any of which increases the number of service units.

(7) "Political subdivision" means a municipality, a district or authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution, or, for the purposes set forth by Section 395.079, certain counties described by that section.

(8) "Roadway facilities" means arterial or collector streets or roads that have been designated on an officially adopted roadway plan of the political subdivision, together with all necessary appurtenances. The term includes the political subdivision's share of costs for roadways and associated improvements designated on the federal or Texas highway system, including local matching funds and costs related to utility line relocation and the establishment of curbs, gutters, sidewalks, drainage appurtenances, and rights-of-way.

(9) "Service area" means the area within the corporate boundaries or extraterritorial jurisdiction, as determined under Chapter 42, of the political subdivision to be served by the capital improvements or facilities expansions specified in the capital improvements plan, except roadway facilities and storm water, drainage, and flood control facilities. The service area, for the purposes of this chapter, may include all or part of the land within the political subdivision or its extraterritorial jurisdiction, except for roadway facilities and storm water, drainage, and flood control facilities. For roadway facilities, the service area is limited to an area within the corporate boundaries of the political subdivision and shall not exceed six miles. For storm water, drainage, and flood control facilities, the service area may include all or part of the land within the political subdivision or its extraterritorial jurisdiction, but shall not exceed the area actually served by the storm water, drainage, and flood control facilities designated in the capital improvements plan and shall not extend across watershed boundaries.

(10) "Service unit" means a standardized measure of consumption, use, generation, or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards and based on historical data and trends applicable to the political subdivision in which the individual unit of development is located during the previous 10 years.

SUBCHAPTER B. AUTHORIZATION OF IMPACT FEE

Sec. 395.011. AUTHORIZATION OF FEE.

(a) Unless otherwise specifically authorized by state law or this chapter, a governmental entity or political subdivision may not enact or impose an impact fee.

(b) Political subdivisions may enact or impose impact fees on land within their corporate boundaries or extraterritorial jurisdictions only by complying with this chapter, except that impact fees may not be enacted or imposed in the extraterritorial jurisdiction for roadway facilities.

(c) A municipality may contract to provide capital improvements, except roadway facilities, to an area outside its corporate boundaries and extraterritorial jurisdiction and may charge an impact fee under the contract, but if an impact fee is charged in that area, the municipality must comply with this chapter.

Sec. 395.012. ITEMS PAYABLE BY FEE.

(a) An impact fee may be imposed only to pay the costs of constructing capital improvements or facility expansions, including and limited to the:

(1) construction contract price;
(2) surveying and engineering fees;
(3) land acquisition costs, including land purchases, court awards and costs, attorney ’s fees, and expert witness fees; and
(4) fees actually paid or contracted to be paid to an independent qualified engineer or financial consultant preparing or updating the capital improvements plan who is not an employee of the political subdivision.

(b) Projected interest charges and other finance costs may be included in determining the amount of impact fees only if the impact fees are used for the payment of principal and interest on bonds, notes, or other obligations issued by or on behalf of the political subdivision to finance the capital improvements or facility expansions identified in the capital improvements plan and are not used to reimburse bond funds expended for facilities that are not identified in the capital improvements plan.

(c) Notwithstanding any other provision of this chapter, the Edwards Underground Water District or a river authority that is authorized elsewhere by state law to charge fees that function as impact fees may use impact fees to pay a staff engineer who prepares or updates a capital improvements plan under this chapter.

(d) A municipality may pledge an impact fee as security for the payment of debt service on a bond, note, or other obligation issued to finance a capital improvement or public facility expansion if:

(1) the improvement or expansion is identified in a capital improvements plan; and

(2) at the time of the pledge, the governing body of the municipality certifies in a written order, ordinance, or resolution that none of the impact fee will be used or expended for an improvement or expansion not identified in the plan.

(e) A certification under Subsection (d)(2) is sufficient evidence that an impact fee pledged will not be used or expended for an improvement or expansion that is not identified in the capital improvements plan.

Sec. 395.013. ITEMS NOT PAYABLE BY FEE.

Impact fees may not be adopted or used to pay for:

(1) construction, acquisition, or expansion of public facilities or assets other than capital improvements or facility expansions identified in the capital improvements plan;

(2) repair, operation, or maintenance of existing or new capital improvements or facility expansions;

(3) upgrading, updating, expanding, or replacing existing capital improvements to serve existing development in order to meet stricter safety, efficiency, environmental, or regulatory standards;

(4) upgrading, updating, expanding, or replacing existing capital improvements to provide better service to existing development;

(5) administrative and operating costs of the political subdivision, except the Edwards Underground Water District or a river authority that is authorized elsewhere by state law to charge fees that function as impact fees may use impact fees to pay its administrative and operating costs;

(6) principal payments and interest or other finance charges on bonds or other indebtedness, except as allowed by Section 395.012.

Sec. 395.014. CAPITAL IMPROVEMENTS PLAN.

(a) The political subdivision shall use qualified professionals to prepare the capital improvements plan and to calculate the impact fee. The capital improvements plan must contain specific enumeration of the following items:

(1) a description of the existing capital improvements within the service area and the costs to upgrade, update, improve, expand, or replace the improvements to meet existing needs and usage and stricter safety, efficiency, environmental, or regulatory standards, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;

(2) an analysis of the total capacity, the level of current usage, and commitments for usage of capacity of the existing capital improvements, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;

(3) a description of all or the parts of the capital improvements or facility expansions and their costs necessitated by and attributable to new development in the service area based on the approved land use assumptions, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;

(4) a definitive table establishing the specific level or quantity of use, consumption, generation, or discharge of a service unit for each category of capital improvements or facility expansions and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial, and industrial;

(5) the total number of projected service units necessitated by and attributable to new development within the service area based on the approved land use assumptions and calculated in accordance with generally accepted engineering or planning criteria;

(6) the projected demand for capital improvements or facility expansions required by new service units projected over a reasonable period of time, not to exceed 10 years; and

(7) a plan for awarding:

(A) a credit for the portion of ad valorem tax and utility service revenues generated by new service units during the program period that is used for the payment of improvements, including the payment of debt, that are included in the capital improvements plan; or

(B) in the alternative, a credit equal to 50 percent of the total projected cost of implementing the capital improvements plan.

(b) The analysis required by Subsection (a)(3) may be prepared on a system-wide basis within the service area for each major category of capital improvement or facility expansion for the designated service area.

(c) The governing body of the political subdivision is responsible for supervising the implementation of the capital improvements plan in a timely manner.

Sec. 395.015. MAXIMUM FEE PER SERVICE UNIT.

(a) The impact fee per service unit may not exceed the amount determined by subtracting the amount in Section 395.014(a)(7) from the costs of the capital improvements described by Section 395.014(a)(3) and dividing that amount by the total number of projected service units described by Section 395.014(a)(5).

(b) If the number of new service units projected over a reasonable period of time is less than the total number of new service units shown by the approved land use assumptions at full development of the service area, the maximum impact fee per service unit shall be calculated by dividing the costs of the part of the capital improvements necessitated by and attributable to projected new service units described by Section 395.014(a)(6) by the projected new service units described in that section.

Sec. 395.016. TIME FOR ASSESSMENT AND COLLECTION OF FEE.

(a) This subsection applies only to impact fees adopted and land platted before June 20, 1987. For land that has been platted in accordance with Subchapter A, Chapter 212, or the subdivision or platting procedures of a political subdivision before June 20, 1987, or land on which new development occurs or is proposed without platting, the political subdivision may assess the impact fees at any time during the development approval and building process. Except as provided by Section 395.019, the political subdivision may collect the fees at either the time of recordation of the subdivision plat or connection

to the political subdivision ’s water or sewer system or at the time the political subdivision issues either the building permit or the certificate of occupancy.

(b) This subsection applies only to impact fees adopted before June 20, 1987, and land platted after that date. For new development which is platted in accordance with Subchapter A, Chapter 212, or the subdivision or platting procedures of a political subdivision after June 20, 1987, the political subdivision may assess the impact fees before or at the time of recordation. Except as provided by Section 395.019, the political subdivision may collect the fees at either the time of recordation of the subdivision plat or connection to the political subdivision ’s water or sewer system or at the time the political subdivision issues either the building permit or the certificate of occupancy.

(c) This subsection applies only to impact fees adopted after June 20, 1987. For new development which is platted in accordance with Subchapter A, Chapter 212, or the subdivision or platting procedures of a political subdivision before the adoption of an impact fee, an impact fee may not be collected on any service unit for which a valid building permit is issued within one year after the date of adoption of the impact fee.

(d) This subsection applies only to land platted in accordance with Subchapter A, Chapter 212, or the subdivision or platting procedures of a political subdivision after adoption of an impact fee adopted after June 20, 1987. The political subdivision shall assess the impact fees before or at the time of recordation of a subdivision plat or other plat under Subchapter A, Chapter 212, or the subdivision or platting ordinance or procedures of any political subdivision in the official records of the county clerk of the county in which the tract is located. Except as provided by Section 395.019, if the political subdivision has water and wastewater capacity available:

> (1) the political subdivision shall collect the fees at the time the political subdivision issues a building permit;
>
> (2) for land platted outside the corporate boundaries of a municipality, the municipality shall collect the fees at the time an application for an individual meter connection to the municipality ’s water or wastewater system is filed; or
>
> (3) a political subdivision that lacks authority to issue building permits in the area where the impact fee applies shall collect the fees at the time an application is filed for an individual meter connection to the political subdivision ’s water or wastewater system.

(e) For land on which new development occurs or is proposed to occur without platting, the political subdivision may assess the impact fees at any time during the development and building process and may collect the fees at either the time of recordation of the subdivision plat or connection to the political subdivision’s water or sewer system or at the time the political subdivision issues either the building permit or the certificate of occupancy.

(f) An "assessment" means a determination of the amount of the impact fee in effect on the date or occurrence provided in this section and is the maximum amount that can be charged per service unit of such development. No specific act by the political subdivision is required.

(g) Notwithstanding Subsections (a)-(e) and Section 395.017, the political subdivision may reduce or waive an impact fee for any service unit that would qualify as affordable housing under 42 U.S.C. Section 12745, as amended, once the service unit is constructed. If affordable housing as defined by 42 U.S.C. Section 12745, as amended, is not constructed, the political subdivision may reverse its decision to waive or reduce the impact fee, and the political subdivision may assess an impact fee at any time during the development approval or building process or after the building process if an impact fee was not already assessed.

Sec. 395.017. ADDITIONAL FEE PROHIBITED; EXCEPTION.

After assessment of the impact fees attributable to the new development or execution of an agreement for payment of impact fees, additional impact fees or increases in fees may not be assessed against the tract for any reason unless the number of service units to be developed on the tract increases. In the event of the increase in the number of service units, the impact fees to be imposed are limited to the amount attributable to the additional service units.

Sec. 395.018. AGREEMENT WITH OWNER REGARDING PAYMENT.

A political subdivision is authorized to enter into an agreement with the owner of a tract of land for which the plat has been recorded providing for the time and method of payment of the impact fees.

Sec. 395.019. COLLECTION OF FEES IF SERVICES NOT AVAILABLE.

Except for roadway facilities, impact fees may be assessed but may not be collected in areas where services are not currently available, unless:

(1) the collection is made to pay for a capital improvement or facility expansion that has been identified in the capital improvements plan and the political subdivision commits to commence construction within two years, under duly awarded and executed contracts or commitments of staff time covering substantially all of the work required to provide service, and to have the service available within a reasonable period of time considering the type of capital improvement or facility expansion to be constructed, but in no event longer than five years;

(2) the political subdivision agrees that the owner of a new development may construct or finance the capital improvements or facility expansions and agrees that the costs incurred or funds advanced will be credited against the impact fees otherwise due from the new development or agrees to reimburse the owner for such costs from impact fees paid from other new developments that will use such capital improvements or facility expansions, which fees shall be collected and reimbursed to the owner at the time the other new development records its plat; or

(3) an owner voluntarily requests the political subdivision to reserve capacity to serve future development, and the political subdivision and owner enter into a valid written agreement.

Sec. 395.020. ENTITLEMENT TO SERVICES.

Any new development for which an impact fee has been paid is entitled to the permanent use and benefit of the services for which the fee was exacted and is entitled to receive immediate service from any existing facilities with actual capacity to serve the new service units, subject to compliance with other valid regulations.

Sec. 395.021. AUTHORITY OF POLITICAL SUBDIVISIONS TO SPEND FUNDS TO REDUCE FEES.

Political subdivisions may spend funds from any lawful source to pay for all or a part of the capital improvements or facility expansions to reduce the amount of impact fees.

Sec. 395.022. AUTHORITY OF POLITICAL SUBDIVISION TO PAY FEES.

Political subdivisions and other governmental entities may pay impact fees imposed under this chapter.

Sec. 395.023. CREDITS AGAINST ROADWAY FACILITIES FEES.

Any construction of, contributions to, or dedications of off-site roadway facilities agreed to or required by a political subdivision as a condition of development approval shall be credited against roadway facilities impact fees otherwise due from the development.

Sec. 395.024. ACCOUNTING FOR FEES AND INTEREST.

(a) The order, ordinance, or resolution levying an impact fee must provide that all funds collected through the adoption of an impact fee shall be deposited in interest-bearing accounts clearly identifying the category of capital improvements or facility expansions within the service area for which the fee was adopted.

(b) Interest earned on impact fees is considered funds of the account on which it is earned and is subject to all restrictions placed on use of impact fees under this chapter.

(c) Impact fee funds may be spent only for the purposes for which the impact fee was imposed as shown by the capital improvements plan and as authorized by this chapter.

(d) The records of the accounts into which impact fees are deposited shall be open for public inspection and copying during ordinary business hours.

Sec. 395.025. REFUNDS.

(a) On the request of an owner of the property on which an impact fee has been paid, the political subdivision shall refund the impact fee if existing facilities are available and service is denied or the political subdivision has, after collecting the fee when service was not available, failed to commence construction within two years or service is not available within a reasonable period considering the

type of capital improvement or facility expansion to be constructed, but in no event later than five years from the date of payment under Section 395.019(1).

(b) Repealed by Acts 2001, 77th Leg., ch. 345, Sec. 9, eff. Sept. 1, 2001.

(c) The political subdivision shall refund any impact fee or part of it that is not spent as authorized by this chapter within 10 years after the date of payment.

(d) Any refund shall bear interest calculated from the date of collection to the date of refund at the statutory rate as set forth in Section 302.002, Finance Code, or its successor statute.

(e) All refunds shall be made to the record owner of the property at the time the refund is paid. However, if the impact fees were paid by another political subdivision or governmental entity, payment shall be made to the political subdivision or governmental entity.

(f) The owner of the property on which an impact fee has been paid or another political subdivision or governmental entity that paid the impact fee has standing to sue for a refund under this section.

SUBCHAPTER C. PROCEDURES FOR ADOPTION OF IMPACT FEE

Sec. 395.041. COMPLIANCE WITH PROCEDURES REQUIRED.

Except as otherwise provided by this chapter, a political subdivision must comply with this subchapter to levy an impact fee.

Sec. 395.0411. CAPITAL IMPROVEMENTS PLAN.

The political subdivision shall provide for a capital improvements plan to be developed by qualified professionals using generally accepted engineering and planning practices in accordance with Section 395.014.

Sec. 395.042. HEARING ON LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN.

To impose an impact fee, a political subdivision must adopt an order, ordinance, or resolution establishing a public hearing date to consider the land use assumptions and capital improvements plan for the designated service area.

Sec. 395.043. INFORMATION ABOUT LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN AVAILABLE TO PUBLIC.

On or before the date of the first publication of the notice of the hearing on the land use assumptions and capital improvements plan, the political subdivision shall make available to the public its land use assumptions, the time period of the projections, and a description of the capital improvement facilities that may be proposed.

Sec. 395.044. NOTICE OF HEARING ON LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN.

(a) Before the 30th day before the date of the hearing on the land use assumptions and capital improvements plan, the political subdivision shall send a notice of the hearing by certified mail to any person who has given written notice by certified or registered mail to the municipal secretary or other designated official of the political subdivision requesting notice of the hearing within two years preceding the date of adoption of the order, ordinance, or resolution setting the public hearing.

(b) The political subdivision shall publish notice of the hearing before the 30th day before the date set for the hearing, in one or more newspapers of general circulation in each county in which the political subdivision lies. However, a river authority that is authorized elsewhere by state law to charge fees that function as impact fees may publish the required newspaper notice only in each county in which the service area lies.

(c) The notice must contain:

(1) a headline to read as follows:
"NOTICE OF PUBLIC HEARING ON LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN RELATING TO POSSIBLE ADOPTION OF IMPACT FEES"

(2) the time, date, and location of the hearing;

(3) a statement that the purpose of the hearing is to consider the land use assumptions and capital improvements plan under which an impact fee may be imposed; and

(4) a statement that any member of the public has the right to appear at the hearing and present evidence for or against the land use assumptions and capital improvements plan.

Sec. 395.045. APPROVAL OF LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN REQUIRED.

(a) After the public hearing on the land use assumptions and capital improvements plan, the political subdivision shall determine whether to adopt or reject an ordinance, order, or resolution approving the land use assumptions and capital improvements plan.

(b) The political subdivision, within 30 days after the date of the public hearing, shall approve or disapprove the land use assumptions and capital improvements plan.

(c) An ordinance, order, or resolution approving the land use assumptions and capital improvements plan may not be adopted as an emergency measure.

Sec. 395.0455. SYSTEMWIDE LAND USE ASSUMPTIONS.

(a) In lieu of adopting land use assumptions for each service area, a political subdivision may, except for storm water, drainage, flood control, and roadway facilities, adopt system-wide land use

assumptions, which cover all of the area subject to the jurisdiction of the political subdivision for the purpose of imposing impact fees under this chapter.

(b) Prior to adopting system-wide land use assumptions, a political subdivision shall follow the public notice, hearing, and other requirements for adopting land use assumptions.

(c) After adoption of system-wide land use assumptions, a political subdivision is not required to adopt additional land use assumptions for a service area for water supply, treatment, and distribution facilities or wastewater collection and treatment facilities as a prerequisite to the adoption of a capital improvements plan or impact fee, provided the capital improvements plan and impact fee are consistent with the system-wide land use assumptions.

Sec. 395.047. HEARING ON IMPACT FEE.

On adoption of the land use assumptions and capital improvements plan, the governing body shall adopt an order or resolution setting a public hearing to discuss the imposition of the impact fee. The public hearing must be held by the governing body of the political subdivision to discuss the proposed ordinance, order, or resolution imposing an impact fee.

Sec. 395.049. NOTICE OF HEARING ON IMPACT FEE.

(a) Before the 30th day before the date of the hearing on the imposition of an impact fee, the political subdivision shall send a notice of the hearing by certified mail to any person who has given written notice by certified or registered mail to the municipal secretary or other designated official of the political subdivision requesting notice of the hearing within two years preceding the date of adoption of the order or resolution setting the public hearing.

(b) The political subdivision shall publish notice of the hearing before the 30th day before the date set for the hearing, in one or more newspapers of general circulation in each county in which the political subdivision lies. However, a river authority that is authorized elsewhere by state law to charge fees that function as impact fees may publish the required newspaper notice only in each county in which the service area lies.

(c) The notice must contain the following:

(1) a headline to read as follows:
"NOTICE OF PUBLIC HEARING ON ADOPTION OF IMPACT FEES"

(2) the time, date, and location of the hearing;

(3) a statement that the purpose of the hearing is to consider the adoption of an impact fee;

(4) the amount of the proposed impact fee per service unit; and

(5) a statement that any member of the public has the right to appear at the hearing and present evidence for or against the plan and proposed fee.

Sec. 395.050. ADVISORY COMMITTEE COMMENTS ON IMPACT FEES.

The advisory committee created under Section 395.058 shall file its written comments on the proposed impact fees before the fifth business day before the date of the public hearing on the imposition of the fees.

Sec. 395.051. APPROVAL OF IMPACT FEE REQUIRED.

(a) The political subdivision, within 30 days after the date of the public hearing on the imposition of an impact fee, shall approve or disapprove the imposition of an impact fee.

(b) An ordinance, order, or resolution approving the imposition of an impact fee may not be adopted as an emergency measure.

Sec. 395.052. PERIODIC UPDATE OF LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN REQUIRED.

(a) A political subdivision imposing an impact fee shall update the land use assumptions and capital improvements plan at least every five years. The initial five-year period begins on the day the capital improvements plan is adopted.

(b) The political subdivision shall review and evaluate its current land use assumptions and shall cause an update of the capital improvements plan to be prepared in accordance with Subchapter B.

Sec. 395.053. HEARING ON UPDATED LAND USE ASSUMPTIONS AND CAPITAL IMPROVEMENTS PLAN.

The governing body of the political subdivision shall, within 60 days after the date it receives the update of the land use assumptions and the capital improvements plan, adopt an order setting a public hearing to discuss and review the update and shall determine whether to amend the plan.

Sec. 395.054. HEARING ON AMENDMENTS TO LAND USE ASSUMPTIONS, CAPITAL IMPROVEMENTS PLAN, OR IMPACT FEE.

A public hearing must be held by the governing body of the political subdivision to discuss the proposed ordinance, order, or resolution amending land use assumptions, the capital improvements plan, or the impact fee. On or before the date of the first publication of the notice of the hearing on the amendments, the land use assumptions and the capital improvements plan, including the amount of any proposed amended impact fee per service unit, shall be made available to the public.

Sec. 395.055. NOTICE OF HEARING ON AMENDMENTS TO LAND USE ASSUMPTIONS, CAPITAL IMPROVEMENTS PLAN, OR IMPACT FEE.

(a) The notice and hearing procedures prescribed by Sections 395.044(a) and

(b) apply to a hearing on the amendment of land use assumptions, a capital improvements plan, or an impact fee.

(c) The notice of a hearing under this section must contain the following:

(1) a headline to read as follows:
"NOTICE OF PUBLIC HEARING ON AMENDMENT OF IMPACT FEES"

(2) the time, date, and location of the hearing;

(3) a statement that the purpose of the hearing is to consider the amendment of land use assumptions and a capital improvements plan and the imposition of an impact fee; and

(4) a statement that any member of the public has the right to appear at the hearing and present evidence for or against the update.

Sec. 395.056. ADVISORY COMMITTEE COMMENTS ON AMENDMENTS.

The advisory committee created under Section 395.058 shall file its written comments on the proposed amendments to the land use assumptions, capital improvements plan, and impact fee before the fifth business day before the date of the public hearing on the amendments.

Sec. 395.057. APPROVAL OF AMENDMENTS REQUIRED.

(a) The political subdivision, within 30 days after the date of the public hearing on the amendments, shall approve or disapprove the amendments of the land use assumptions and the capital improvements plan and modification of an impact fee.

(b) An ordinance, order, or resolution approving the amendments to the land use assumptions, the capital improvements plan, and imposition of an impact fee may not be adopted as an emergency measure.

Sec. 395.0575. DETERMINATION THAT NO UPDATE OF LAND USE ASSUMPTIONS, CAPITAL IMPROVEMENTS PLAN OR IMPACT FEES IS NEEDED.

(a) If, at the time an update under Section 395.052 is required, the governing body determines that no change to the land use assumptions, capital improvements plan, or impact fee is needed, it may, as an alternative to the updating requirements of Sections 395.052-395.057, do the following:

(1) The governing body of the political subdivision shall, upon determining that an update is unnecessary and 60 days before publishing the final notice under this section, send notice of its determination not to update the land use assumptions, capital improvements plan, and impact fee by certified mail to any person who has, within two years preceding the date that the final notice of this matter is to be published, give written notice by certified or registered mail to the municipal secretary or other designated official of the political subdivision requesting notice

of hearings related to impact fees. The notice must contain the information in Subsections (b)(2)-(5).

(2) The political subdivision shall publish notice of its determination once a week for three consecutive weeks in one or more newspapers with general circulation in each county in which the political subdivision lies. However, a river authority that is authorized elsewhere by state law to charge fees that function as impact fees may publish the required newspaper notice only in each county in which the service area lies. The notice of public hearing may not be in the part of the paper in which legal notices and classified ads appear and may not be smaller than one-quarter page of a standard-size or tabloid-size newspaper, and the headline on the notice must be in 18-point or larger type.

(b) The notice must contain the following:

(1) a headline to read as follows: "NOTICE OF DETERMINATION NOT TO UPDATE LAND USE ASSUMPTIONS, CAPITAL IMPROVEMENTS PLAN, OR IMPACT FEES";

(2) a statement that the governing body of the political subdivision has determined that no change to the land use assumptions, capital improvements plan, or impact fee is necessary;

(3) an easily understandable description and a map of the service area in which the updating has been determined to be unnecessary;

(4) a statement that if, within a specified date, which date shall be at least 60 days after publication of the first notice, a person makes a written request to the designated official of the political subdivision requesting that the land use assumptions, capital improvements plan, or impact fee be updated, the governing body must comply with the request by following the requirements of Sections 395.052-395.057; and

(5) a statement identifying the name and mailing address of the official of the political subdivision to whom a request for an update should be sent.

(c) The advisory committee shall file its written comments on the need for updating the land use assumptions, capital improvements plans, and impact fee before the fifth business day before the earliest notice of the government’s decision that no update is necessary is mailed or published.

(d) If, by the date specified in Subsection (b)(4), a person requests in writing that the land use assumptions, capital improvements plan, or impact fee be updated, the governing body shall cause an update of the land use assumptions and capital improvements plan to be prepared in accordance with Sections 395.052-395.057.

(e) An ordinance, order, or resolution determining the need for updating land use assumptions, a capital improvements plan, or an impact fee may not be adopted as an emergency measure.

Sec. 395.058. ADVISORY COMMITTEE.

(a) On or before the date on which the order, ordinance, or resolution is adopted under Section 395.042, the political subdivision shall appoint a capital improvements advisory committee.

(b) The advisory committee is composed of not less than five members who shall be appointed by a majority vote of the governing body of the political subdivision. Not less than 40 percent of the membership of the advisory committee must be representatives of the real estate, development, or building industries who are not employees or officials of a political subdivision or governmental entity. If the political subdivision has a planning and zoning commission, the commission may act as the advisory committee if the commission includes at least one representative of the real estate, development, or building industry who is not an employee or official of a political subdivision or governmental entity. If no such representative is a member of the planning and zoning commission, the commission may still act as the advisory committee if at least one such representative is appointed by the political subdivision as an ad hoc voting member of the planning and zoning commission when it acts as the advisory committee. If the impact fee is to be applied in the extraterritorial jurisdiction of the political subdivision, the membership must include a representative from that area.

(c) The advisory committee serves in an advisory capacity and is established to:

(1) advise and assist the political subdivision in adopting land use assumptions;

(2) review the capital improvements plan and file written comments;

(3) monitor and evaluate implementation of the capital improvements plan;

(4) file semiannual reports with respect to the progress of the capital improvements plan and report to the political subdivision any perceived inequities in implementing the plan or imposing the impact fee; and

(5) advise the political subdivision of the need to update or revise the land use assumptions, capital improvements plan, and impact fee.

(d) The political subdivision shall make available to the advisory committee any professional reports with respect to developing and implementing the capital improvements plan.

(e) The governing body of the political subdivision shall adopt procedural rules for the advisory committee to follow in carrying out its duties.

SUBCHAPTER D. OTHER PROVISIONS

Sec. 395.071. DUTIES TO BE PERFORMED WITHIN TIME LIMITS.

If the governing body of the political subdivision does not perform a duty imposed under this chapter within the prescribed period, a person who has paid an impact fee or an owner of land on which an impact fee has been paid has the right to present a written request to the governing body of the

political subdivision stating the nature of the unperformed duty and requesting that it be performed within 60 days after the date of the request. If the governing body of the political subdivision finds that the duty is required under this chapter and is late in being performed, it shall cause the duty to commence within 60 days after the date of the request and continue until completion.

Sec. 395.072. RECORDS OF HEARINGS.

A record must be made of any public hearing provided for by this chapter. The record shall be maintained and be made available for public inspection by the political subdivision for at least 10 years after the date of the hearing.

Sec. 395.073. CUMULATIVE EFFECT OF STATE AND LOCAL RESTRICTIONS.

Any state or local restrictions that apply to the imposition of an impact fee in a political subdivision where an impact fee is proposed are cumulative with the restrictions in this chapter.

Sec. 395.074. PRIOR IMPACT FEES REPLACED BY FEES UNDER THIS CHAPTER.

An impact fee that is in place on June 20, 1987, must be replaced by an impact fee made under this chapter on or before June 20, 1990. However, any political subdivision having an impact fee that has not been replaced under this chapter on or before June 20, 1988, is liable to any party who, after June 20, 1988, pays an impact fee that exceeds the maximum permitted under Subchapter B by more than 10 percent for an amount equal to two times the difference between the maximum impact fee allowed and the actual impact fee imposed, plus reasonable attorney's fees and court costs.

Sec. 395.075. NO EFFECT ON TAXES OR OTHER CHARGES.

This chapter does not prohibit, affect, or regulate any tax, fee, charge, or assessment specifically authorized by state law.

Sec. 395.076. MORATORIUM ON DEVELOPMENT PROHIBITED.

A moratorium may not be placed on new development for the purpose of awaiting the completion of all or any part of the process necessary to develop, adopt, or update land use assumptions, a capital improvements plan, or an impact fee.

Sec. 395.077. APPEALS.

(a) A person who has exhausted all administrative remedies within the political subdivision and who is aggrieved by a final decision is entitled to trial de novo under this chapter.

(b) A suit to contest an impact fee must be filed within 90 days after the date of adoption of the ordinance, order, or resolution establishing the impact fee.

(c) Except for roadway facilities, a person who has paid an impact fee or an owner of property on which an impact fee has been paid is entitled to specific performance of the services by the political subdivision for which the fee was paid.

(d) This section does not require construction of a specific facility to provide the services.

(e) Any suit must be filed in the county in which the major part of the land area of the political subdivision is located. A successful litigant shall be entitled to recover reasonable attorney's fees and court costs.

Sec. 395.078. SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENTS.

An impact fee may not be held invalid because the public notice requirements were not complied with if compliance was substantial and in good faith.

Sec. 395.079. IMPACT FEE FOR STORM WATER, DRAINAGE, AND FLOOD CONTROL IN POPULOUS COUNTY.

(a) Any county that has a population of 3.3 million or more or that borders a county with a population of 3.3 million or more, and any district or authority created under Article XVI, Section 59, of the Texas Constitution within any such county that is authorized to provide storm water, drainage, and flood control facilities, is authorized to impose impact fees to provide storm water, drainage, and flood control improvements necessary to accommodate new development.

(b) The imposition of impact fees authorized by Subsection (a) is exempt from the requirements of Sections 395.025, 395.052-395.057, and 395.074 unless the political subdivision proposes to increase the impact fee.

(c) Any political subdivision described by Subsection (a) is authorized to pledge or otherwise contractually obligate all or part of the impact fees to the payment of principal and interest on bonds, notes, or other obligations issued or incurred by or on behalf of the political subdivision and to the payment of any other contractual obligations.
(d) An impact fee adopted by a political subdivision under Subsection (a) may not be reduced if:

(1) the political subdivision has pledged or otherwise contractually obligated all or part of the impact fees to the payment of principal and interest on bonds, notes, or other obligations issued by or on behalf of the political subdivision; and

(2) the political subdivision agrees in the pledge or contract not to reduce the impact fees during the term of the bonds, notes, or other contractual obligations.

Sec. 395.080. CHAPTER NOT APPLICABLE TO CERTAIN WATER-RELATED SPECIAL DISTRICTS.

(a) This chapter does not apply to impact fees, charges, fees, assessments, or contributions:

(1) paid by or charged to a district created under Article XVI, Section 59, of the Texas Constitution to another district created under that constitutional provision if both districts are required by law to obtain approval of their bonds by the Texas Natural Resource Conservation Commission; or

(2) charged by an entity if the impact fees, charges, fees, assessments, or contributions are approved by the Texas Natural Resource Conservation Commission.

(b) Any district created under Article XVI, Section 59, or Article III, Section 52, of the Texas Constitution may petition the Texas Natural Resource Conservation Commission for approval of any proposed impact fees, charges, fees, assessments, or contributions. The commission shall adopt rules for reviewing the petition and may charge the petitioner fees adequate to cover the cost of processing and considering the petition. The rules shall require notice substantially the same as that required by this chapter for the adoption of impact fees and shall afford opportunity for all affected parties to participate.

Sec. 395.081. FEES FOR ADJOINING LANDOWNERS IN CERTAIN MUNICIPALITIES.

(a) This section applies only to a municipality with a population of 105,000 or less that constitutes more than three-fourths of the population of the county in which the majority of the area of the municipality is located.

(b) A municipality that has not adopted an impact fee under this chapter that is constructing a capital improvement, including sewer or waterline or drainage or roadway facilities, from the municipality to a development located within or outside the municipality 's boundaries, in its discretion, may allow a landowner whose land adjoins the capital improvement or is within a specified distance from the capital improvement, as determined by the governing body of the municipality, to connect to the capital improvement if:

(1) the governing body of the municipality has adopted a finding under Subsection (c); and

(2) the landowner agrees to pay a proportional share of the cost of the capital improvement as determined by the governing body of the municipality and agreed to by the landowner.

(c) Before a municipality may allow a landowner to connect to a capital improvement under Subsection (b), the municipality shall adopt a finding that the municipality will benefit from allowing the landowner to connect to the capital improvement. The finding shall describe the benefit to be received by the municipality.

(d) A determination of the governing body of a municipality, or its officers or employees, under this section is a discretionary function of the municipality and the municipality and its officers or employees are not liable for a determination made under this section.

Sec. 395.082. CERTIFICATION OF COMPLIANCE REQUIRED.

(a) A political subdivision that imposes an impact fee shall submit a written certification verifying compliance with this chapter to the attorney general each year not later than the last day of the political subdivision's fiscal year.

(b) The certification must be signed by the presiding officer of the governing body of a political subdivision and include a statement that reads substantially similar to the following: "This statement certifies compliance with Chapter 395, Local Government Code."

(c) A political subdivision that fails to submit a certification as required by this section is liable to the state for a civil penalty in an amount equal to 10 percent of the amount of the impact fees erroneously charged. The attorney general shall collect the civil penalty and deposit the amount collected to the credit of the housing trust fund.

APPENDIX E

Resources

Web Resources

Impact Fees
NAHB www.nahb.org/infrastructurefinance
Impact Fees.com (Duncan and Associates) www.impactfees.com
National Impact Fee Roundtable www.impactfees.org
National Association of REALTORS http://www.realtor.org/library/library/fg805
American Planning Association http://www.planning.org/policyguides/impactfees.html
HUD http://www.huduser.org/publications/affhsg/impactfees.html

School Impact Fees
National Clearinghouse for Educational Facilities www.edfacilities.org/rl/impact_fees.cfm

Infrastructure Finance Alternatives
Council of Development Finance Agencies www.cdfa.net
National Conference of State Legislatures www.ncsl.org

NAHB PUBLISHED RESOURCES

An Overview of Special Purpose Taxing Districts Proportionate-Share Impact Fees
Building for Tomorrow: Innovative Infrastructure Solutions
Infrastructure Finance: Does Your State Encourage Innovation
Infrastructure Solutions – Best Practices from Solution Oriented States