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Using impact fees

Was Secaucus' use of Xchange fees legitimate?

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A critical deadline is fast approaching for the Secaucus Recreation Center, and the financing of the facility's construction highlights the issue of how impact fees paid by developers should, or shouldn't, be used.

Sometime within the next few months, the Town Council is almost certain to abandon the current health club, membership-based business model that has been used to raise operating expenses at the facility that opened its doors in December 2008.

Already losing about $500,000 annually, the center was a promising idea that many residents believe quickly turned into a financial albatross.

The $12 million facility was funded through a variety of sources, including $5 million in impact fees that are being paid over time by Xchange developer Fraternity Meadows, a subsidiary of Atlantic Realty.

The town negotiated a per unit impact fee with the developer but put the money in the general fund.

Supporters of the Recreation Center have argued that getting this $5 million commitment was a great benefit to Secaucus and enabled the town to build a much needed facility.

"It's the first time ever that a developer came into Secaucus to build and make money here and actually gave something back," former Mayor Dennis Elwell told a skeptical resident in 2008. "This was an opportunity for us."

Others who support the idea of the recreation center, but who opposed the way in which it was approved and financed, including current Mayor Michael Gonnelli, have countered that the $5 million in impact fees should not have been allocated to the facility's construction. They've argued that the money from the developer should have been used for other purposes.

"I've said all along an impact fee should be used for just that: it should be used to offset the financial impact the town is going to have as a result of this new development," said Gonnelli. "Those impacts are things like roads, police, fire, [Emergency Medical Services], and children. We're going to get a lot of school kids as a result of this development."

According to a Secaucus Board of Education document obtained by the Reporter, the town is already bussing 70 students from the Xchange development to Secaucus' four public schools, in addition to one pre-kindergarten student who is not bussed.

"I think the impact fee should have been put towards those things," says Gonnelli, who was not on the Town Council when the Recreation Center was approved.

Had the Recreation Center become financially self sufficient through membership dues, as its supporters had planned, and had the recession not hit, it's likely there would be no scrutiny of the facility, its building costs, financing, or operating expenses.

But with the center taking on big losses and the council scrambling to stop the financial hemorrhaging, every aspect of the facility is now being examined and evaluated, as is the question of how impact fees paid by developers should – and should not – be spent by a municipality.

Looking for funding

Impact fees gained popularity in the 1980s, according to urban planners Julian Conrad Juergenmeyer and Ben F. Johnson, when inflation was high, the federal government cut back on its funding of local government initiatives, and property owners began to vocally oppose constant tax increases to fund municipal expenses. These factors, according to the pair, forced local governments, like Secaucus, to "look elsewhere to fund the ever-increasing demands of constituents."

Local governments began looking at proprietary fees as a model that could be adapted to fund infrastructure needs.

Long before the 1980s municipalities already had a long history of charging property owners to connect to sewer and water lines. Adopting the evolving notion that development should pay for itself, towns began charging nominal fees for such infrastructural needs as road development. Landmark court cases eventually struck down these fees for being unconstitutional taxes on new development and municipalities were forced to revise their fee structure. Now, municipalities can only charge what are known as "in lieu fees" that are reasonable and proportional to the impact of a new development.

Xchange: $2,801 per market rate unit

To get a handle on the possible financial impact Xchange would have on the town, Secaucus commissioned a study by Rutgers University's Edward J. Bloustein School of Planning and Public Policy. According to the lengthy 125-page report, the Xchange development "at its approximate 10-year build out, will generate approximately 4,124 persons and 303 public school children, representing an increase of 26 percent and 16 percent, respectively, to Secaucus' current population…and a similar 16 percent to the current enrollment…of the Secaucus School District."

Much of the report goes on to address the development's likely impact on the local school system, although it also includes some dollar estimates regarding the likely impact of the development on police, public works, EMS and fire services.

Based on these estimates, the town negotiated a per unit impact fee with the developer.

Under the developer's original plan, Xchange, which is being built over a number of years and in several phases, would include 1,805 market rate housing units and 170 affordable housing units. In an agreement made with the town in September 2007, the developer agreed to pay Secaucus a $2,801 impact fee for each unit of market rate housing built. The fees collected by the town would eventually total $5,055,805.

The total number of units to be built, including the number of market rate and affordable housing units, has shifted several times since Xchange broke ground. But in several ordinances and other public documents the purpose of the impact fee is "to offset the anticipated fiscal impacts of the project."

No document explicitly details what those "fiscal impacts" might be. But residents who were critical of the Recreation Center early on – most notably residents Sam Maffei and Frank MacCormack – believe it does not constitute a legitimate "impact," and the money collected should have been used for schools, roads, police, fire, and EMS.

Nexus or not?

The accounting and tracking of the Xchange money has yet to become a controversy in Secaucus, but it could become one down the line.

Secaucus applies its impact fee money to the municipal general fund, which according to Dwight H. Merriam, a land use attorney with the law firm of Robinson & Cole, is highly unusual.

"Impact fees generally have to have a nexus or a connection to the development that is paying for them. The U.S. Supreme Court has found that when you exact something from somebody, which is what an impact fee is, certain standards have to met. One standard that has to be met is there has to be a qualitative connection between the exaction and the impact from the development…When you start taking money from a specific development and rolling it into the general fund, where it's used for improvements that are not needed to offset the impacts of the new development, then you run into the argument that there isn't a qualitative nexus," Merriam, who often represents developers, stated.

It is more common, he said, for impact fee payments to be kept separate from the general fund, say in a special escrow account that is used only for infrastructure near the development and other needs generated by the developement.

Ironically, he believes that "impacts" need not be limited to schools, roads, police, fire, and EMS. He believes that a facility such as a recreation center could be considered a "legitimate impact" since the residents of Xchange will have "recreational needs that will have to be met."

The mayor, however, countered: "The residents of Xchange, just like the residents at Harmon Cove, already have their own fitness facility included at the development."

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