Impact Fees

Smart Growth Recommendations from New Jersey Future

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How Can Impact Fees Help Achieve Smart Growth?

Quality of life for New Jersey's residents is in peril from uncoordinated and sprawling development. Expanding a town's authority to collect impact fees is now under consideration as a potential "smart growth" solution aimed at curbing this uncoordinated and sprawling development. In theory, impact fees are a simple and common sense approach to help pay for development. But simply charging developers more to build is not a smart growth solution. Absent a solid connection to good planning, impact fees could result in well-financed sprawl.

Generally, an impact fee is assessed by local governments on new development projects to help pay for infrastructure needed to serve that development. Such infrastructure could include roads and sewers. Unlike a subdivision or site plan ordinance – which requires the developer pay for or provide certain *on-site* infrastructure like sidewalks, streets and utility service within the development project itself – impact fees are spent on *off-site* infrastructure made necessary by the development.

Proponents see impact fees as alleviating the rise in property taxes that can accompany new development, as well as bringing a certain amount of fairness to existing residents. When impact fees are used, costs are "internalized" to the new development and existing taxpayers are not overly burdened by the costs of new development. Impact fees also offer the benefit of providing both builders and taxpayers with predictability. Builders will be able to accurately calculate costs associated with development, and taxpayers and planning officials will similarly be able to calculate the fees accompanying development in their town.

Critics see impact fees as an impediment to economic growth as well as a mechanism to unnecessarily increase development and housing costs. Critics argue in particular that impact fees will increase the cost of housing and end up hurting those least able to meet the state's high housing costs.

A recent Brookings Institution paper (Arthur C. Nelson and Mitch Moody, *Paying for Prosperity: Impact Fees and Job Growth*, Brookings Institution Center on Urban and Metropolitan Policy, 2003). looked at the question of impact fees and economic expansion as measured by job growth. It found that when all other factors were accounted for, impact fees actually facilitate job growth. Therefore it is critical from a smart growth perspective that impact fees be used in conjunction with sound land use planning in order to avoid sprawl. It's also critical that affordable housing be exempt from impact fees.

Smart Growth Recommendations in Brief

New Jersey Future supports legislation that would broaden impact fees only if there is a strong connection between impact fees and the State Development and Redevelopment Plan. The following would be necessary elements in an amendment to the Municipal Land Use Law authorizing broader impact fee ordinances:

1. Link fees to plan endorsement
2. Link fees to municipal capital improvement plans
3. Link fees to fees to State Development and Redevelopment Planning areas
4. Exempt affordable housing
5. Use fees as an incentive for plan endorsement
6. Regionalize impact fees to recognize cross-border impacts of development
7. Review and sunset impact fee legislation

For details, see page 4.

How Impact Fees Work

New Jersey is one of 22 states (see states list, below) that use some form of impact fees. New Jersey municipalities can require fees, or "contributions," from developers to be made in certain circumstances.

Impact fees operate under both state law as well as the complex and ill-defined limitations imposed by the United States Constitution. The New Jersey Municipal Land Use Law (MLUL) governs local land use authority. Under the MLUL (*N.J.S.A. 40:55D-42*), municipalities are allowed to impose on developers their pro-rata share of certain off-site improvements necessitated by construction within a proposed subdivision or development. By law municipalities can impose impact fees only to fund off-tract water, sewer, drainage and street improvements.

What is lacking under current law is authority to impose fees for things like public schools, other utilities (gas, electric, cable), open space, parks and recreational facilities, transit facilities, solid waste and recycling, public safety facilities, and libraries.

In recent years, the legislature has considered several impact fee bills which would expand the types of facilities that could be eligible for fees. Additionally, Governor McGreevey, in his 2003 State of the State address, pledged to work to provide municipalities with expanded authority to enact impact fees in order to combat sprawl. To do this it would be necessary to amend the MLUL to provide municipalities with broader powers to enact impact fee ordinances. If this is done, complex legal issues would arise.

Currently municipal authority to require developers to contribute to the cost of off-site improvements is limited to only those improvements for which the need arose as a direct consequence of the particular subdivision or development (*Swanson, et al, v. The Township of Hopewell, 149 N.J. 59, 65,* 1997). The New Jersey Supreme Court has traditionally required a strong "causal nexus" between off-site infrastructure and a development in order to justify a contribution or fee (*Holmdel Builders Assoc. v. Township of Holmdel et al, 121 N.J. 550, 571*). The term "causal nexus" is not clearly defined. Therefore, the exact scope of the types and location of infrastructure to be supported by impact fees is difficult to determine.

The U.S. Supreme Court does not offer much guidance on this issue. It has never ruled on impact fees directly. The closest it has come is a case from 1994, *Dolan v. City of Tigard, 512 U.S. 374*. (This case dealt not with an impact fee per se, but instead with a requirement that the land owner dedicate land to the town. But it is the closest the Court has come to addressing the impact fee issue.) There the Court established that in order for an exaction (the term for any monetary or in-kind contribution from a developer) to be constitutionally sound there must be an "essential nexus" between the exaction and a legitimate state purpose, and "rough proportionality" between the exaction and the impact of the development project. Therefore we are left to speculate about what the exact parameters of the law really are.

The legality of impact fees is a complex issue. Shaping an impact fee system to promote smart growth and the implementation of the State Plan in this context presents a challenge.

State Impact Fee Enabling Acts

Texas	1987
Maine	1988
California	1989
Vermont	1989
Nevada	1989
New Jersey	1989
Illinois	1989
Virginia	1990
West Virginia	1990
Washington	1990
Georgia	1990
Pennsylvania	1991
Oregon	1991
Arizona	1991
New Hampshire	1991
Indiana	1991
Maryland	1992
Rhode Island	1992
Idaho	1992
New Mexico	1993
Wisconsin	1994
Colorado	2001

Impact Fees: The Property Tax Connection

New Jersey relies more heavily than most states on local property taxes to fund key services and infrastructure including public schools, local roads and sewers. When taxes to pay for growth rise, current residents feel they are unfairly burdened by the new growth. In the 1990s, 139 New Jersey municipalities saw their property tax rates increase from 40 percent to more than 100 percent. Ironically these large increases can come from either new growth or loss of growth to sprawling new communities. In theory, impact fees could help reduce the need to keep raising taxes to pay for the infrastructure needed to support new development. But the reality is more complex.

Because municipalities are so dependent on property taxes to finance local services and infrastructure, especially schools, they often chase and compete for new development or "ratables" – even when the development doesn't fit the community's character, adds to traffic woes, and eliminates open land. Without a link to better planning and zoning, impact fees could spur this race by offering greater financial gains for towns seeking development.

Meaningful property tax reform could, in theory, help reduce the need for impact fees by establishing a better system for funding local governments. Until property tax reform takes effect, some argue that other measures such as impact fees are appropriate tools to assist local governments.

Impact Fees & Housing: A California Lesson

Despite a lagging state economy, housing production is up in California — housing production reached a 10-year high of 164,000 units in 2002. What is interesting is that even with a sluggish economy and an increase in production, home prices are still increasing. And what is even more interesting is that many local impact fees are also on the rise. Thus, it appears that impact fees in California are not deterring housing production.

The reason many local governments are raising impact fees in California is twofold. First, is the current state budget climate. Accompanying the increase in many impact fees was rhetoric about likely cuts in state support for local government. Like California, New Jersey is facing growing state budget problems which may result in less state support for local governments. Second is their experience lowering impact fees in the 1990s. In an attempt to stimulate housing production, many local governments cut impact fees in the 1990s. This did not work and housing production lagged the growing economy in the late 1990s.

California offers the lessons that impact fees, or even increasing impact fees, do not necessarily result in a drop in housing production.

Source: California Planning and Development Report

How Impact Fees Work in Other States

State	Link to Planning	Use Impact Fee for Schools	Use Impact Fee for Road Upgrades Only
Georgia	Yes	Yes	No
Idaho	Yes	Yes	No
Illinois	Yes	No	Yes
Indiana	Yes	No	No
Maine	Yes	No	No
Nevada	Yes	No	No
New Hampshire	No	Yes	No
Pennsylvania	Yes	No	Yes
Virginia	Yes	No	Yes
West Virginia	Yes	Yes	No

Recommendations & Checklist for Effective Impact Fees

New Jersey Future supports legislation that would broaden municipal impact fees if, and only if, there is a strong connection between the fees and the State Development and Redevelopment Plan. Simply charging developers more to build is not a smart growth solution. Indeed, absent a solid connection to good planning, impact fees could result in well-financed sprawl.

To promote smart growth and the implementation of the State Plan, the following would be necessary elements in an amendment to the MLUL authorizing broader impact fee ordinances:

1. **Link fees to plan endorsement.** New Jersey Future's favored approach would be to simply allow only municipalities that have plans endorsed by the State Planning Commission to impose impact fees. This would ensure that impact fees will be used in areas with smart growth land use regulations. It will also act as a much needed and powerful incentive for municipalities to come forward and seek plan endorsement.

2. **Link fees to municipal capital improvement plans**. Impact fees would reinforce better planning if made available only to municipalities with adopted capital improvement programs. A capital improvement plan lays out a scheme for providing public facilities and infrastructure to meet the needs of future development that will take place in accordance with the town's master plan and land use regulations. From a smart growth planning perspective it is critical to link impact fees to this capital improvement plan. Such linkage also provides greater transparency and predictability for all players. Developers who are paying fees have a right to know how the fees will be used, and the public deserves the assurance that the fees aren't driving development decisions.

3. **Link fees to State Development and Redevelopment Planning areas.** In addition to making impact fees contingent on plan endorsement and municipal capital improvement plans, impact fees could vary according to the planning area in which the project is located. For example, a project in PA 2, where redevelopment is desired, could have a lower impact fee than a project in PA 3, 4 or 5.

4. **Exempt affordable housing.** Impact fee legislation should not allow municipalities to avoid their constitutional obligation to provide affordable housing, or to raise the cost of affordable housing. Therefore, developments offering primarily affordable housing should be exempt from impact fees.

5. **Use impact fees as an incentive for plan endorsement.** New Jersey Future envisions that impact fee regulations will work in tandem with other land use tools. In our vision, such regulations will serve as an incentive for municipalities to bring their planning into line with the State Plan. Historic development patterns – governed by today's state and local development regulations – have resulted in the decreased quality of life in older urban and suburban areas as well as environmental degradation of open lands. Impact fees should be allowed in order to achieve smart growth and implement the State Plan.

6. **Regionalize impact fees to recognize cross-border impacts of development.** The small physical size of New Jersey, the large number of municipal governments, and the existing patterns of development mean nearly all new developments (beyond a minimal size) have impacts not only on the host municipality, but on surrounding municipalities. Impact fees could help minimize these impacts and promote smarter growth if they were administered across municipal boundaries under cooperative planning.

7. **Review and sunset impact fee legislation**. Municipalities should report regularly on the funds that become available as impact fees are collected, and what percentage of local costs they offset. After five years, the DCA and State Treasury should review impact fee use and report its findings to the legislature, to ensure impact fees are used in accordance with law, are fair, and do not drive but rather support planning decisions. The law should sunset in the sixth year.

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