Development Impact Fees: An Overview

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Tax or Fee?

- Tax
  - Forced contribution to raise revenue for the maintenance of governmental services offered to the general public
  - Levied whether or not one uses a particular service

Tax or Fee?

- Fee
  - Paid in exchange for a special service, benefit, or privilege not conferred upon the general public
  - Not a revenue measure but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege
  - Payment of a fee is voluntary (can refuse the special service, benefit, or privilege)

Evolution of Impact Fee Practice

- State law and home rule provisions
- State court decisions
  - *Homebuilders Association of Dayton and the Miami Valley v. City of Beavercreek* (Ohio 2000)
  - *Volusia County, etc., et al., v. Aberdeen at Ormond Beach, L.P., etc.* (Florida, 2000)
  - Tina Brown, First Home Builders of Florida, and Lee County Building Industry Association, Inc. v. Lee County, Florida (5/25/04)
- Federal and Supreme Court decisions
  - *Nollan v. California Coastal Commission* (1987)
  - *Dolan v. City of Tigard* (1994)

Clear Definition

An impact fee is a monetary exaction other than a tax or special assessment…that is charged by a local government agency to an applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project.

(CA Government Code)

Fee-Eligible Public Facilities Frequently Named in State Laws

- Water supply, treatment, and distribution facilities
- Wastewater collection and treatment facilities
- Storm water drainage and flood control facilities
- Roadway facilities

Fee-Eligible Public Facilities Sometimes Named in State Laws

- Parks and recreation facilities
- Municipal office facilities
- Public safety facilities
- Public library facilities
- Public school facilities

States that Enable Impact Fees for School Construction*

- Florida
- New Hampshire
- Oregon (allows school districts to assess impact fees)
- Washington

*Partial list

Elements of Enabling State Legislation

- Authority to assess impact fees
- Local ordinance
- Geographic service areas for specificity of fee calculation
- Comprehensive development plan
- Capital improvement program
- “Rational nexus” for the fee

Elements of Enabling State Legislation (cont.)

- Fee not to be used for existing deficiencies
- Credits
- Timelines for payment
- Standards for challenging fees
- Segregated funds

Elements of Enabling State Legislation (cont.)

- Timeline for expenditures
- Provision for refunds
- Entitlement to use of service, benefit, or privilege by property owner
- Exemptions/waivers
- Advisory Committee

Authority to Assess

- Impact fee legislation should clearly state the types of jurisdictions that are authorized to impose impact fees

Authority to Assess: Examples of Current Practice

- Local government (IL, IN, NV, OR)
- Counties (AZ, GA, NM, WV)
- Municipalities/Cities (GA, ME, NH, NM, VT)
- Political Subdivisions (TX)
- Intergovernmental Agreements (cities, counties, schools, special districts, and the state) (GA, NM)

Virginia

- Counties with a population over 500,000, adjacent counties and cities, cities adjacent to the adjacent counties and cities and towns in such counties

Local Ordinance

- Fees are assessed locally through the passage of a local ordinance
- Provisions must be carefully drafted to withstand court challenges
- Specifies criteria for consideration in the calculation or formula for determining impact fee assessments

Local Ordinance (cont.)

- Some states provide guidance for local ordinances (+20 states), including provisions for notice and public hearings
- Some states permit the ordinances under “home rule” statutes (CA, FL, KS, OH)

Service Areas

- Designation of a specified geographic area to be served within a jurisdiction
- Helps clarify which development will benefit from specific services for which the fee is assessed

School Districts as Service Areas

- In Washington, each school district may be designated a separate service area and may have different impact fees depending on local costs; however some districts cross political jurisdictions where fees differ

Comprehensive Development Plan

- Land use assumptions on which to base cost predictions for needed public facilities
  - Use
  - Density
  - Intensity

Capital Improvement Program

- Definition of capital improvement for the purpose of fee calculation
  - Land
  - Buildings
  - Durable equipment and machinery
  - Paving
  - Landscaping
  - Grading
  - Associated engineering costs

Capital Improvement Program

- Fees do not cover costs for
  - Supplies
  - Salaries
  - Training
  - Maintenance and repairs
  - Administrative costs, program operating costs, etc.
- Use of impact fees to pay interest on debt service is controversial
- Facilities must have a life expectancy of three or more years and are owned and operated by or on behalf of a local government (TX)

Rational Nexus

- Needs test: reasonable connection between the need for additional facilities and the growth resulting from the new development
- Proportionality test: fee must represent the developer’s proportionate share of the costs incurred, with no excess
- Benefits test: fee collected must actually, but not exclusively, benefit the development more than the general public

New Development versus Existing Deficiencies

- A fee cannot be imposed to address existing deficiencies except where they are exacerbated by new development
- Funds cannot be used to provide facilities which exceed the level of those available to the general public unless available public funds are designated to upgrade the non-impacted facilities

Credits

- Credits must be given for outside funding sources (e.g., federal and state grants), developer initiated improvements, in-kind contributions, and local tax payments which fund capital improvements
- These credits will reduce the overall impact fee to be paid by the developer

Timeline for Payments

- Specified in the enabling legislation.
- Most jurisdictions collect the fee at the time of plat approval or when the building permit is approved.
- Some jurisdictions allow partial payment initially followed by a second payment at the time of occupancy

Standards for Challenging

- Provision for the developer to provide an independent fee calculation to counter perceived errors in the original calculation
- Provision for administrative and court appeals by developers who believe they have been unfairly treated, to avoid costly litigation (IN)

Segregated Funds

- Funds received under the impact fee program must be segregated from the general fund and used solely for the purposes for which the fee is established
- Regular auditing and public reporting must be a component of the funding requirements

Timeline for Expenditures

- Typically 5-6 years from the time the funds are received.
- Refunds may be required after the time for construction of capital facilities has expired
- No refunds required if construction has been completed but contractor has not been paid by the jurisdiction

Refunds

- Provisions must be included in the ordinance to permit refunds for projects that are not constructed
- The ordinance should specify the recipient of the refund. Some states specify the developer, some the property owner of record at the time of the refund, and some do not specify.

Entitlement

- The payment of impact fees entitles the owners in the development/service area to use the facilities built with their fees
- While they are the primary beneficiaries, they do not have to be the sole beneficiaries

Exemptions

- Used to encourage specific types of development
  - Affordable housing
  - Developments that create employment (WV)
  - Overriding public purpose
- May require an alternate source of revenue to offset the fee that the exempted development would have paid

Advisory Committee

- Where included, usually requires an impact advisory fee committee of 5-10 members, with at least 40% representing the development, building or real estate industries.
- Sometimes includes a requirement that no member be an elected official
- Not practical in small communities

Food for Thought

- Who really pays?
- Who benefits?
- What unit of assessment is most equitable?
- Are impact fees equitable across districts?
- What is the effect of impact fees on passage of school bond and operating issues?
- Do impact fees help or hinder development?
- What alternatives are available?

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