Special Report

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Rethinking School Impact Fees

Introduction

The Growth Management Act of 1990 authorized cities and counties in Washington state to impose fees on developers of property to mitigate the impact of new development on public infrastructure. Impact fees are most often used for such facilities as roads, water and sewer systems. The Growth Management Act authorized their collection for schools as well, on the premise that new development should pay for a proportionate amount of capital costs created by the new enrollment it generates. Numerous jurisdictions, including most of those planning under GMA, today utilize these fees to supplement traditional sources of funding for the construction of school facilities. Others persist in assessing fees for school impacts under the authority of the State Environmental Protection Act (SEPA), creating a dual system of impact fees with very different sets of rules.

The growing use of school impact fees subsequent to GMA has coincided with a deep and chronic shortfall in dedicated revenues for the state's school construction assistance program, which provides reimbursement grants to school districts for eligible capital expenditures. As a result, the state has had difficulties directing funds to school districts for eligible projects in a timely manner. At the same time, school districts must contend with reluctance by taxpayers to support excess levies or bond issues for school construction purposes. Thus impact fees, if a marginal source of revenues at present, may be taking on a more significant role in the financing of educational infrastructure in the state. As school impact fees grown in their prevalence and in the revenues collected, concerns have arisen about the manner in which they are imposed and expended, and their implications for educational equity.

In this study, we assess the merits of impact fees as a school finance mechanism, and identify the strengths and weaknesses of the statutory framework within which they are imposed in Washington state. As background, we explain the shortcomings of the state's present system for financing school construction. We then survey the use of school impact fees by Washington jurisdictions. We examine the operation of impact fees in selected cities, counties and school districts to illustrate some of the issues raised by the present system. We close with a set of recommendations for legislative and administrative actions that might make school impact fees a more equitable, understandable and accountable local revenue source, and perhaps reduce some of the present dissatisfaction with them among both payers and users of the fees.

In our research we relied in large part on questionnaire responses from and personal interviews with city, county and school district officials. We also consulted with attorneys specializing in land use regulation and with members of the building, development and real estate industries. We conducted a close analysis of local impact fee ordinances, capital facilities plans and available fee rate studies. For reasons of manageability, we confined our data collection to jurisdictions in western Washington. We discussed construction issues with staff of the state Office of Superintendent of Public Instruction and the Washington Legislature, and impact fees with staff at the Department of Community, Trade and Economic Development and the Office of State Auditor. We also conducted a review of literature on impact fees and other types of development exactions.

Given the difficulty in obtaining systematic information about school impact fees and the limited resources for this study, our intent here is not to present a comprehensive analysis of the impact fee system. Our hope is that our study will, at the least, stimulate discussion about impact fees, identify avenues for further research, and suggest some directions for change.

Background: Washington's school construction problem

Under the state's present system of financing school construction, state government provides funds to local school districts on a matching basis for capital costs meeting certain criteria set out in regulations promulgated by the State Board of Education.

The state determines its share of the cost of school projects through a statutory formula that measures the district's wealth per pupil in relation to other districts. The formula is designed to produce an average state share of 50 percent of eligible costs. To qualify for assistance, school districts must (1) demonstrate need, in terms of unhoused students or facility condition, and (2) demonstrate that they have, through a bond issue, capital project excess levy, or a combination of revenue sources, authorized sufficient local funds to cover the formula-driven local share of project costs. (About 43 percent of local school bond issues have passed during the last five years, and about 67 percent of capital project levies.) The Washington Administrative Code (WAC 180-27-035) authorizes school districts to use impact fees collected under the Growth Management Act—but not under any other authority—as part of the required local match. Eligible projects receive state assistance on the basis of a priority system also set by administrative rule. (Office of Superintendent of Public Instruction, *Financing and Organization of Public Schools*, 77.)

Since 1965, the state has financed the school construction assistance program from revenues in a constitutionally dedicated fund, the Common School Construction Fund. Revenues to the Common School Construction Fund have been derived primarily from the sale of timber harvested on state lands that were set aside in trust to fund education when Washington attained statehood in 1889. When revenues in the Common School Construction Fund are insufficient, the state is authorized to sell bonds payable from interest earned on funds in the state's Permanent Common School Fund.

During the 1980s the state was able to meet all of the need for school construction funding from timber revenues or from bonds supported by the permanent fund. During this decade, however, revenues from these sources have been insufficient to meet the demands for school construction aid. This, in turn, has forced the state to search for alternative sources of revenue.

First, a series of governmental and judicial acts, including the federal Endangered Species Act and a ban on the export of raw logs, have contributed to a decline in revenues from timber sales on the school trust lands. According to a forecast by the Department of Natural Resources, trust land revenues will fall from a peak of $103 million in 1990 to about $46 million this year. Revenues are projected to begin rising again next year, with a significant upturn in 1996, but will not approach the levels, in real terms, attained in the 1970s. State Public Lands Commissioner Jennifer Belcher testified to the House Education Committee in September 1994 that about $100 million per year in timber revenues are needed to meet construction needs, and that it is unlikely that the state can overcome the legal restrictions on the cutting of trees required to achieve that. The addition of the marbled murrelet to the Endangered Species List is just the latest hurdle. Every time a species is listed, she told the committee, that has an impact on school construction as Figure 1 indicates, however, market forces alone make timber sales from state lands an unstable and unreliable source of funding for as basic and ongoing a need as school facilities, even if the we'd never heard of the spotted owl or the marbled murrelet.

The stagnating revenues to the Common School Construction Fund would not be such a problem were we not also in a period of rapidly escalating school enrollment. After a stretch of flat or declining enrollment in the 1970s and early 1980s, the Baby Boom echo and increased migration to the state have propelled many thousands of new pupils into Washington schools. The Office of Financial Management forecasts an additional 118,694 students between the present school year and 2000-2001. As Figure 1 shows, with the exception of 1996, school enrollment will outpace growth in trust land revenues through at least the rest of the decade.

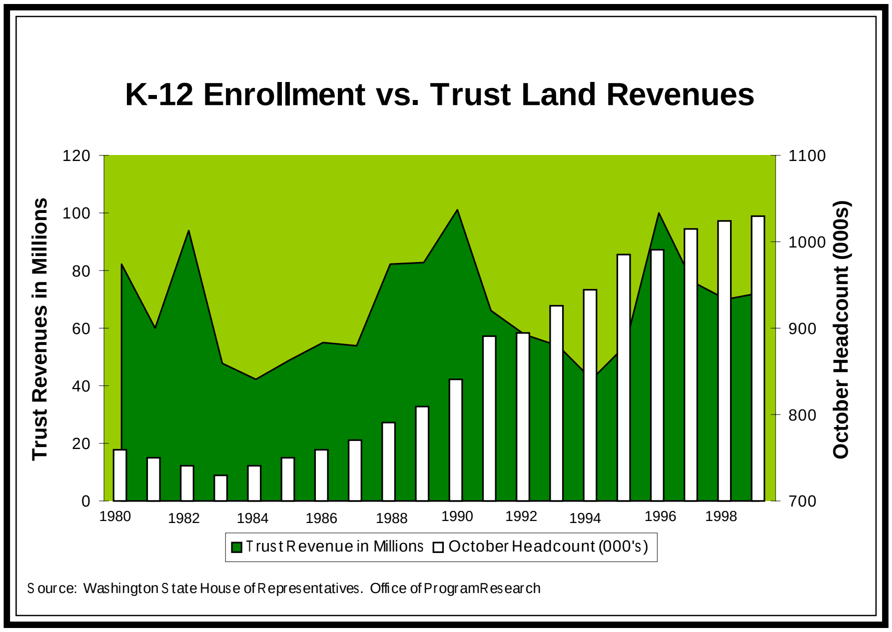

FIGURE 1

Bill Robinson, an analyst in the House Capital Budget Committee, points out that the aggregate enrollment data mask two additional drivers of demand for school construction: the interdistrict movement of students in a highly mobile society, and the projected aging of the school cohort through the 1990s, creating a need for more expensive, secondary school facilities. Robinson speculated at the House hearing in September that an increasing rate of local levy approval will place still higher costs on the state for school construction.

To make up for the shortfall in the Common School Construction Fund and meet the increased demand, the state has been supplementing revenues from trust lands through the issuance of general obligation bonds and through General Fund appropriations. During the first half of the 1990s, only 45 percent of school construction requirements will have been paid from school trust timber revenues. In the current biennium the state has appropriated $30 million from the General Fund and added $29 million in general obligation bonds, but total funding capacity will still fall $97 million short of eligible project costs to the state. In September 1994, the House Office of Program Research projected a gap of $243 million between trust land revenue and the total potential demand for school construction aid in 1995-1997. Newer estimates place the shortfall at closer to $400 million.

Initiative 601, which caps annual expenditures in the state general fund at a formula-driven level beginning with fiscal 1996, will make it more difficult in the future to supplement lagging timber revenues with general fund dollars. State bonds are also a limited option for school construction. As taxes are cut in response to the lower spending levels allowed by I-601, the state's legal debt limit, which is tied to tax revenues, becomes tighter, leaving little room to add school construction to the long list of priorities already assigned to the capital budget. A task force convened by Commissioner Belcher has searched over the past several years for potential solutions to the problem. One proposal would appropriate a significant amount of general fund dollars over the next few biennia to a new endowed fund for school construction. Invested appropriately, the resources in that fund would provide a stable stream of revenue for school building projects into the next century.

In a questionnaire sent to counties, cities and school districts in the Puget Sound region, the Research Council asked planning officials how the state's overall system for financing school construction might be improved. We summarize a few of those responses below.

- "Shortfalls in the state's participation caused by drop-offs in timber sales and the effects of Initiative 601 will create increasing inequities in educational opportunity based on the condition of the local tax base and the peculiarities of the local electorate…In the absence of greater state financial help, the 60 percent approval requirement for local bond issues should be relaxed--say to 55 percent--facilitate the raising of local revenues to do the job…(Snohomish County)

- "Allocate sufficient funding to cover the Common School Construction Fund requirements. Increase the impact mitigation fee to equal the actual costs thereof." (Central Kitsap School District, Silverdale)

- "The [state reimbursement assumption of] square feet per student should be raised to a reasonable level. The priority system should be modified to be more favorable to new construction needs." (Evergreen School District, Vancouver)

- "The state's priority system is sound, but woefully underfunded …State revenues need to be tied to a more stable resource than timber harvesting. This system is old and is no longer valid. Impact fees provide a valid, third source of funding…" (Olympia School District)

While the state searches for a long-term solution to its school construction financing problem, the pressure is likely to grow on local governments to shift, wherever possible, the costs of increased demands on school facilities to new development.

How prevalent is the use of impact fees?

Impact fees have become an increasingly popular tool in the United States for financing capital construction by local governments. According to the U.S. Department of Housing and Urban Development, "Use of impact fees increased greatly in the past two decades as many of the nation's communities experienced unprecedented, rapid growth accompanied by decreasing financial resources. Local decision makers, fearful revenue for capital facilities would not keep pace with demand, began to shift the burden of paying for the facilities to the buyers of new homes—those believed to create the need." (HUD,v.) The rise of impact fees has a number of causes, including a diminished commitment by federal, state and local governments to financing community facilities over the last three decades, the taxpayer revolt of the 1970s, and the environmental movement, which challenged the idea that growth was fundamentally good, and eventually paid for itself.

A 1989 survey of local governments by the Government Finance Officers Association (GFOA) showed jurisdictions in 36 states reporting use of impact fees (though in some only one or two large jurisdictions were using them. Water, sewer, parks and recreation, and roads were by far the most common types of facilities financed by them. (Leithe and Montavon, 12.) HUD reports that impact fees exist today under one name or another in all fifty states. Sixteen states, including Washington, have statewide legislation that specifically authorizes localities to impose impact fees. Seven other states have some more general form of enabling legislation. (HUD, 17.)

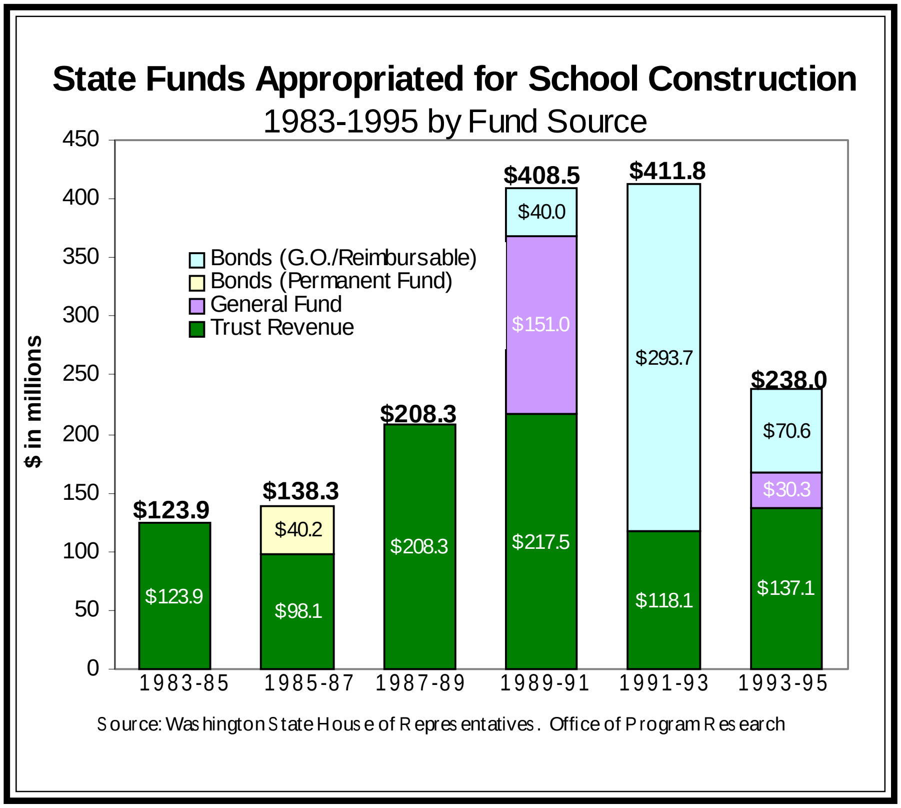

FIGURE 2

Because there has been no requirement for the reporting of impact fee ordinances or revenues to any state agency or other clearinghouse, it is difficult to determine with precision the extent of impact fee use in Washington state. This is a huge information gap that handicaps not only researchers but legislators and other government officials in their efforts to understand and evaluate impact fees as a public finance tool in this state. The Department of Community, Trade and Economic Development, which oversees the implementation of the Growth Management Act, has thus far not collected systematic information on the fees that have been adopted under the act. As best as we have been able to determine, at least 37 counties and cities impose impact fees for one purpose or another under one or another statutory authority. Transportation-related fees appear to be the most common. According to our survey, at least 17 cities and counties collect school impact fees for at least 39 school districts in the state.

Nor, despite the proliferation of impact fees since 1990, is it possible to make a reasonable estimate of the amount of local government revenue being collected from this source. The State Auditor established a separate account code for impact fees (344.85), for use in the standard local government accounting system beginning in 1991. In time, this may provide a reasonably reliable means of determining the growth and reliance on impact fees. Thus far, however, many jurisdictions have failed to report the revenues they've received from this source under this account code, making the Auditor's data of little value. Summary data prepared for us by the Auditor's office shows a total of $860,781 in impact fees collected in 1992, followed by a jump to about $6.8 million in 1993. Neither of these totals, however, includes data for King County, which clearly surpasses any other jurisdiction in impact fee collections.

In the absence of reliable statewide data, some local records suggest the increasing amounts of impact fees being collected. The City of Olympia, for example, increased its collections for the Olympia School District from $1,703 in 1992, to $84,535 in 1993, to $326,968 as of October 1994. King County reports that impact fee receipts totaled $92,941 in 1991, $1,409,903 in 1992 and $2,769,330 in 1993.

Impact fees as an infrastructure financing tool

In the following sections, we examine impact fees as a tool of public finance, and establish some criteria for proper use of this revenue mechanism. This discussion will provide the basis for evaluating Washington's impact fee law and the actual use of these fees by its cities and counties.

By the term impact fee, we mean "a monetary charge imposed by local government on new development to recoup or offset a proportionate share of public capital costs required to accommodate such development with necessary public facilities." (Nicholas, 1) By this definition we exclude land dedications or other in-kind exactions on builders and developers imposed to mitigate asserted impacts of property development on public infrastructure.

The fundamental rationale for impact fees is that while new development does pay for required capital facilities through local taxes and user fees, and while other sources, such as state and federal grants, may also contribute, these payments are not sufficient to cover all of the capital costs created by the development. In other words, growth—in particular residential growth—cannot be presumed to pay for itself. According to Altshuler and Gomez-Ibanez,

The available evidence shows that development does not cover new public costs; that is, it brings in less revenue for local governments than the price of servicing it. Development typically pays its own way less often than was thought in the 1950s and 1960s, partly because of changes in fiscal conditions and partly because past studies understated the capital costs of growth. Many types of development do not meet rising infrastructure demands, particularly in rapidly growing communities, at difficult-to-service sites, and where costly retrofitting of existing infrastructure is required. (Altshuler and Gomez-Ibanez, 77.)

If growth does not pay for itself, then the excess costs of development are imposed, in the form of higher taxes and fees, on existing residents, who had no part in the decision to develop the property, and who are seen as obtaining no benefit from it. “Clearly a community may pay for needed facilities,” says James C. Nicholas of the University of Florida. “But *must* it? Increasingly the answer is that a community need not absorb all costs but may impose a proportionate, or fair, share of such costs upon new development.” (Nicholas, *JAPA*, 2, and Snyder and Stegman, *Paying for Growth,* 57.)

That is not to suggest anything resembling unanimity on the economic impacts of growth, or on the validity of impact fees. Geographers Richard Morrill and David Hodge of the University of Washington reject the notion that new development is a net cost to society, and that its costs should be born up front by the developers in the form of fees and exactions. “Residential, commercial and industrial development is not a long-term cost or burden, but repays itself over time through taxes and the contributions of the new citizens,” they argue. “Housing is not a net cost, but a precious investment and asset.” The new citizens who ultimately bear the costs of impact fees, they say, also create the new products and services, buy the goods, and pay the taxes that support urban service. “For generations, new development has provided its internal infrastructure and typically has provided assistance or mitigation to the wider community through access roads, utility extensions, school and park land.” There is no reason, they suggest, to believe that they cannot do the same today.

There is also little question that impact fees offer political attractions to local communities with infrastructure needs, especially those that may have deferred investment in such infrastructure in the past. “After all, the voters to whom the burden will be shifted are not present to oppose the measure or campaign against the elected officials responsible for adoption, and the chief beneficiaries are the existing residents whose votes at the next election are highly prized,” point out James E. Frank and Paul B. Downing of Florida State University. “Passing bond issues and building facilities prior to the arrival of projected student increases is an ideal that is seldom met,” notes a report by the Tahoma School District. “Voters are reluctant to burden themselves with additional taxes when a pressing evident need isn’t apparent.” Impact fees offer a path of escape from this political problem. They’re paid in large part by people from outside the district, and don’t require the consent, as do local taxes, of those on whom most of the burden falls.

Who pays impact fees? The housing affordability issue

One of the chief criticisms of impact fees is that they tend to price new housing out of the means of many people of low or moderate income, creating a special hardship for young families seeking to buy their first homes, and for older people buying down in their retirement. The incidence of impact fees—the "who pays?" question—is a highly disputed matter. It is beyond the scope of this study to examine this issue at any length; but it cannot be avoided entirely, because the assumptions we make about incidence have implications for the equity of school impact fees applied in Washington.

The most common assumption is that the burden of impact fees falls not on the developer, but on the homebuyer in the form of higher housing prices. "Most builder/developers maintain that the fee is a cost of house production, and include it in the selling price like other production costs," says the Department of Housing and Urban Development. "Local officials likewise tend to presume the cost…is borne by home buyers." (HUD, vi.) Washington builders and developers appear to have little doubt of this. Bill Hewitt, a Vancouver builder, says that every fee charged to development is a line item that you have to include when you go to the bank for financing. "The price of your house has to demonstrate that you've added in all the fees as a cost of development. Banks don't let developers absorb those costs," he says, and so force them to pass fee costs on to buyers.

Richard Morrill of the University of Washington calls it "straight economic theory": developers have to pass those costs on, he says, because changes in the value of land are built into the price of housing. Because the higher land cost then is carried through all the transactions involved in the development process, the ultimate cost borne by the buyer may be significantly greater than the original fee amount imposed on the developer. Prof. Morrill further notes that when impact fees are built into the sales prices of new housing, they have an inflationary effect on the valuation of existing housing as well.

His view is supported by a study by Singel and Lillydahl of impact fees imposed on residential development in the Colorado suburb of Loveland. The study found that the prices of older homes neighboring the development tended to appreciate to reflect the fee-induced higher prices of the new housing. The researchers attributed about two-thirds of the 7 percent increase in home prices in Loveland over the period they studied to the effect of impact fees. (Singel and Lillydahl, 90.) The Loveland study suggests that impact fees generate revenue for local communities in at least two ways: directly, through payment of the fees by the developers, and indirectly, through increased property taxes on new and existing housing.

Who ultimately pays impact fees is far from a simple question. In *Paying for Growth*, Snyder and Stegman point out that the incidence of fees depends on the demand for new development. The same tax incidence theory that applies to the property tax generally applies to other types of exactions on property. "If demand is strong (or inelastic), the costs of development fees will be passed on to the buyer, but if demand is weak (elastic), the developer or landowner will have to pay the costs." (Snyder and Stegman, 30, and HUD, v-vi.)

In those instances in which developers are forced by the market to bear the cost themselves, the fee, because it is the same regardless of the value of the home, acts as an inducement for the developer to build more expensive homes in order to recoup that cost. Either way, impact fees have a negative effect on housing affordability. Homebuilders and developers in unincorporated King County estimate that a range of impact fee assessments can cumulatively add $10,000 to $15,000 to the cost of a new home in some areas.

Measuring the incidence of any type of land exaction is a complex matter, but most would agree that, in the vast majority of cases, most of the cost of impact fees is paid by the buyer in the selling price of the new home. Prof. Morrill estimates the buyer's share of the fee at 85-90 percent. Others may put it somewhat lower, depending on the market. But there can be little question that the result, in the context of school impact fees, is that parents of children residing in new housing on which impact fees have been assessed bear an additional cost for the educational services they receive that parents of children in existing housing do not. That finding has important consequences for our study of the manner in which school impact fees are imposed and manner in which they are spent. It means that impact fees must be held to a higher level of scrutiny as to their equity than would otherwise be the case.

Singel and Lillydahl sum up the issue well:

> "The presumed virtue of impact fees is that the burden of new infrastructure is imposed on those who are responsible for the cost. Our results suggest that such a view may be too simplistic. New homebuyers may incur an increase in housing price that is greater than the impact fee…Builders and developers who profit from growth may bear little or no burden of the fee. On the other hand, existing homeowners may experience capital gains. In a typical community where existing homeowners are the dominant voting group, impact fees are thus likely to be more popular than a general tax increase. To the extent that new home owners are also new residents, and thus responsible for infrastructure costs, this may be somewhat equitable. However, this is unlikely to be universally true." (Singel and Lillydahl, 91.)

These same arguments were made when Washington's Growth Management Act was debated almost five years ago, but they did not deter the enactment of one of the most expansive impact fee enabling acts in the nation. Whatever their incidence, and whatever their effect on housing affordability, impact fees are by now an established part of the development landscape, both here and elsewhere. "Originally attacked as increasing housing costs and denying homeownership to moderate income people, impact fees are now an accepted financing method," says Michael

A. Stegman, Assistant Secretary for Policy Development and Research at HUD. "But the time has come to implement what has been learned from our experience by enacting legislation to ensure that impact fee programs fairly balance the interest of the community and new homebuyers." Adds economist Jonathan Levine, "The growing popularity of impact fees as an infrastructure financing mechanism stems less from pure public finance motives than from pressing political and fiscal considerations. Nevertheless, it is appropriate for planners and analysts of public finance to rethink the fees' rationales." (Levine, 222.)

What makes for valid impact fees?

"Perception is almost as important as reality when it comes to impact fees," observes James T. Nicholas, co-director of Growth Management Studies at the University of Florida. Unlike the most common exaction on land, the property tax, impact fees lack any long-established and reasonable easily verified standard, such as market value. Thus legal scholars and land use experts have invested great time and energy in developing a set of standards for such fees that will both hold up in court and be politically acceptable to the community.

If one takes the further step and agrees that most impact fees are paid by the buyer, then it follows that these fees must be held to particularly high standards of equity and accountability. This is because the party making the payment is also presumed to be the party receiving the direct benefits of the services paid for through the fees. Impact fees are based on the same benefit principle as are any other user fees and charges; that is, those who benefit from government-provided goods and services should bear the costs of providing them. Thus growth should pay for itself by making monetary payments to local governments for the costs of the capital facilities they require. (Snyder and Stegman, 56.)

But in what amounts, and for what purposes? Most policy and legal analysts agree that impact fees are intended to be regulatory, not revenue-raising, mechanisms. Their purpose is thus not to raise money generally for a local government, but to protect the public by requiring that necessary supporting public facilities are provided as a condition for new development. (Nicholas, 2.) If the fee raises money in amounts greater than the infrastructure costs created by the development, and is used for purposes unrelated to the development, the link (or nexus) between the fee and the development it is imposed on is lost. At the time the exaction may be judged a tax, rather than a fee, and subject to challenge on legal grounds in most states.

The most widely used standard for judicial review of impact fees is what is known as the rational nexus test. This is used to determine the reasonableness of impact fees on new development by evaluating the fee against the key criteria of need, cost and benefit. The rational nexus standard, in brief, requires that three tests be met:

- ❑ **The needs test:** The development must create a need for the capital facilities in question. In other words, there must be a reasonable connection between the need for additional facilities and the growth resulting from the new development.

- ❑ **The proportionality test:** The most widely used standard for judicial review of impact fees is what is fee must represent the developer's proportionate share of the costs incurred or to be incurred by the local government in accommodating the development paying the fee.

- ❑ **The benefits test:** The fees collected from the development must actually, but not exclusively, benefit the development. (Leithe and Montavon, 5; Nicholas, 6; and Bachrach, et. Al. in Nelson, 139).

These legal principles must then be formulated in operational terms and incorporated into legislation, so that a fee may be calculated in a manner that passes each of these critical tests. For instance, the revenues raised must be managed in such a way and expended in such a time that the development assessed the fee will receive a substantial benefit from the improved facility. (Nicholas, 6.)

Summing up a large body of scholarly research and drawing on the statutes of various states, analysts at the U.S. Department of Housing and Urban Development have developed a set of provisions which should be included in state legislation on impact fees to ensure that such fees meet the accepted legal standards of need, benefit and proportionality:

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

- ❑ Legislation should identify the specific types of development eligible for impact fee assessment, and clearly state the basis for that assessment.

- ❑ Legislation should stipulate all types of facilities and other expenditures that are eligible for funding by the impact fees.

- ❑ Legislation should require definition of the service area for the facility improvement, i.e., the specific geographic area that will be served by the facility.

- ❑ Legislation should require that a rational nexus or more stringent relationship exist among the new development's need for the facility, the amount of fee charged to develop the needed facility and the benefits that accrue to new development from the facility.

- ❑ Legislation should require that impact fees finance only those eligible facilities projected for development in existing capital improvements plan.

- ❑ Legislation should require that the level of service provided by infrastructure funded by impact fees not exceed the level of service provided by existing infrastructure.
- ❑ Legislation should include a system of credits for developer-donated in-kind contributions and for payments in taxes and fees for capital improvements of the type authorized for funding by impact fees.
- ❑ Legislation should allow jurisdictions to establish a system of fee exemptions for specified types of development consistent with community priorities, with the foregone fees paid from general revenues.
- ❑ Legislation should state the time of fee payment.
- ❑ Legislation should require the establishment of separate interest-bearing accounts for the deposit of impact fees.
- ❑ Legislation should require the adoption of a plan to refund fees not spend within a reasonable time period.
- ❑ Legislation should specify criteria for consideration in the calculation or formula for determining impact fee assessments.

Can school fees meet the rational nexus test? Some equity considerations.

"Perhaps the most controversial facility for which impact fees are assessed are school sites and facilities." (Bachrach, et.al., A Standard Development Impact Fee Enabling Statute, in Nelson, 141.) It quickly becomes apparent from a look at standards like those proposed by HUD that impact fee theory simply does not work as well for school facilities as it does for roads, water, sewer and other kinds of infrastructure for which exactions have more traditionally been used. In particular, it is exceedingly difficult for school impact fees to pass the benefits test that is integral to establishing the vital nexus between development impacts, fee calculations and fee expenditures. In this and other respects, imposing impact fees for schools suggest an attempt by governments to drive a square revenue peg through a round legal hole.

To reiterate, under the benefits principle, those who benefit from public goods and services should bear the costs. Thus residents of a new development may pay a transportation impact fee to offset the costs of construction of an access road to a highway, or a sewer impact fee to mitigate the costs of connecting them to a municipal system. The benefit principle does not demand that the benefit of the fees be exclusive to the development. It is sufficient to meet the test if the development paying the fee receives a benefit from the expenditure of the fee that is greater than the benefit received by the general public. (Bachrach, et.al., in Nelson, 156.) (Thus item four in the HUD list recommends that impact fee legislation require that a specific geographic area, or service area, be designated for each impact fee.)

It does not take a great deal of analysis to discern that the benefits principle applies poorly to schools, because unlike roads, sewers, or even parks, the benefits of educational services are presumed to accrue not just to those receiving the services, but to everyone. Snyder and Stegman properly observe that "The benefit principle is applied most often in financing goods and services where government involvement is not based on considerations of equal opportunity or basic needs. The most compelling application of impact fees is in financing infrastructure that is provided only to certain residents…" But as they point out, "Education yields broad benefits to all of society, not just to those in school, and society has identified social and moral responsibilities in education that extend beyond the individual. Accordingly, elementary and secondary education is financed through ad valorem property taxes and income taxes, rather than through user charges." (Snyder and Stegman, 28.) In this broadly shared view, the imposition of impact fees to finance roads, sidewalks or water connections that serve new development is a legitimate application of the benefits principle (and thus a legitimate use of impact fees), but the financing of educational services through this means is not.

This conclusion raises constitutional issues for impact fees, especially in a state with as strong a mandate for state funding of education as Washington. The belief that education is a public not a private, a general not an individual, benefit is enshrined in Article IX of the Washington State Constitution, which declares that "It is the paramount duty of the state to make ample provision for the education of all children residing with its borders without distinction or preference…" Impact fees in effect require the parents of children residing in new development to pay a user charge for educational facilities that parents of other children in the school district to not, although all children may receive the same educational benefits from the facility. Impact fees thus introduce an ability-to-pay principle into educational services that seems inimical to constitutional guarantees of a free and public education. Legal analyst Nancy Stroud notes that "Because most state constitutions contain provisions for a uniform system of public free schools, as well as extensive legislation and budgeting for the financing of schools, one may argue that school impact fees are inappropriate candidates for exactions. That argument, however, has not been tested in court." (Nelson, 93.)

The inability of school impact fees to meet the benefits test produces a number of other, more obvious inequities. The principle of horizontal equity requires that in paying for new infrastructure, those who make similar locational decisions, thus imposing similar costs on facilities, should be treated the same. School impact fees inevitable violate that principle in at least two ways:

- New residents with school-age children who reside in large developments pay the fee, while, under many state laws, those in small developments do not.

- ❑ New residents with school-age children who move into new housing pay the fees, while new residents who move into existing housing do not, although both presumably receive the same services and have exactly the same impacts on school facilities.

Moreover, in a state such as Washington, in which school districts cross municipal boundary lines, developments may or may not pay impact fees, or pay widely disparate fees, to the same school district, depending on which side of the city line they happen to be. Homebuyer A, who purchases a new home in jurisdiction X, which has the school impact fees, thus pays an additional charge for educational services from the school district, while homebuyer B, who was lucky enough to find a house in jurisdiction Y, which has not adopted impact fees, does not, though both homebuyers presumably create the same demands on district facilities. For example, homebuyers in unincorporated King County who are served by the Federal Way School District bear the cost of county-imposed school impact fees, while those in the City of Federal Way, which has no fees, escape them. Overlap between school district and municipal lines also result in homebuyers paying very different fees to mitigate the same school impacts, as in the case of Stanwood, where developments within the Stanwood city limits pay a single-family unit fee of $635 to Stanwood School District, while those in unincorporated Snohomish County pay $2,733 or more than four times as much.

Though Washington state may present some unique variations, inequities of this kind are inherent to school impact fees. It may be possible to mitigate them somewhat certain rules and procedures, but they cannot be eliminated. They literally come with the territory.

The difficulties in applying accepted legal standards to school impact fees, and the constitutional issues that arise, may account for the relatively infrequent use of this type of development exaction around the nation. In the survey conducted GFOA in 1989, only 20 of the 329 impacts fees reported by local governments were for schools.

Beyond the legal and constitutional issues, school impact fees may have another unintended consequence: they may weaken public willingness to pay for school infrastructure. According to one county planning official interviewed for this study, there is some anecdotal evidence that the availability of impact fees has a negative effect on votes for school bonds. This effect, if confirmed by more systematic evidence, should not be surprising. The very logic of impact fees encourages current residents to say, in effect, "Let the new people pay for the problem they've created." Yet under the current state system, impact fees can never do more than supplement voter-approved bonds and levies. It would be ironic indeed if impact fees, intended to help local governments fill the gap between school facility needs and existing resources, were found to have had the perverse effect of diminishing those resources, and making the financing of school construction more difficult than it was before.

Washington state's impact fee law: Provisions

In the sections that follow we explain Washington state's impact fee law, and discuss its strengths and weaknesses in theory and in practice.

The state's impact fee law was adopted in its original form as part of Engrossed Substitute House Bill 2929 in 1990. The bill was strongly influenced by growth management laws in Oregon and Florida, and benefited from the careful consideration of legal standards for impact fee imposition that had developed through case law by the time legislation in those states had been enacted. The 1990 legislation and subsequent amendments are codified as RCW 82.02.050-100.

The intent of the legislature in authorizing impact fees, according to 82.02.050, was

> (a) to ensure that adequate facilities are available to serve new growth and development, thus meeting the GMA goal of concurrency.
>
> (b) to promote orderly growth and development by establishing standards by which counties, cities and towns may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development; and
>
> (c) to ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.

The statute empowers "counties, cities and towns that are required or choose to plan under the Growth Management Act to impose, by ordinance, impact fees on development as part of the financing for public facilities, with some important provisos. First, the financing for the facilities must provide for a balance between impact fees and other sources of public funds, and cannot rely solely on impact fees." This means that impact fees may be used only as a supplement to other local or state funding.

Second, it limits the jurisdictions authorized to impose fees to those required or choosing to plan under the Growth Management Act, and limits the object of fee expenditures to public facilities that are addressed in the capital facilities element of a comprehensive land use plan adopted pursuant to the Growth Management Act. The fees may be used to help pay for the following capital facilities owned or operated by government entities: (a) public streets and roads; (b) parks, open space and recreation facilities; (c) school facilities; and (d) fire protection facilities in jurisdictions not part of a fire district. Certain exceptions were allowed before the fiscal year 1994. But after July 1, 1993, no county, city or town was authorized to continue to collect and expend impact fees unless it had adopted a comprehensive plan under GMA, and unless its capital facilities plan identified (a) deficiencies in public facilities serving existing development and the means by which they would be eliminated; (b) additional demands placed on existing facilities by new development; and (c) the public facility improvements that would be required to serve new development.

RCW 82.02.050 sets three further conditions for impact fees which address the three components of the rational nexus standard that we set out earlier: needs, proportionality and benefits. The statute directs that impact fees:

(a) shall only be imposed for system improvements that are reasonably related to the new development.

(b) shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and

(c) shall be used for system improvements that will reasonably benefit the new development.

"It is clear," says Seattle attorney Richard E. McCann, "that the drafters of this legislation have made every attempt to ensure that the requirements of validating impact fees have been satisfied. The rational nexus requirement of *Nollan* and the reasonable relationship requirement of *Unlimited* are reflected in these criteria." (McCann, 2-23. Full citations.)

RCW 82.02.060 seeks to ensure that these requirements are met in operational terms. This section lists provisions that must be included in an ordinance adopted by a local jurisdiction as a condition of imposing impact fees. The ordinance must first include a schedule of fees, "based upon a formula or other method for calculating such fees," for each type of development activity subject to fees. The formula or other method for calculating the fees must take into consideration at least the following factors in determining new development's proportionate share of capital improvements:

(a) "The cost of public facilities necessitated by new development." The use of the word "necessitated" requires a close relationship between the development and the facilities to be financed with the fees;

(b) "An adjustment to the cost of the public facilities for past or future payments made or reasonably anticipated to be made by new development to pay for system improvements in the form of user fees, debt service payments, taxes, or other payments earmarked for or proratable to the particular system improvement." This requires jurisdictions to recognize in their formulas that impact fee-paying development will also pay for those public facilities through property taxes and other local levies. The adjustment is usually shown as a tax credit against the impact fee.

(c) "The availability of other means of funding public facility improvements." This means that the formula must take into account the shares of capital improvements that will be paid from local taxes and any state or federal funds.

(d) "The cost of existing public facilities improvements," and

(e) "The methods by which public facilities improvements were financed."

In addition to the credit for past or future taxes, the statute requires that local ordinances also provide a credit for the value of any dedication of land, new construction or other type of in-kind contribution that the developer may have made to facilities in the capital facilities plan.

The ordinance must also permit the jurisdiction to adjust the standard impact fee at the time the fee is imposed to consider "unusual circumstances in specific cases to ensure that impact fees are imposed fairly." In practice this provision has been used to enable local governments to reduce the fee amount produced by the formula by some essentially arbitrary percentage, termed a "discount factor," to bring it to a politically acceptable level. King County, for example, discounts the "standard" fee by 50 percent, across the board, for all school districts, Olympia by 66 percent, and Kitsap County by a full 80 percent. In some ordinances, such as Clark County's, this adjustment is expressed as the "public-private ratio," representing what the local legislative body, after all the data calculations have been done, believes to be the "proper balance between costs paid by the developer and the public." (DCD, *Paying for Growth,* 13.)

One suspects that if the impact fee formulas required by RCW 82.02.050 truly measure the proportionate share of the costs of public facilities attributable to new development as accurately and equitably as claimed, cities and counties would not have to "discount" the results of these calculations by as much as to 50 or 80 percent in order to "ensure that impact fees are imposed fairly." The comment of Douglas R. Porter, Director of Development Policy Research at the Urban Land Institute, on the calculation of impact fees seems an accurate description of the process in Washington.

There are a variety of ways to go through that calculation, all the way from very simple things that are usually wrong to very complicated things, which are also sometimes wrong. And often you end up with a proposed fee that is very high and which, through a political process, is brought down to say, a half or a third of what the initial calculations showed it should be. (Porter, 52.)

Even a "Guide to Impact Fees" prepared by the state Department of Community Development acknowledges that the determination of impact fees is driven by more than empirical data about development impacts and facilities costs. "The actual fee varies from jurisdiction to jurisdiction," the Guide notes, "depending on an array of market and political factors (i.e., what fee will be acceptable to the community." Through introducing a clearly political factor into the impact fee calculation, the "discount factor" nevertheless is important in reducing the impact of the fees on housing affordability.

Figure 3 (p.20) demonstrates the calculation of the school impact fee for Tahoma School District through the formula prescribed in the King

County ordinance, which is often considered a model for other jurisdictions. It can be summarized as:

> *(Site acquisition cost + permanent facility cost + temporary facility cost) minus (state match credit + tax credit + developer provided facility cost) = standard or gross fee + 50% discount factor = final or net fee*

The ordinance must permit, though not require, consideration of studies and data submitted by the developer for the purpose of seeking adjustment of the fee.

Acknowledging the potentially adverse impact of impact fees on housing affordability, RCW 82.02.060 authorizes local jurisdictions to exempt low-income housing and other development purposes with broad public purposes from impact fees imposed under this chapter. The revenue foregone by must be made up from public funds other than impact fee accounts. (In other words, the cost of the exemptions cannot be shifted to other fee-payers.) As Figure 4 (p.23) suggests, relatively few jurisdictions provide such exemptions. Clark County is distinctive in exempting senior as well as low-income housing from impact fees imposed under this ordinance.

To help ensure that the development paying the fees benefits from their expenditure, the statute requires the ordinance to establish one or more reasonable service areas within which fees will be calculated for various land use categories.

Impact fees may be imposed for system improvements costs previously incurred, so long as the new growth and development paying the fee will be served by those previously constructed improvements. This is a provision which appears to be distinctive to Washington state. Impact fees may not, however, be imposed to make up for any system improvement deficiencies. In other words, new development may not be obliged to pay for bringing previously existing, insufficient facilities up to standard.

RCW 82.02.070-080 seeks to provide accountability for the use of impact fees. These sections require that:

- ❑ Impact fee receipts be earmarked specifically and retained in special interest-bearing accounts for each type of facility for which the fees are collected
- ❑ Fees be expended only in conformance with the capital facilities plan element of the comprehensive plan.
- ❑ Fees can be expended or encumbered within six years of receipt, unless the governing body of the county, city or town identifies in writing extraordinary reasons why they should be held longer.

The latter provision is based on the assumption that impact fee payers are effectively denied the benefits of the fees if they are not expended for appropriate purposes within a reasonable amount of time.

Current owners of property on which an impact fee has been paid may, on request, receive a refund with interest of any fees paid if the fees are not expended or encumbered within the requisite period of time. The local governing body must notify potential claimants of refunds by first class mail. Any fees that have not been expended or encumbered within the time limitations for which no application has been made for refund within one year of notification are retained by the local government, and may be expended on eligible capital facilities. (RCW 82.02.080.)

Developers may pay impact fees under protest in order to obtain a permit or other approval of development activity. The local government must provide for an administrative process for the appeal of an impact fee. The appeal process may result in the modification of the fee “upon a determination that it is proper to do so based on principles of fairness.” A fee-imposing jurisdiction may also provide for the resolution of disputes over impact fees by arbitration. (RCW 82.02.070.)

RCW 82.02.050-090 meets most of the criteria for model impact fee legislation set out in the HUD report and in similar studies. These include, most notable, (1) specification of the types of jurisdictions eligible to impose fees; (2) requirement that fees meet the rational nexus tests of need, benefit and proportionality; (3) credits against the fee amount for developer-provided improvements and anticipated future taxes proratable to the facility; (4) authorization of exemptions from fees for low-income housing; (5) requirements for separate, interest-bearing accounts for fees, time limits for expenditure, and refunds.

The state’s impact fee law nevertheless has omissions and ambiguities that could be corrected through appropriate legislation in order to more closely ensure that it meets both the intent of the Legislature and recognized standards for valid impact fees.

FIGURE 3

GMA Impact Fee Calculation

Single-Family Unit, King County, For Tahoma School District (1994)

Step One

Calculate site acquisition cost per residence.
((Acres x Cost per acre)/Facility capacity) x Student generation factor

	Required site acreage	Acreage/site cost per acre	Facility capacity	Student factor	Total
Elementary School	20	14,820	750	0.516	203.92
Junior High School	30	14,857	900	0.181	89.64
High School	40	7,245	1,200	0.146	65.26
Site Acquisition Cost per Residence					**$328.82**

Step Two

Calculate permanent facility cost per residence.
((Facility cost/Facility capacity) x Student generation factor) x (Permanent/Total square footage)

	Facility cost	Facility capacity	Student factor	Footage ratio	Total
Elementary School	10,500,000	750	0.516	0.95	6,388.32
Junior High School	9,015,000	750	0.181	0.95	2,074.52
High School	9,580,340	528	0.146	0.95	2,526.01
Permanent Facility Cost					**$11,488.86**

Step Three

Calculate temporary facility cost per residence
((Facility cost/Facility capacity) x Student generation factor) x (Temporary/Total square footage)

	Facility cost	Facility capacity	Student factor	Footage ratio	Total
Elementary School	45,000	25	0.516	0.05	43.16
Junior High School	45,000	30	0.181	0.05	12.62
High School	45,000	30	0.146	0.05	10.18
Temporary Facility Cost					**$65.95**

Step Four

Calculate state match per residence
Boeckh Index x SBE square footage standard x District match percentage x Student generation factor

Current	SBE Boeckh	District footage	Student match	Factor	Total
Elementary School	86.96	80	0.5852	0.516	2,100.70
Junior High School	86.96	110	0.5852	0.181	1,013.20
High School	86.96	120	0.5852	0.146	891.58
State match Credit per Residence					**$4,005.47**

FIGURE 3 CONTINUED

Step Five

Calculate tax credit per single-family residence.

Average Residential Assessed Value	145,359
Current Debt Service Tax Rate/1000	0.0016869
Bond Buyer Index Annual Interest Rate	0.0558
Discount Period (10 years)	10
Tax Credit per Single-Family Residence	***$1,841.20***

Step Six

Calculate developer provided facility credit

Facility/site value	0.00
Dwelling Units	0.00
Developer Provided Facility Credit	**$0.00**

Step Seven

Calculate King County's 50 percent discount factor.

Step Eight

Calculate fee.

	Site Acquisition per Single Family Residence	328.82
+	Permanent Facility Cost per Residence	11,488.86
+	Temporary Facility Cost per Residence	65.95
	Total Cost per Residence	**$11,883.63**
	State Match Credit per Residence	4,005.47
+	Tax Credit per Residence	1,841.20
+	Developer Provided Facility Credit	0.00
	Total Credits per Residence	**$5,846.67**
	Total Cost per Residence	11,883.63
-	Total Credits per Residence	5,846.67
	Gross Impact Fee	**$6,036.96**
	Gross Impact Fee	6,036.96
x	50% Discount	.50
	Net Impact Fee	***$3,018.48***

FIGURE 4

Provisions of Impact Fee Ordinances

Provision	**Clark Co.**	*Enumclaw*	**King Co.**	***Kitsap Co.***	*Lake Stevens*	***Mukilteo***	**Olympia**	*Snohomish Co.*
Schedule of impact fees	✓	✓	✓			✓	✓	
Formula for calculating impact fees that measures proportionate share	✓	✓	✓	✓	✓	✓	✓	✓
Adjustment to fees for past or anticipated future tax payments	✓		✓	✓				
Credit for dedication of land or system improvement provided by developer	✓		✓		✓			✓
Adjustment of standard fee for unusual circumstances	✓		✓	✓			✓	
Consideration given to studies or data submitted by developer	✓		✓	✓			✓	
Fee receipts earmarked and placed in separate interest-bearing accounts	✓		✓	✓			✓	
Fees must be expended in conformance with capital facilities plan	✓		✓	✓			✓	
Annual report on impact fee accounts	✓		✓	✓			✓	
Fees not expended within a set period of years are refunded with interest	✓	✓	✓	✓		✓	✓	
Timing of fee payment specified	✓		✓	✓	✓	✓		
Administrative appeals process	✓		✓	✓	✓	✓	✓	
Exemption for low-income housing	✓		✓	✓				

Plain type: GMA-based ordinance.
Italics: SEPA-based ordinance.

Washington's Impact Fee Law: Issues and Problems

1. Legal and administrative responsibility for impact fees

A fundamental requirement of state enabling legislation for impact fees is that it clearly states the types of jurisdictions that are authorized to impose the fees. The Washington law meets that requirement by limiting the authorization to "Counties, cities and towns" in RCW 82.02.050(2). The statute creates confusion, however, about the legal and administrative responsibility for impact fees by authorizing their collection for school facilities but omitting any role in the process for the governmental entity responsible for the facilities, the school district.

It has become common parlance to say that various school districts impose various amounts of impact fees. Yet not only does the state's impact fee law not authorize school districts to impose fees, it does not even authorize cities and counties to impose them *for* school districts. A 1989 King County Council task force recommended that the county lobby the Legislature for the creation of 'school benefit districts' with the authority to charge fees to developers. The legislature turned this appeal aside, however, when it adopted the Growth Management Act, restricting fee authorization to counties, cities and towns. A section of the growth management bill (HB 2929) would have authorized cities and counties to impose fees for other authorities. That provision, however, was vetoed by Gov. Booth Gardner. Thus, according to Seattle attorney John Hempelmann, there is nothing in current state law that authorizes any authority, such as a city or county, to impose an impact fee for another authority. Yet that has not prevented cities and counties from imposing fees for school districts *without* express legal authority. Nowhere in Chapter 82.02, in fact, are school districts mentioned at all.

But the problem of impact fee accountability goes farther than a perhaps expansive reading of the 1990 act by cities and counties. It is by now apparent that in many jurisdictions it is the school districts, not the local governments authorized to impose them, that drive the school impact fee process. Our survey leaves little doubt that in practice school districts identify the need for the fees, who will be assessed, the amounts of the fees, and the purposes for which the fees will be spent. In Olympia, for example, fee-payers seeking exemptions for particular developments or credits for in-kind improvements apply to the school district – which has no statutory authority for impact fees – rather than to the city. (Any exemptions and credits approved by the school district must then be approved by the city's Planning Director.) Bainbridge Island's ordinance is one of several that directs school districts to expend impact fees for purposes consistent with RCW 82.02, though that chapter clearly restricts authority to expend as well as collect impact fees to counties, cities and towns.

Some local governments appear to have all but abdicated responsibility for school impact fees to the school districts, confining their roles to ratification of determinations made by the districts. For example, a telephone survey on impact fees conducted by Hebert Associates in February 1994 elicited the following statements from personnel in city and county planning departments:

- "The school district assigns the fee. We are required to collect the fee."
- "We require that all major developments negotiate directly with the school district."
- "We collect the fees. The agreement is with the school district."
- "The school district collects mitigation fees."
- "Done at the discretion of the individual school district."
- "We coordinate with the school district, but don't set the fees."
- "The developer works out something with the schools. There is no set fee. It's up to the school district to determine an amount." (Hebert Research, Off-site and On-site Impact Fee and Mitigation Research, Feb. 1994.)

None of these statements is consistent with the language or intent of RCW 82.02, which places *all* of the responsibility for impact fees with the county, city or town. A survey by the Washington Research Council in late 1994 had similar results. City and county officials responding to the WRC questionnaire stated, for example,

- that the school district is responsible for tracking unexpended fee revenues and notifying potential claimants of their eligibility for refunds, though RCW 82.02.070-080 specifically assign this duty to the county, city or town;
- that the school district is "in charge" of ensuring that impact fee receipts are expended within six years of collection, when this, again, is the city, county or town's legal responsibility;
- that we would have to ask the school district, not them, for information about the capital facilities plan, when under law the city or county is required to collect and spend impact fees *in accordance* with the capital facilities plan.

When asked in a telephone interview for the current levels of school impact fees in his city, yet another planning official responded that the city did not collect them or set the rates, and that we'd have to ask the school district for the information. All of these statements are suggestive of a process that is in too many cases out of the control of those legally charged with administering it, and thus unaccountable to the public.

Oregon is the only state that authorizes school districts to assess impact fees. Rather than extend such power to school districts, enabling legislation in some states make provision for intergovernmental agreements authorizing one jurisdiction to collect an impact fee on behalf of another. (HUD, 32.) One suggested model for impact fee legislation recommends that "When impact fees are collected for capital improvements to be undertaken by a different local government than the one collecting the fee, the collecting entity shall enter into agreements with the capital improvements to ensure compliance with the provisions of the statute." (Bachrach, et.al., in Nelson, 138) Such agreements would seem especially important where school districts embrace both city and unincorporated county areas, as they so often do in Washington.

Washington's impact fee law makes no provision for interlocal agreements. Acting on their own, however, some jurisdictions have included provisions in their ordinances requiring an interlocal agreement between the city or county government and the school district before impact fees may be imposed for schools. King County's impact fee ordinance, for example, provides for an interlocal agreement between the county, the district, and any city setting forth certain terms relating to the collection of impact fees by the county and distribution of those fees to the district. Kitsap County's ordinance bars collection of fees for any school district until an interlocal agreement has been approved between the county and the district. Clark County similarly provides that school fees shall not be collected on behalf of any school district until such district enters into an interlocal agreement with Clark County providing for submittal of capital facilities plans, fund administration, report of expenditures, allocation of risk, and other appropriate matters. Such agreement may include a city as well when a city adopts a "substantially similar" fee for a district whose boundaries include portions of unincorporated Clark County.

Provisions like these have the value, in the absence of any direction from state statue, of clearly setting out the respective roles of the city and/or county government and the school district in the operation of school impacts. In so doing, they help guarantee that in actual practice responsibility and accountability for impact fees will reside where the legislature intended when it enacted Chapter 82.02.050-090.

2. Types of development eligible for assessment, and the unit of assessment.

Chapter 82.02 states only that fees may be imposed on "development activity," broadly defined as "any construction or expansion of a building, structure or use, any change in use of a building or structure, or any change in the use of land, that creates additional demand and need for public facilities." It does not specify the unit of assessment of the fee, instead leaving it up to the discretion of the local government.

The unit of assessment issue is especially important with regard to residential development. According to analysts, the decision whether to assess the fee on a flat per unit basis, or on other bases, such as square footage or the number of bedrooms, has significant implications for the progressivity of the fees and their effect on housing affordability. HUD report notes that impact fees, because they are unrelated to ability to pay, are inherently regressive. The level of regressivity is heavily influenced by the unit of assessment chosen.

A flat per-unit impact fee assessment…accounts for a proportionately greater share of sales price of a lower-priced home than of a higher-priced home, with direct consequences for the supply of moderately priced, affordable housing…A fee assessment based on dwelling type, living space square footage or number of bedrooms may more accurately reflect the proportionate household benefit provided by capital improvement. (Nicholas, Nelson and Juergensmeyer, in HUD, 33.)

A new 1,200 square foot, two-bedroom home is likely to have both a lesser impact on present school facilities and to derive lesser benefits from proposed new facilities, than is a 3,000 square foot, four-bedroom home, for the simple reason that the smaller home is likely to generate fewer students. Owners of both homes, however, pay the same fee in a per-unit assessment system. Nicholas finds that assessing fees by unit size tends to be the least regressive approach, with the per-unit approach the most regressive. (Nicholas, "Progression of Impact fees," 523.)

Washington jurisdictions generally impose impact fees on a flat, per unit basis (the approach judged most regressive), distinguishing only between single-family and multi-family homes. Just a few provide for differential fees for mobile homes, manufactured homes or duplexes. None assess on the basis of square footage, and none differentiate by the number of bedrooms in calculating the fees on single-family homes. Lake Stevens, Olympia, Snohomish County and Tumwater impose a lower fee on one-bedroom, multi-family units than on those with two or more bedrooms. (See Figure 5, pg 38.)

3. Types of facilities that may be funded

Chapter 82.02 defines the kinds of facilities that may be financed through impact fees by reference to local capital facilities plans adopted under the Growth Management Act. This may not, however, ensure that facilities for which fees are assessed are "reasonably related to the new development" and "reasonably benefit the new development," as required in Sec. 82.02.050. Should impact fees be permitted to be used, for example, for school facilities that are not instructional in nature, or are not necessitated by development-induced growth? Tahoma School District's capital facilities plan, for example, indicates that the district will finance construction of a "Music Temporary" facility entirely through impact fees. This may be a worthy educational activity, but it is not immediately apparent why a music facility is necessary to accommodate new growth generated by housing development.

The current language of Ch. 82.02 may cover the legal bases, but a more clear expression of allowable uses of school impact fees would more nearly guarantee that they are dedicated to increasing instructional capacity, and reduce the perception and accountability problems now associated with the fees.

4. Service area

RCW 82.02.060 (6) requires that each local impact ordinance "establish one or more reasonable service areas," which are geographic areas within which the fees are to be calculated and imposed. Designating service areas for each type of fee increases the chances that the fees imposed on specific developments will be proportionate to the costs they create, and that the payers of the fees will benefit from their expenditure. "Identification of the area served by they capital improvement can ensure the fee meets the rational nexus or other relationship test." (HUD, 36.)

The service area concept is much more easily applied to roads, sewer, or water connections, however, than it is to school facilities. Indeed, the difficulty of relating school fees to service areas indicates how difficult it may be for this type of impact fee to meet the benefits test. Again, that test requires, at a minimum, that the development paying the fee receive a benefit from its expenditure that is greater than that received by the general public. But in practice, the service area for school impact fees is not just the area surrounding the development (as it is for, say, road fees), but the *entire school district.* The fees collected thus benefit the entire school district, not just the new development. One could go a step further: Lacking any specific direction from state law, impact fees collected from a residential development on one side of town may be used to improve school facilities on the other side of town, facilities in which the children of the new development may never set foot. In that case, the fee-payers arguably receive *less* benefit from the fees than do others.

Some Washington jurisdictions recognize this problem, and specifically identify the school district as the service area for the school impact fee, regardless or where facilities may be built, or who they directly serve. A 1992 rate study by the Olympia School District for the adoption of school impact fees there cites four reasons why the use of service areas is “inappropriate for school impact fees,” notwithstanding the statutory mandate. These are:

> a) The construction of a new school benefits dwellings that are not in the adjacent area because the new school relieves overcrowding in other schools. “Each time a new school is constructed, its attendance area boundaries have a ripple effect on the existing attendance areas of neighboring schools.”
>
> b) Some district facilities and programs are used for students throughout the district, making the use of service areas for impact fees “virtually meaningless.”
>
> c) Students may be bused, for a variety of reasons, throughout the district.
>
> d) The use of service areas for school impact fees, whether on municipal, school attendance boundaries, or some other basis, conflicts with the need for the school board to provide comparable facilities throughout the district. (Thus strict enforcement of the service area requirement might lead to better facilities in fast-growing parts of a school district than in other parts.)

In its response to our questionnaire, King County states that “Additional new capacity anywhere within the district at the appropriate grade level is deemed to benefit new development since a district is free to shift school attendance boundaries. A new development may or may not be in the service area of the facility which is built or expanded by impact fees paid by the development.”

Lake Stevens’ impact fee ordinance makes the same argument for designating the service area impacted by new development, whatever its location, to be the entire school district. “The school district must, on occasion, adjust the boundaries of the schools within the district, based upon the demographics of the school population; therefore, impact fees cannot be directly attributable to a specific geographic area at all times.” Lake Stevens is not, however, willing to take the argument for an expansive fee nexus quite so far as is Olympia. “The school district shall, however, attempt to designate impact mitigation for elementary schools, as much as possible, to the general geographic area in which the subdivision or residential development is located,” the Lake Stevens ordinance states, "especially…where the school population for the subdivision or residential development is within what is considered normal walking distances between home and an elementary school or school site."

Snohomish County similarly identifies the service area for which development impacts are computed as "the entire geographic area encompassed by a school district's boundaries. "New capacity anywhere in the district positively affects any development within that district because individual school 'catchment areas' can be and are adjusted to balance supply and demand for school/classroom space," the county's planning department explains. "Conversely, a new development anywhere can affect capacity everywhere within a district."

Clark County also identifies the school district as the service area for school fees assessed under its ordinance. These jurisdictions deserve credit for acknowledging and addressing the problems posed by the service area requirement for school impact fees. Other city and county ordinances simply disregard the issue.

5. Student generation factor

Calculation of school impact fees that meet the statutory requirement that fees "not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development" requires that the local jurisdiction make a reasonably reliable estimate of the number of students that will be generated by new residential development. As indicated by Figure 3 (*GMA Impact Fee Calculation,* p. 20) this "student factor" is a key variable in the determination of the fee amount. Yet neither in statute nor in administrative rule is there any guidance offered to school districts as to how to make this critical calculation. The result is a variety of methods in use and a variety of outcomes, with little ability for anyone on the outside to judge their accuracy.

Following are some examples of ordinance provisions for arriving at the student factor:

- ❑ King County specifies that student factors be based on district records of average actual student generation rates for new development over a period not more than five years prior to the fee calculation. If a district has no such records, it may use data from adjacent districts or districts with similar demographics, or adopt a county-wide average.

- ❑ Snohomish County requires simply that "empirical studies" be conducted for and by each school district for each type of development and grade level.

- ❑ Kitsap County calculates a county-wide average to be used by all school districts for which it collects fees, derived by dividing the number of students of each grade level by the number of single- and multi-family residences in each district. The use of county-wide averages in regions as diverse as King County and Kitsap County seems prone to an unacceptable margin of error. Could housing demographics possibly be identical from Poulsbo to Bremerton to Port Orchard?

❑ The City of Bainbridge Island specifies that the student factor in its formula be based on 1991 U.S. census data as updated by occupancy permits issued since that time, together with district records of average actual students enrolled per household, by grade level.

❑ The City of Enumclaw's ordinance is silent as to the method for determining the student factor.

This diversity of methodologies produces a range of student generation factors in use for impact fee calculation that seems difficult to account for merely through differing demographics. For example, the number of middle school students assumed to be generated per single family unit is 0.12 for Kitsap County, 0.76 for Enumclaw, 0.18 for Olympia, 0.51 for Bainbridge Island and 0.15 for Federal Way.

Washington's impact fee law thus fails to offer any guidance to local governments on a key factor affecting the proportionality of school impact fees. In this as in other regards, the statute sets proportionality as a requirement, but gives no indication as to how it is to be achieved by the jurisdiction, or how others are to judge whether it has been achieved. Jurisdictions imposing impact fees are required under state law to consider studies and data submitted by the developer to adjust the amount of the fee, but absent any standard in rule or statute for measuring the impact on schools from development, there seems little point in developers going through such an exercise.

Granted, arriving at such a standard is no simple task. According to Alberta Mering, assistant director for school facilities in the Office of the Superintendent of Public Instruction, "There are so many factors involved" in student generation from new development. "The cost of the house is probably going to limit the number of kids you have…I don't know how they can get to accurate numbers." The state Office of Financial Management does not take housing construction data into account at all in its periodic projections of school enrollment. Yet however imprecise or open to dispute, the imposition of any standard, uniform methodology for identifying the student factor would provide a desirable measure of predictability and accountability in fee calculations.

6. Level of service

HUD defines "level of service" as "a measure of the relationship between service capacity and service demand for public facilities." How much facilities, in other words, should new development be required to pay for through impact fees?

HUD states as a rule that infrastructure intended to serve new development should be provided at a level similar to existing community levels. "A higher service standard cannot be established legally for new development (whose infrastructure is partially provided from impact fees) than for established residents (whose infrastructures is financed from general revenue.)…Superior service provision will not meet tests of reasonableness." (HUD, 40-41)

Many of the states authorizing impact fees explicitly address this level of service issue in their enabling legislation. Georgia's law, for example, provides that "Development impact fees shall be calculated on the basis of levels of service for public facilities that are adopted in the municipal or county comprehensive plan that are applicable to existing development as well as the new growth and development." Similar language is to be found in Idaho, Illinois, Indiana, Nevada and Texas. (HUD, 40, 50-78.)

Level of service is not specified in Washington state's enabling legislation, except for the provision in RCW 82.02.060 (7) that local ordinances "[m]ay provide for the imposition of an impact fee for system improvement costs previously incurred by a county, city or town [a provision unique to this state] provided such fee shall not be imposed to make up for any system deficiencies." As "system improvement deficiencies" is not defined in the chapter, the intent of this provision is not certain. The language may be understood to prohibit the use of impact fees to bring substandard facilities up to standard. It does not, however, clearly bar impact fees from being used to *raise* the standard of public facilities in a community.

For school impact fees, level of service translates for the most part into the amount of space per student that will be provided by school facilities. The state's impact fee law offers no guidance on this major component of the fee calculation; nor is level of service often addressed in local ordinances. The State Board of Education specifies by rule the space allocations, by grade level, on which matching state assistance to school districts for construction will be based. The maximum matchable area per student in grades K-6 is 80 square fee, in grades 7-8 110 square fee, and in grades 9-12 120 square fee. (WAC 180-27-035). According to Grace Yuann, an attorney with the Seattle firm of Preston Gates & Ellis who advises local governments on GMA issues, these standards are low, and many school districts exceed them in their construction plans. Alberta Mering of SPI acknowledges that the SBE standards are about 20 square feet under the national average. She emphasizes that the state's space allocation assumptions are not necessarily standards for school districts in building facilities, but rather a way to determine and cap the state's matching costs.

Those who bear the burden of impact fees express concern that they are taken advantage of to provide the resources with which school districts exceed the state level of service standards. In this view, a decision by local taxpayers, through their votes for school bonds or building levies, to construct facilities that exceed the standards for state matching funds is a commendable commitment to better education. When “excess” building specifications are reflected in impact fee calculations, however, it is a different matter. In this case the payers of the fees (whether developers, home buyers or renters) often do not live in the jurisdiction, and have had no say in the decision as to the level of service to be provided. A perception arises that impact fees permit local governments to use newcomers or outsiders with no political clout in the community to pay for school buildings that are of a higher standard than their present ones, and that resident taxpayers would otherwise be unwilling to support. Developers fear that local officials look at them as “deep pockets” for the construction of unnecessarily extravagant facilities.

How real is this potential? Mering points out that school districts are free to exceed the state building standards if they choose, but if they do state matching funds are then spread over higher costs, and the districts must make up the difference through local tax dollars and other resources. Not all are willing or can afford to do that. Moreover, impact fees currently make up only a small portion of local revenues for capital projects. Most respondents to the WRC survey report that this source accounted for less than five percent of total resources for school capital facilities budgets during the 1993 fiscal year. Mering believes that “The role of impact fees in school construction will probably be minimal.”

There are exceptions to this rule. Tahoma School District, a fast-growing district which has rejected successive school bonds at the polls, reports that an extraordinary 24.5 percent of school building costs were funded by impact fees in that year. The fees were used in that district to fund 100 percent of the cost of temporary facilities at Rock Creek School, a $91,000 project serving 50 students.

Generally, however, the relatively small pool of funds provided to school districts by impact fees up to now minimizes the chances that developers and new residents are being exploited to pay for facilities that would otherwise not be built. As difficulties persist in financing school construction, however, and as impact fees become more prevalent, the potential increases for the failure of state law to specify the level of service on which impact fees are to be based to result in the imposition of unreasonable fees. A clear statement in statute that the level of service provided by infrastructure funded by impact fees may not exceed the level of service provided by existing infrastructure would significantly reduce that risk.

7. Timing of fee payment

RCW 82.02 also fails to address a crucial issue in the operation of impact fees, the timing of fee payment. According to HUD, "The timing of payment has a myriad of consequences. Most important is the effect on housing affordability." As a general rule, the earlier in the development process the fee is collected, the greater the effect on the total cost of the development. This is because the additional cost of the fee, added onto the price of the land, increases the developers borrowing costs, which are then multiplied as they are carried through each transaction in the process. These additional carrying costs are ultimately passed on to the buyer in higher housing prices. "As costs are loaded in at the land stage," says Greg Collier of Hebert Research in Bellevue, "there is more of an impact on the end price of the home." A 1992 Hebert study for the Building Association of Washington found a multiplier of four for costs added at the lot development phase of building a house. A $1,000 increase in raw land costs therefore raises the total sales price of a $150,000 house by $4,000. The later in the development process increased building costs are incurred, the less their effect on prices. Thus impact fees of $4,000 boost the sales price of a home by $16,000 if collected at the time a subdivision is platted, and by only $8,000 if collected at the time the building permit is issued. (Hebert, Single-family Development and Building Costs Research, May 1992, and Shannon, "Facing realities of growth," *The Olympian*, July 12, 1992.)

Most analysts therefore urge that impact fee legislation provide for fees to be assessed early and collected late in the development process. According to HUD, "Jurisdictions that impose impact fees must be aware of the consequences of fee collection timing and consider a…program that has the greatest potential for offsetting fees' negative effects on housing affordability. Fee assessment at plat recordation/approval and collection at building permit issuance may offer the most acceptable schedule." (HUD, 45.)

Requiring fee collection even later in the process, i.e., at issuance of the certificate of occupancy, further reduces the carrying costs of the fees, and is thus even more preferable if housing affordability is a concern. Lillydahl, et.al. recommends that local government consider delaying payment of the fee until the project is occupied, and allowing payment over five to ten years at subsidized rates. While the jurisdiction may suffer somewhat from late payment of the fee, the impact of fees on housing costs may be significantly mitigated by such a plan. The survey done for GFOA showed that 68 of the 125 fees reported were collected at the building permit stage, 25 at the subdivision stage and 22 at the certificate of occupancy stage. (Leithe and Montavon, 26.)

Most states specify when impact fees are to be assessed and collected, with considerable variation to be found from one state to another. Arizona, Georgia (for most types of facilities), Oregon and Pennsylvania require fee payment at the issuance of the building permit. Illinois, Indiana, New Hampshire and Virginia specify payment at certificate of occupancy for most development. Nevada and Texas allow either option. Vermont appears to be alone in requiring fees be paid at the subdivision level. Several states require that local governments permit payment in installments over a period of years.

Washington state law provides no direction to cities and counties on the timing of payment issue. Local practices thus vary. Fees are collected by Enumclaw, Mukilteo, Lake Stevens, Snohomish County and Kitsap County at plat or subdivision approval, and by Clark County, Olympia and Tumwater at issuance of the building permit. (Project proponents in Lake Stevens may request permission from the school district to postpone payment until building permit issuance.) King County makes 50 percent of fees due on a plat payable at the time of plat approval, and the other 50 percent when occupancy permits are issued. Bainbridge Island varies timing of payment by the type of development.

Specifying in state law the point in the development process at which impact fees must be paid, as do most other states authorizing such fees, would contribute to more equal treatment of developers and homebuyers from one jurisdiction to the next and, most importantly, offset some of the increased housing costs created by the fees.

SEPA-based impact fees: The legal issue

While there is thus evident room for improvement in Washington's GMA-based impact fee law, that law nevertheless must be said to contain most of the standard provisions deemed necessary to meet the legal tests of reasonableness and proportionality. A far more serious problem is the imposition of impact fees by Washington cities and counties under the State Environmental Protection Act (SEPA), which offers few of the advantages provided by the Growth Management Act.

SEPA was enacted in 1971 as a broad legislative framework for statewide environmental and land use planning. Among its purposes is to "Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities." (RCW 43.21C.020) To meet this goal, the law authorizes local governments to enter into agreements with property owners to mitigate the impacts of development. Several Washington jurisdictions, including the Cities of Enumclaw, Monroe and Sedro Woolley and Snohomish Counties and cities therein, impose school impact fees not under the relevant provisions of the Growth Management Act (RCW 82.02.050-090), but under SEPA.

There persists a lively debate among specialists in land use law as to the legality of SEPA-based impact fees. It is beyond the scope of this study to review those arguments in detail. The Revised Code of Washington is, in any event, sufficiently murky and contradictory on this score as to make resolution of the question, absent new legislation or a major new decision by the state Supreme Court, unlikely.

In *Paying for Growth's Impacts: A Guide to Impact Fees,* the Washington Department of Community Development states that "The validity of fees as a SEPA-authorized remedy is open to challenge under RCW 82.02.020, which appears to prohibit imposition of impact fees under any law except the GMA and the Local Transportation Act." That section states that:

> "Except as provided in RCW 82.02.050 through 82.02.090, no county, city or town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land."

That seems a straightforward restriction of impact fees to those authorized under GMA in the sections of RCW reviewed above. RCW 82.02.020, enacted prior to GMA in 1982, then goes on to carve out some specific exemptions from this prohibition, including transportation impact fees pursuant to RCW 39.92 and fees for transportation improvement districts pursuant to RCW 36.73.120. It also excepts fees charged for processing applications or preparing detailed statements under SEPA. Significantly, however, it makes no specific exception for fees that might be imposed to mitigate environmental impacts under SEPA. There thus seems, to an analyst residing outside the community of land use attorneys, to be a heavy burden of proof on those arguing for the propriety of SEPA-based impact fees.

One of those is attorney Grace Yuann of the Seattle firm Preston, Gates & Ellis. Attorney Yuann notes that prior to the enactment of GMA, Washington jurisdictions relied on several sources of statutory authority to require new development to mitigate its impacts on public facilities, including the State Subdivision Act (RCW 58.17), SEPA (RCW 83.21C) and the authorization for voluntary agreements under RCW 82.02.020. The latter citation is especially important to understanding the legal controversy surrounding impact fees today. This language states that "[t]his section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat."

RCW 82.02.020 appears to be a general authorization of payments to mitigate impacts of developments – without specific reference to SEPA – which was left intact when the Growth Management Act was passed. According to Attorney Yuann, "The Legislature's enactment of the impact fee provisions did not eliminate the use of these alternative methods of mitigating impacts caused by the new development. While RCW 82.02.020 was amended by the GMA, the express authorization to enter into voluntary agreements survives post-GMA." She also notes that two sections of the Revised Code, one in Title 43 and the other in Title 82, specifically prohibit "double dipping," or collecting impact fees under both statutory authorizations for the purpose of mitigating the same impact. RCW 82.02.100, tacked on to the end of the GMA impact fee law, provides that "A person required to pay a fee pursuant to RCW 43.21C.060 for system improvements shall not be required to pay an impact fee under 82.02.050 through 82.02.090 for those same system improvements." Comments Yuann, "The implicit recognition that SEPA mitigation payments may continue to be imposed pursuant to a jurisdiction's SEPA authority demonstrates that the Legislature did not intend to foreclose the collection of such payments when it enacted the GMA." (Yuann, 6)

Other legal experts strongly dissent from this view. John Keegan of Davis, Wright, Tremaine argues that the two provisions cited by Yuann as implicit sanctions of non-GMA fees "are anti-double dipping statutes; they are not express authorizations to impose impact fees. Both provisions can be reconciled with the legislative prohibition in RCW 82.02.020 which prohibits fees except as expressly authorized pursuant to specific statutes." The "double dipping" amendment to GMA enacted by the Legislature in 1992, he says, "did not undo the prohibition in RCW 82.02.020, nor could such prohibition be released by mere implication." (Keegan, 3.)

Attorney John Hempelmann is even more emphatic in denying the authority to impose impact fees under any other authority than GMA. In a Sept. 1994 letter to Mukilteo School District (one of those receiving fees under claimed SEPA authority), Hempelmann advises that:

> "There is no express authority in either state law or City of Everett codes for the District to collect impact fees…Second, neither the State Environmental Policy Act, RCW Chpt. 43.21C, nor the State Supreme Court's decisions interpreting SEPA, authorize use of SEPA to impose or collect school impact fees. There is substantial doubt whether the Supreme Court would approve use of impact fees for this purpose…"

No court has ever explicitly stated that SEPA provides authority to collect impact fees or to order anyone to pay them, Hempelmann says. Nor has any court ever addressed a situation in which a jurisdiction is planning under GMA, but collecting fees under SEPA, as some jurisdictions now are.

McCann reaches a somewhat more equivocal position, finding SEPA authority for impact fees emerging, if in a less than crystalline fashion, from SEPA case law. In *Hillis Homes v. Snohomish County* (1982), the state Supreme Court invalidated an impact fee imposed on residential development to help pay for schools on the ground that the exaction was in effect a tax intended to raise revenue, rather than a fee intended to regulate land use, and that only the state legislature could levy such a tax. RCW 82.02.020 was enacted shortly after. "This statute caused considerable difficulty in local governments' attempt to impose impact fees on developers," McCann observes, "but did not stop them entirely." In another significant decision, *Prisk v. Poulsbo* (1987), the Court ruled that any fees assessed under SEPA must be based on a specific environmental policy, rather than on a presumed general authorization, and reference "specific adverse environmental impacts." The Court pronounced that cities "may impose conditions under SEPA…only if they act pursuant to legitimate environmental policy concerns which are incorporated into environmental ordinances, and there is a reasonable relationship between the conditions or fees imposed and the environmental objective…" While carefully circumscribing the authorization, this decision "opened the SEPA door to impact fees," says McCann.

The state Supreme Court seemed to raise the standard of scrutiny of SEPA-based impact fees, however, in its last major decision on the subject before the advent of GMA. In *R/L Associates v. Seattle* (1989) the Court noted that even though past cases (e.g., *Prisk*) "have resisted a strict application of 82.02.020 when confronted with the validity of a development fee, they do not reject such an application." The Court decided to "apply the statute according to its plain and unambiguous terms," says McCann, invalidating a Seattle housing ordinance that would have required payments of developers for low-income housing. *"Thus, just before passage of the GMA, the Washington Supreme Court announced that it would strictly adhere to the RCW 82.02.020 prohibition of involuntary charges or fees, direct or indirect, on real estate development."* [Emphasis added.] (McCann, 2-21-22.) This careful construction of impact fee authority by the state's highest court is the immediate judicial background of the Growth Management Act of 1990. It is not unreasonable to infer that this decision was in the Washington Legislature's mind as its members drafted the law that would amend RCW 82.02 and set the rules for most impact fees in operation today.

SEPA-based impact fees: The policy issue

The question of the legal authority to assess impact fees under SEPA would not be so important did it not have such great implications for the actual implementation of the fees. In those jurisdictions in which impact fees are assessed pursuant to SEPA rather than to GMA, the imposition, calculation, administration and expenditure of the fees are subject to few of the rules and conditions that we have previously established as validating requirements. The result is an impact fee process that invites abuses, excesses and inequities.

Even if one assumes that SEPA is legally available as a basis for impact fees, Keegan argues, it's the wrong tool to use. To be sure,

FIGURE 5

Sample School Impact Fees

Jurisdiction / School District	Authority	Year Adopted	Fees SF	MF	MF+
City of Bainbridge	GMA	1991			
Bainbridge I.			$2,240	$700	
City of Camas	GMA	1992			
Camas			688	593	
Clark County	GMA	1993			
Battle Ground			750	203	
Camas			688	593	
Evergreen			931	406	
Green Mountain			639	0	
Hockinson			1,200	0	
Washougal			1,600	591	
City of Duvall	GMA	1994			
Riverview			2,099	1,584	
City of Enumclaw	SEPA	1991			
Enumclaw			1,334	1,055	
City of Lake Stevens	SEPA	1991			
Lake Stevens			1,882	806	1,882
City of Mukilteo	SEPA, SSA	1992			
Mukilteo					
King County	GMA	1991			
Federal Way			2,518	1,355	
Highline			2,123	1,868	
Issaquah			2,792	1,146	
Kent			3,381	1,773	
Lake Washington			2,951	1,179	
Northshore			2,888	743	
Riverview			2,013	1,014	
Snoqualmie Valley			3,068	1,676	
Tahoma			3,018	1,744	
Kitsap County	GMA	1992			
Bainbridge I.			963	555	
Bremerton			963	555	
Central Kitsap			963	555	
North Kitsap			963	555	
South Kitsap			963	555	
City of Mount Vernon	GMA	1993			
Mount Vernon			2,658	2,615	
City of Newcastle	GMA	1994			
Issaquah			2,792	1,146	
City of Olympia*	GMA	1992			
Olympia			1,717	742	1,385
Skagit County		1994			
Conway	GMA		3,997	0	

GMA: Growth Management Act, RCW 82.02

SEPA: State Environmental Protection Act, RCW 43.21C.

SSA: State Subdivision Act, RCW 58.17

SF: Single-Family MF: Multi-Family MF+: Multi-Family with 2 or more bedrooms

*Olympia charges a fee of $1,385 per mobile/manufactured unit for Olympia S.D

**Everett S.D. also charges a fee of $2,666 per 2,3, or 4-plex unit.

***Tumwater charges a fee or $791 per mobile/manufactured unity of Olympia S.D.

Sources: Preston, Gates & Ellis, and WRC Survey.

FIGURE 5 CONTINUED

Jurisdiction School District	Authority	Year Adopted	Fees *SF*	MF	MF+
Snohomish County	SEPA	1991			
Arlington			1,287	187	920
Edmonds			2,556	822	1,324
Everett**			1,865	1,313	1,313
Granite Falls			1,990	850	850
Lake Stevens			1,914	273	1,943q
Lakewood			1,550	220	1,107
Marysville			935	134	668
Monroe			2,959	1,120	3,045
Mukilteo			2,618	71	1,972
Northshore			3,535	0	1,906
Snohomish			827	118	591
Stanwood			2,733	390	1,952
Sultan			1,253	179	896
City of Stanwood	GMA	1993			
Stanwood			635	236	
City of Tumwater***	GMA	1993			
Olympia			1,703	746	791

GMA: Growth Management Act, RCW 82.02
SEPA: State Environmental Protection Act, RCW 43.21C.
SSA: State Subdivision Act, RCW 58.17
SF: Single-Family MF: Multi-Family MF+: Multi-Family with 2 or more bedrooms
* Olympia charges a fee of $1,385 per mobile/manufactured unit for Olympia S.D.
** Everett S.D. also charges a fee of $2,666 per 2,3, or 4-plex unit.
***Tumwater charges a fee or $791 per mobile/manufactured unity of Olympia S.D.
Sources: Preston, Gates & Ellis, and WRC Survey.

Chapter 82.02.020 does set certain conditions on payments made to mitigate impacts pursuant to voluntary agreements. These provisions, like the similar ones in 82.02.050, are intended to require the fees to meet the criteria of reasonableness and rational nexus that we set out earlier. It states that in any voluntary agreement made under this section

a) "The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;

b) The payment shall be expended in all cases within five years of collection; and

c) Any payment not so expended shall be refunded with interest…"

FIGURE 6

GMA and SEPA Impact Fees

Growth Management Act (RCW 52.02.050-090)	**State Environmental Protection Act** (Voluntary Agreements under RCW 82.02.020)
Fees may only be imposed for system improvements that are reasonably related to the new development, and that reasonably benefit the new development.	Fees may only be expended to fund a capital improvement agreed upon to mitigate the identified, direct impact of the development.
The financing for system improvements to serve new development may not rely solely on impact fees.	No provision.
Amount of fees may not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development.	No provision.
Fees may be collected and spent in conformance with the capital facilities plan element of an adopted comprehensive plan.	No provision.
Ordinance imposing impact fees must include a schedule of fees for each type of development activity subject to the fees. The schedule must be based on a formula or other method of calculating the fees. That formula must take into account several factors.	No provision.
Ordinance may provide an exemption for low-income housing or other development activities with broad public purposes, so long as the foregone revenues are made up from public funds other than impact fee accounts.	No provision.
Ordinance shall provide a credit against the fees for any land dedication or system improvements provided by the developer to facilities identified in the capital facilities plan and required as a condition of the development.	No provision.
Ordinance shall allow the jurisdiction to adjust the standard impact fee to insure that fees are imposed fairly.	No provision.
Ordinance shall permit consideration of studies and data submitted by the developer in calculating the fee amount.	No provision.
Fees may be imposed for system improvement costs previously incurred to the extent that those improvements will serve new growth and development, but they may not be used to make up for any existing deficiencies.	No provision.
Fee receipts must be earmarked and retained in separate, interest-bearing accounts for each type of facility for which fees are collected.	Fee receipts must be held in a reserve account.
Jurisdiction must provide an annual report on each impact fee account, showing the source and amount of moneys collected and the system improvements they financed.	No provision.
Fees must be expended or encumbered within six years, unless extraordinary and compelling reasons are provided in writing by the governing body.	Fee receipts must be expended within five years.
Payments not expended or encumbered within six years must be refunded with interest to current property owner. Potential claimants must be notified by first class mail.	Any payments not expended within five years must be refunded with interest to property owners of record.

It further provides that no local government may require any payment as part of such a voluntary agreement which the local government "cannot establish is reasonably necessary as a direct result of the proposed development or plat."

Those provisions are fine so far as they go. But they fall far short of the legal protections provided by 82.02.050-090. And such provisions are entirely absent from SEPA (Chapter 43.21C.) As Keegan notes, the typical SEPA scenario might be a situation in which the fee is the product of a single environmental impact statement, or of a local formula calculating costs for facilities per single-family unit (as we find, for example, in Snohomish County). In either case, SEPA is a poor basis for assessing fees, because, unlike GMA

a) There is usually no capital facilities plan pursuant to which infrastructure needs are identified;

b) The process leads to inconsistent treatment from one development applicant to the next, with some exempted from fees, and others paying what the market will bear;

c) There is no separation of existing infrastructure deficiencies from the impact of the new development;

d) There is usually no financing plan to pay for the share of the facility not attributable to new development;

e) There is no systematic provision for credits for in-kind contributions and improvements made by the developer. (Keegan, 3-4)

f) Figure 6 (*GMA and SEPA Impact Fees*, p. 40) shows that even under the voluntary agreements language of RCW 82.02.020, SEPA-based fees are subject to few of the conditions placed on impact fees by the Growth Management Act. In addition to the gaps and omissions cited above by Keegan, RCW 43.21C and 82.02.020 most notably fail to

g) Prohibit fees from being used as the sole source of the financing of an improvement;

h) Require jurisdictions assessing such fees to enact an ordinance governing their operation;

i) Require that the fees be calculated through a formula, enacted by ordinance, and specify factors that must be taken into consideration in the formula;

j) Require that fee amounts reflect anticipated future taxes paid by the development proratable to the facility;

k) Authorize submission of data by the developer and adjustment of the fee by the jurisdiction to ensure accuracy and fairness;

l) Authorize exemptions from fees for low-income housing, and

m) Require an annualized accounting of fee receipts.

FIGURE 7

SEPA Impact Fee Calculation

Single-Family Unit, Snohomish County, for Lake Stevens School District (1992)

Land Acquisition Impact + Local Effort Acquisition Construction Cost Impact + Bus Fleet Impact = Impact Fee

Step One

Calculate student population impact

1. Number of Units x Single-Family Residence = Number of Students

Number of Students	1 x 0.700 = 0.700

2. Number of Students x Student Population Configuration by Level = Population Impact

Elementary School:	0.700 x 50% = 0.350
Junior High School:	0.700 x 25% = 0.175
Senior High School:	0.700 x 25% = 0.175

Step Two

Calculate land acquisition impact

Add (Population x (Number of Acres x Land Acquisition Cost))/Average Enrollment for All Levels = Land Acquisition Impact

Elementary School:	(0.350 x (10 acres x $30,000 in land acquisition cost)/500 =	210.00
Junior High School:	(0.175 x (20 acres x $30,000 in land acquisition cost)/750 =	140.00
Senior High School:	(0.175 x (30 acres x $0 in land acquisition cost)/1,000 =	0.00
		$350.00

Step Three

Calculate local effort construction cost impact.

(Add Population Impact x (Boeckh Index x Footage per Student x Local Funding Percentage) for All Levels) + Impact to Reopen an Unoccupied School = Local Effort Construction Cost Impact

Elementary School:	0.350 x ($79.97 x 80 sq. ft. x 32.6%) =	729.97
Junior High School:	0.175 x ($79.97 x 100 sq. ft. x 32.6%) =	456.23
Senior High School:	0.175 x ($0 x 120 sq. ft. x 32.6%) =	0.00
Impact to Reopen Unoccupied School:		0.00
		$1,186.20

Step Four

Calculate bus fleet impact

(Total Students x Student Busing Factor) x Cost per Seat/Average Bus Runs = Bus Fleet Impact

0.700 x 1 x $902.78/4 = **$157.99**

Step Five

Calculate single-family fee.

Land Acquisition Impact + Local Effort Construction Cost impact + Bus Fleet Impact = Fee

Land Acquisition Impact:	350.00
Local Effort Construction Cost Impact	1,186.20
Bus Fleet Impact:	157.99
1992 Single-Family Fee	**$1,694.18**

By assessing under SEPA rather than GMA authority, jurisdictions escape most of the requirements on fees specified in model impact fee legislation, requirements intended to ensure that the fees satisfy the critical legal tests of need, benefit and proportionality. One local planning official aptly described the SEPA impact fees process to us as "catch as catch-can," a situation that GMA was, at least in part, intended to remedy.

Figure 4 (*Provisions of Impact Fee Ordinances,* p. 22) shows the effect of the differing requirements for SEPA- and GMA-based fees on local impact fee ordinances. The GMA-based ordinances in place in Clark County, King County, Kitsap County and Olympia offer far more legal protections to property owners and taxpayers, and thus far more assurance that fees will be assessed fairly and used appropriately, than do the SEPA-based ordinances of Enumclaw, Lake Stevens, Mukilteo and Snohomish County.

Figure 7 (p. 42) shows how impact fees were calculated by Snohomish County for Lake Stevens School District in 1992. Compare this with the much more elaborate process required by King County's ordinance to calculate the same fee for Tahoma School District in 1994. A number of critical components required or authorized by RCW 82.02.060 which tend to mitigate the fee amount, including the state match, the tax credit, the facility credit and the discount factor, are absent from the SEPA calculation. The SEPA fee in Lake Stevens is the simple addition of estimated costs per student. This formula does not take into account the other sources of financing for school facilities, and recognize that fee payers will contribute toward their support from these other means as well. It does nothing to prevent residents of new development from paying twice for facilities improvements: once through impact fees, and again through property taxes on their new homes. It thus cannot possibly guarantee that new development will be assigned an appropriately proportionate share of the costs of new facilities.

The possible use of impact fees to make up for current deficiencies--a practice explicitly prohibited by GMA--may be the most glaring problem resulting from the weak set of ground rules for SEPA-based fees. In order to meet the rational nexus test, the local government must show, preferably through an adopted capital facilities plan, how existing deficiencies will be made up, perhaps through taxes that only existing development will pay, before impact fees may be imposed on new development. (Nicholas and Nelson, in Nelson, 172.) Washington's State Environmental Protection Act imposes no such requirement. It therefore leaves a genuine risk that new homeowners will be asked to carry the burden for the failure of local officials and taxpayers to meet their communities' infrastructure needs.

The City of Mukilteo's SEPA-based ordinance, for example, requires only that a school district show that it will have unhoused students or inadequate bus seating capacity somewhere within a five-year enrollment projection period in order for mitigation remedies to be imposed on new development. There is no requirement on the city or district to demonstrate that the projected future lack of capacity is *attributable* to the new development. The ordinance also places no requirement on the city to show that any unhoused student population that occurs over the next five years cannot be accommodated through existing financing sources.

Mukilteo illustrates other weaknesses and inequities in SEPA-based impact fee laws. The impact elements that can be mitigated through impact fees under the Mukilteo ordinance – local effort construction cost, land acquisition and bus fleet costs – are not required to be included in capital facilities plans, as they are in GMA-based ordinances. According to Ordinance No. 716, City of Mukilteo, “The district is authorized to utilize mitigation received pursuant to this chapter *in the manner the district determines will best meet its educational service needs* so long as the use will mitigate the impacts of the subdivision or development for which the mitigation was received and result in improvements to district wide student housing and transportation conditions.” (Emphasis added.) Lake Stevens’ ordinance No. 371 contains similar language. Under neither of these ordinances are fees restricted to uses creating new capacity to accommodate growth attributable to new development.

Accountability is also a much greater problem under SEPA-based than under GMA-based fee ordinances. Lake Stevens provides that “The method and formula for determining any required school impact mitigation shall be established by the Lake Stevens School District,” not by the city. Mukilteo directs that fees be paid “directly to the school district,” which shall establish an escrow account for their deposit. Statutory authority for such payment is difficult to find. RCW 82.02.020 authorizes only “counties, cities, towns or other municipal corporations,” not school districts, to collect fees and place them in interest-bearing accounts. Snohomish County stated to WRC that “Actual use of [impact fee] funds is not tracked by Snohomish County,” which should be troubling indeed for all those builders and new residents required to pay them.

One of the key intents of RCW 82.02.050-090 is to provide some measure of predictability in the amount of fees that new development will be asked to pay, and the amount of revenues that will be available to local governments. Because it leaves so much discretion to local jurisdictions in the determination of fees, SEPA provides little such predictability. Snohomish County acknowledges that “Under our existing program fees can fluctuate as much as 30-50 percent either direction from year to year within a district.” The average single-family home in Lakewood S.D. rose from $998 to $1,550, the 1 bedroom, multi-family fee in Edmonds S.D. rose from $641 to $1,324. For the County’s 13 school districts, the average impact fee on 1-bedroom, multi-family units declined by 37 percent from 1993 to 1994, while the average fee on 2-bedroom units increased by 33 percent. Total revenues from school mitigation fees in Snohomish County exploded from $71,583 in 1992 to $658,350 in 1993, before falling back to $284,388 in 1994.

Both the City of Mukilteo and Snohomish County report that they are in the process of planning a transition from SEPA-based to GMA-based impact fee systems. Snohomish County told WRC that “Capital facilities plans meeting GMA requirements are now under development for each of the 14 school districts…[A] framework plan is also being developed for the County’s comprehensive plan, as well as a model impact fee ordinance." The County further reports that it "will be looking to improve and streamline our administrative procedures for computing, collecting and disbursing impact fees as we convert from a SEPA to a GMA-based program. We will also be attempting to develop a formula that produces less volatility in fee levels' annual variations within any given district."

Those laudable plans by Snohomish County are a recognition that the State Environmental Policy Act provides a poor framework for the imposition of impact fees. A transition by all local governments now assessing fees under SEPA to a strengthened GMA impact fee law would be a valuable step toward injecting greater equity and accountability into the present system for financing school facilities.

Recommendations

1. Integrate SEPA and GMA, and require that any impact fees that may be assessed conform to a uniform set of legal requirements.

Establish in law that authorization for SEPA-based impact fees is terminated on a date certain. Require transition to GMA requirements (RCW 82.02.050-090) of any jurisdictions wishing to impose impact fees. Those requirements include adoption of a valid impact fee ordinance as a condition of imposing such fees.

Policy rationale: Continued collection of school impact fees under SEPA is without a firm foundation in Washington state law, perpetuates a confusing, unpredictable and unaccountable dual fee system, and results in fees that do not meet the necessary legal standards of need, benefit and proportionality.

2. Specify eligible objects of expenditure of impact fee revenues.

Add language to Chapter 82.02 clearly limiting the use of impact fees to system improvements necessitated by increased enrollment attributable to new development.

Policy rationale: The exclusive reference to a capital facilities plan in Chapter 82.02 is too vague, and does not clearly express the nexus of fees to new development. Limitation on uses of fee receipts should be made explicit in law for better public understanding of legislative intent.

3. Define the student generation factor.

Specify by rule valid and acceptable methods for deriving the student generation factor in calculating impact fees.

Policy rationale: The wide variety of methods to determine student factor allow for a wide margin of error and create an appearance of arbitrariness in fee calculations. Student factor standards, set by the State Board of Education in cooperation with the Department of Community Development, would increase public understandability and governmental accountability and more nearly ensure that fees imposed reflected actual development impacts.

4. Define and limit the level of service to be supported by impact fees.

Establish in statute that the level of service to be provided by facilities to be funded by impact fees may be no greater than the level of service provided by existing infrastructure to the community as a whole.

Policy rationale: New development should not be required to raise the standard of service for the community. The current language barring use of impact fees to make up for system improvement deficiencies is insufficient. Capping the level of service component in the impact fee formula at some existing, verifiable standard, as do some other states, would eliminate any temptation to exploit impact fees for the construction of facilities that local taxpayers would not be willing to support by themselves.

5. Specify timing of payment.

Assess early, collect late. Calculate fees at platting and require payment at certification of occupancy. Provide an option to pay fees over a five-year period, with interest.

Policy rationale: The earlier in the process impact fees must be paid, the greater is their effect on transaction costs, and thus on sales prices. Scheduling payment to take place at the end of the development process would reduce or eliminate the widely acknowledged, adverse effect of impact fees on housing affordability.

6. Require an interlocal agreement.

Add to RCW 82.02.060 a provision requiring cities, counties and school districts to form intergovernmental agreements clearly designating the roles and responsibilities of each governmental entity as a condition for assessing school impact fees.

Policy rationale: Under current practices, statutory authority for fees rests with counties and cities, yet practical authority for the operation of fees often seems to reside in school districts. Clearly fix responsibilities for identification of school impacts and calculation, administration and expenditure of impact fees. Restore the clear legislative intent that cities and counties, not school districts, are the authorizing and responsible governmental entities for the purposes of impact fees.

7. Develop a long-term solution to the state's school construction financing problem. Establish in law that the construction of school facilities is a public, not a private responsibility.

Policy rationale: The Washington State Constitution establishes that public education, and by extension the necessary facilities in which it is conducted, is a public service different in kind from roads, water, sewer, parks or other kinds of infrastructure services. Education is presumed to benefit all the members of society, not just those directly receiving the service. The current controversy over school impact fees is at least in part a consequence of the state's abdication of its responsibility to provide adequate and reliable funding for school districts' legitimate capital needs. All of the parties to this dispute – developers, builders, realtors, homeowners, local governments and school districts – are victims of the state's failure to meet its obligations to its school children.

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