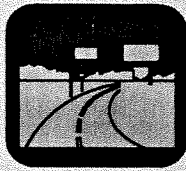
Impact Fees in Hawaii

Implementing the State Law

by James C. Nicholas & Dan Davidson



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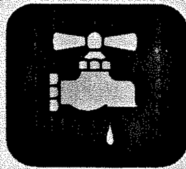

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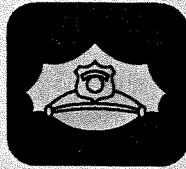

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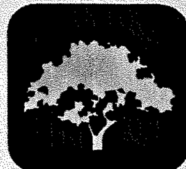

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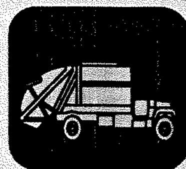

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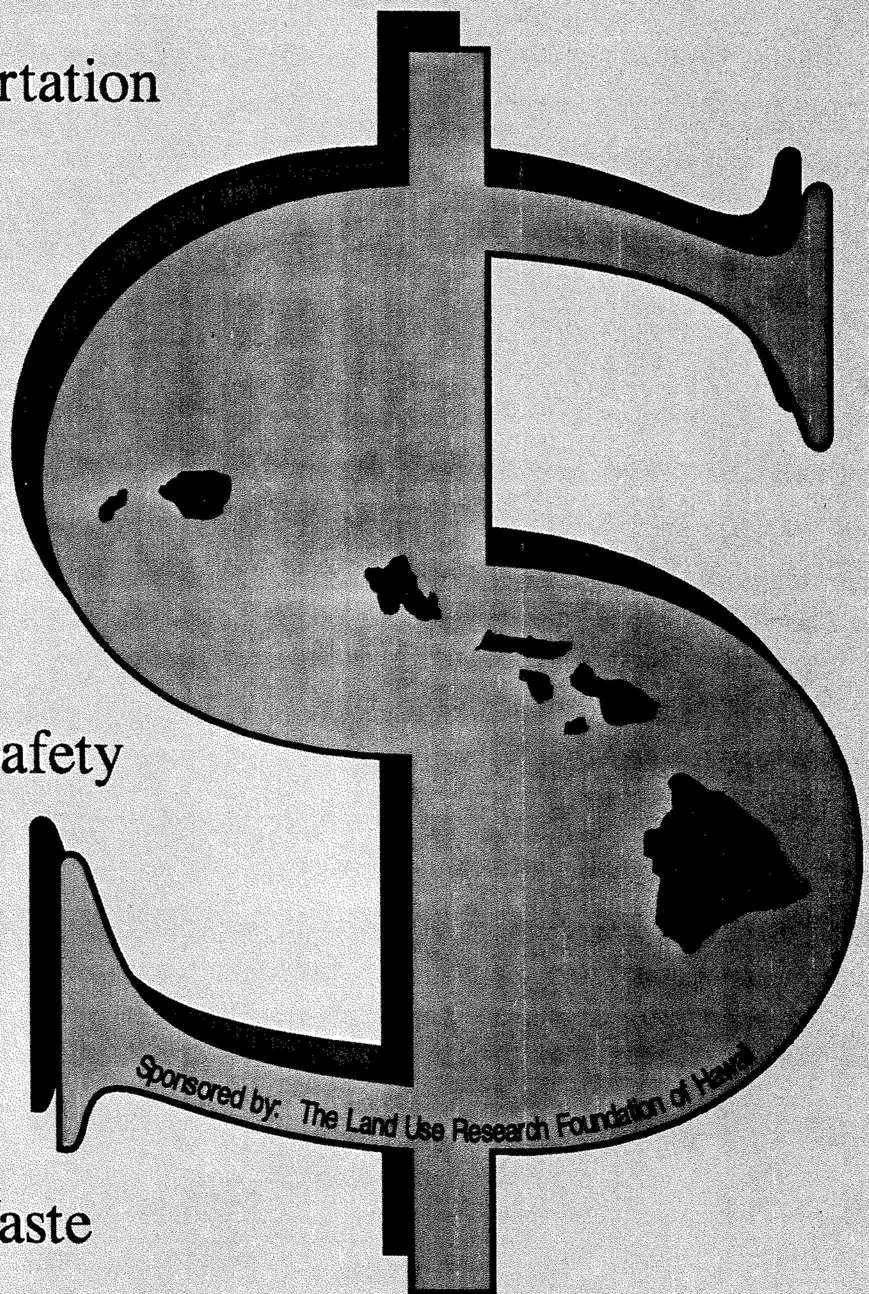

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The Land Use Research Foundation (LURF) of Hawaii is a private non-profit research and trade organization whose members are major Hawaii landowners and development companies.

The goal of the Land Use Research Foundation of Hawaii is the fostering of sensible land use planning and responsible development in the State. This is achieved through better understanding and communication among the various sectors that make up Hawaii's community (government, business and general public), and a commitment to improving the processes of land use planning, government regulation and property development. The Foundation believes that quality land development provides an essential service for Hawaii's people and is critical to a healthy economy for our State.

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I. INTRODUCTION

Each county in Hawaii must provide the public facilities, or "infrastructure," to meet the needs of its residents and its visitors. Infrastructure is a relatively recent addition to the English language. As the term is presently used, it refers to the physical support system of a community. For the counties, this includes capital improvements for water systems, sewage systems, local roads and parks, police and fire protection, storm water drainage, and solid waste disposal. To a great extent, the quality of life enjoyed within a community depends upon keeping current with infrastructure. Traffic congestion results from the rate of increase of traffic that is greater than the rate of increase in transportation facilities. Water pollution results from the production of more wastewater than wastewater treatment capacity. School or park overcrowding occurs when population increase outstrips facilities.

The solution to these and other problems is, conceptually, very simple — build more facilities. While the conceptual solution is simple, the financial components of the solution are far from simple. Since Hawaii has grown at a relatively rapid pace, its counties face the problem of how to pay for the public facilities needed to accommodate this growth. Shrinking federal dollars and a general reluctance to increase property taxes contribute to this dilemma, which is not at all unique to Hawaii. Determining how to finance public infrastructure improvements is a nationwide problem.

Development impact fees are one mechanism now being employed by many mainland municipalities to help pay for growth. Impact fees generally are combined with other means of funding public investments such as general taxation, motor fuel taxes, assessment districts, and user charges. Although there has been considerable discussion of the concept throughout the State, Hawaii's actual use of impact fees has thus far been limited to sewer and water connection fees. No county has adopted a comprehensive system of impact fees as a means of financing new infrastructure, although many of costs of growth have been shifted to new development through the use of conditional zoning to obtain exactions or contributions from developers for infrastructure. Increasingly, however, each county has begun to consider impact fees as a more predictable alternative.

Establishing impact fees may now become a necessity because of the Hawaii Impact Fee Law. In 1992, the Hawaii State Legislature enacted House Bill 3787, entitled "A Bill for an Act Relating to Impact Fee Authorization" as Act 282. Based upon national model legislation, this law authorizes county use of impact fees and provides general guidelines for their use. The text of the law is included as Appendix A. In the law, the state legislature declares that the imposition of impact fees to provide for public facilities and services required to accommodate new development is both fair and reasonable.

The Hawaii Impact Fee Law invokes an approach to impact fees known as the Rational Nexus Test. This approach is by far the most commonly used method in other states and will be discussed in Chapter II. The law contains the following transition provision that embodies the Rational Nexus Test:

> *Any county requiring impact fees or imposing development exactions in order to fund public facilities, shall incorporate fee requirements into its broader system of development and land use regulations in such a manner that developments, either collectively or individually, are not required to pay or otherwise contribute more than a proportionate share of public facility capital improvements. Section 2.§ -8, Act 282*

It appears that county adoption of a system of comprehensive, proportionate-share impact fees represents the best way for Hawaii's counties to meet the requirements of the Hawaii Impact Fee Law. The intent in this short volume is to provide clear and practical guidance to county governmental officials and other users on how to accomplish this.

This book is organized into the following subject areas. In Chapter II, the history of impact fees and their legal basis is presented along with a discussion of their role as an instrument of fiscal policy. A statistical survey of how impact fees are used in different jurisdictions, and how much they cost, is presented, along with a section on exactions and impact fees in Hawaii. Chapter III provides a section by section discussion of the Hawaii Impact Fee Law so that its requirements may be implemented easily by the counties.

Chapter IV presents the "nuts and bolts" of calculating proportionate-share fees under the law and in accordance with a land use plan. The differences between "needs driven" and "improvements driven" methods of calculation are set forth. Chapter V covers the equally important issues pertaining to the administration of an impact fee program. Chapter VI, entitled "Drafting an Ordinance," sets forth all of the elements that are needed in order to draft a comprehensive impact fee ordinance. In conclusion, Chapter VII covers the integration of impact fees with other methods of finance, including special districts and development agreements.

II. HISTORY AND RATIONALE OF IMPACT FEES

A. HISTORY OF EXACTIONS — FROM DEDICATIONS TO IMPACT FEES

Impact fees are the latest evolution in the regulation of new development. As American society became more urbanized, it became necessary for local governments to regulate how new developments took place. This began by requiring developers of new subdivisions to put in streets and to install necessary utilities. The initial scope of governmental review of new developments was confined to matters within the ownership of the development — so-called on-site issues or impacts. As issues within the ownership were addressed, attention focused on what have become known as off-site impacts.

The increasing cost of maintaining the existing infrastructure, combined with the decline of public support for taxation alternatives, has forced local jurisdictions, in the United States and elsewhere, to seek alternatives [Ambrosky, 1987, Alterman, 1988, Netzer, 1988, and Callies & Grant, 1991]. Impact fees are one alternative.

Impact fees are monetary charges 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 & Nelson, 1988]. There are other forms of developer contributions — land dedications and other "exactions," imposed by means of conditions on zoning — but this discussion will focus mainly on the impact fee.

The impact fee originated in states and communities experiencing relatively rapid growth. Because rapid growth requires the rapid expansion of capital facilities to a larger population, it raises the fundamental question of who pays. The underlying question in all controversies about impact fees is who is to pay for the roads, parks, schools, utilities, protection services, and other public facilities needed to serve a growing population?

Impact fees are generally imposed as a condition for some approval to proceed with development [Bosselman & Stroud, 1986]. The most common approval used to require the payment of an impact fee is the building permit. Impact fees, thus, fall within the general system of local government land development regulation as contrasted with revenue raising (taxation) programs. The objective of impact fees is not to raise money. Rather, the objective of impact fees is to ensure adequate capital facilities. The adequacy of capital facilities is critically important to the entire system of land development regulation. Where capital facilities are not adequate, permitting development is contrary to the responsibility of a local government to protect public health, safety, and welfare. Or, using the more popularly current terms, inadequate physical infrastructure is destructive to quality of life. It follows then that a requirement that development proceed only when such adequacy is either attained or ensured would be an act protecting the public from the harm that would occur in the absence of these facilities. The role of the impact fee is to assist in financing the provision of these needed public facilities.

B. EXACTIONS AND IMPACT FEES AS FISCAL POLICY

There can be little doubt that America has made a significant shift in fiscal priorities. The move has been away from public investments in physical infrastructure. Nowhere has this reprioritization been more keenly felt that in the provision of adequate roads.

The roads of American cities have been subjected to ever increasing traffic while maintenance and improvement programs have lagged [Vaughn]. The result has been deterioration of roads and bridges, and increasing congestion. The resources made available to the nation's transportation system have not been sufficient even to maintain this existing stock let alone keeping up with need [Nat'l Council on Public Works]. While the nature of the problem has been national in scope, the more rapidly growing areas of the country have felt the greater burden. Numerous calls for reform, i.e., more money, have fallen to the fiscal reality of the 1980's and 1990's. This problem continues.

It should come as a surprise to no one that there has been a revolution in governmental finance. "Down with taxes" has been the battle cry of this modern day revolution. While actual taxes paid have rarely, if ever, actually fallen, all levels of government have found insufficient revenues to meet the desired levels of spending. Given a tendency toward federal fiscal retrenchment, local and state governments have looked for "innovative" and "creative" methods of revenue generation [Nicholas 1992]. It would appear that both of these methods of finance involve finding "someone else" to pay [Nicholas 1992]. As revenue sources became more difficult to find, lower priority expenditures first were reduced and frequently eliminated. Unfortunately, transportation has been one of the more frequently cut item because it is easier to cut capital spending than continuing operations. The National Council on Public Works Improvements concluded that the nation's "infrastructure is barely adequate to fulfill current requirements, and insufficient to meet the demands of future economic growth and development" and recommended a doubling of infrastructure investment [Nat'l Council].

Within a general context of tax limitations, taxes have been increased. Nationally, motor fuel taxes have been increasing at an annual rate of 13% per year (combined state and federal) [Stat. Abs. of the US]. In Hawaii, motor fuel taxes have increased from five cents per gallon in 1970 to eleven in 1989 — an increase of 120% [Stat. Abs. of the US, 1972 and 1991]. These increases have been insufficient for during the 1970 - 89 period prices increased by 220%. It is obvious that a 120% increase in motor fuel taxes fade in comparison with a 220% increase in prices. This is a partial explanation for increasing road congestion. Virtually all states, including Hawaii, have increased general taxes as have most local governments. These general tax increases have been insufficient to counter the decline in infrastructure finance. Investment in public capital — infrastructure — has been so low that the aggregate stock of public capital is now declining in the United States [Netzer]. Almost daily reports of falling bridges or airport delays confirms this decline.

Clearly additional resources are needed. No student of this subject has failed to recommend massive amounts of additional resources. But, such recommendations must be considered in light of former President Bush's comment that "[s]tate and local governments — along with the private sector — must also fulfill their responsibilities to maintain and expand the Nation's infrastructure" [Econ. Report of the President - 1990, p. 123]. In the 1992 presidential campaign, President Clinton expressed the wish to increase federal investment in public infrastructure. If this comes to fruition, it could mean a reversal in the decline in public investment in infrastructure. The issue is what will be the source, or sources, of these funds. One commonly used means is assessments on new developments — impact fees.

Impact fees began in California, Texas and Florida. Today, in one form or another, they are found throughout the country [Nicholas 1991]. In some places they are known as system development charges (Georgia and Oregon) and in others they are facility benefit assessments (San Diego, California). The most common name is impact fees. Despite what they are called, they all have the same purpose of shifting a portion of capital costs to new development. Today, impact fees exist for capital improvements to:

POTABLE WATER
SOLID WASTE
ARTERIAL ROADS
LOCAL ROADS
PARKS
FIRE PROTECTION
PUBLIC BUILDINGS
EMERGENCY MEDICAL SERVICE.
SEWERS
DRAINAGE
COLLECTOR ROADS
PUBLIC SCHOOLS
PUBLIC LIBRARIES
LAW ENFORCEMENT
PUBLIC CEMETERIES

In addition, linkage fees, a close but less legally established relative of impact fees, exist for:

LOW INCOME HOUSING	DAY (CHILD) CARE FACILITIES
MASS TRANSIT	AFFORDABLE AND EMPLOYEE HOUSING
ART-IN-PUBLIC PLACES	JOB CREATION.

The evolution of public finance in the United States has been toward "privatization" and away from general taxation. There are several reasons for this trend that are well known to everyone. In consequence, localities had to develop means of raising private revenues to replace amounts previously received from the state or the federal government.

Charges for services, or user fees, have been the more common means of "revenue enhancement." Table 1 shows the recent national trend in local government revenue. These data clearly show what most local government taxpayers have felt — total general revenue is growing but both local taxes and user fees are growing at an even faster rate. This is due, primarily, to lessened federal shared revenues and grants. Between 1980 and 1988, taxes went from 38% to 42% of general revenues while user charges went from 33% to 40%. Obviously other sources have been declining. This table clearly shows the dilemma of local governments and their response to that dilemma. While technically not a user charge, impact fees are grouped under this general heading. There are private sources of revenue — privatization — that primarily off-set declines in other revenues.

TABLE 1

LOCAL GOVERNMENT REVENUE BY MAJOR SOURCE
UNITED STATES (millions of dollars)

	1980	1985	1988	% CHANGE
COUNTIES				
TOTAL GEN. REVENUE	54,573	85,500	106,069	94.4%
TAX REVENUE	18,813	30,898	40,578	115.7%
CHARGES FOR SERVICES	11,300	23,193	29,680	162.7%
CITIES				
TOTAL GEN. REVENUE	76,056	114,649	135,835	78.6%
TAX REVENUE	31,256	47,647	59,791	91.3%
CHARGES FOR SERVICES	32,002	57,353	67,884	112.1%
BOTH				
TOTAL GEN. REVENUE	130,629	200,149	241,904	85.2%
TAX REVENUE	50,069	78,545	100,369	100.5%
CHARGES FOR SERVICES	43,302	80,546	97,564	125.3%
COUNTIES		**— PERCENT OF GEN. REVENUE —**		
TOTAL GEN. REVENUE				
TAX REVENUE	34.5%	36.1%	38.3%	
CHARGES FOR SERVICES	20.7%	27.1%	28.0%	
CITIES				
TOTAL GEN. REVENUE				
TAX REVENUE	41.1%	41.6%	44.0%	
CHARGES FOR SERVICES	42.1%	50.0%	50.0%	
BOTH				
TOTAL GEN. REVENUE				
TAX REVENUE	38.3%	39.2%	41.5%	
CHARGES FOR SERVICES	33.1%	40.2%	40.3%	

SOURCE: U.S. Bureau of the Census, Statistical Abstract of the U.S., 1991, p. 298-99.

C. THE RATIONAL NEXUS TEST

Impact fees are not taxes. The Hawaii Impact Fee Law authorizes fees and not taxes. The same is true for all other state enabling acts. There is a very fundamental and significant difference between fees and taxes.

A tax is a payment required by government where there is no connection between the amount paid and any service or benefit received from the taxing authority. By contrast, a fee is a payment required by government where there is a direct connection between the amount paid and any service or benefit received. Contrast state income taxes with motor fuel taxes. There is no relationship between the amount of state income taxes paid and the receipt of governmental services or benefits. The payment of motor fuel "taxes" presents a very different picture. The amount of motor fuel taxes paid is directly related to the use of the transportation system. The more that the transportation system is used by an individual, the more fuels consumed and the more motor fuel taxes paid. Additionally, if an individual was to totally avoid the use of the (vehicular) transportation system, there would be no payments toward its construction and up-keep. Thus, the motor fuel tax is really not a tax at all. Rather, it is a user fee that we call a tax. Nevertheless, the primary distinction between fees and taxes is proportionality between payments and benefits.

Because impact fees are not taxes, the requirement to pay, and the amount paid, must be apportioned to use of or benefit from the relevant facility. This requirement is implemented by the Rational Nexus Test.

The Rational Nexus Test has two equally important legs:

1. The facility improvement to be financed, in whole or in part, by impact fees must require expansion because of new development; and
2. The fees collected must be deposited in a separate fund (earmarked) and spent for the purposes for which they were collected in such a manner that the feepayer receives a substantial benefit from the improvement.

New development can be required to pay for the costs of growth but not for the costs of past mistakes. Likewise, whatever new developments pay toward the costs of growth actually must be used to pay those costs. To do otherwise would break the critical link — the nexus — between payment and benefit.

There are other general approaches to impact fees. In California, the Reasonable Relationship Test reigned supreme until 1988 legislation invoked a test almost indistinguishable from the rational nexus test. In its original form, the reasonable relationship standard was less strict than the rational nexus test and simply called for a "relationship" rather than a "nexus" between payments and benefits. From Illinois came the Specifically and Uniquely Attributable Test. (Pioneer Trust & Savings Bank v. Village of Mount Propect) This test is much stricter than the rational nexus standard and, in it's pure form, would preclude most impact fee programs. The essence of this standard is that an improvement, in order to be assessed to new development, must be needed solely because of the new development being charged. Rarely could such a strict standard be met. Perhaps because of this, Illinois has allowed their Specifically and Uniquely Attributable standard to evolve into one that is almost indistinguishable from the rational nexus standard.

The movement toward the general acceptance of rational nexus was helped along by the U.S. Supreme Court in Nollan v. California Coastal Commission. In this 1987 case, the California Coastal Commission imposed a condition on the issuance of a building permit requiring the dedication of an easement that would allow the public to pass on the seaward side of the Nollan's property. The stated reason for this condition was that the reconstruction of the Nollan's house would interfere with the public's view of the Pacific Ocean from the landward side of the Nollan's property. The Court found that the requirement to dedicate a north-west easement on the seaward side of the property lacked an "essential nexus" with the public harm of blocking the view on an east-west axis from the landward side of the property. The state imposed dedication requirement was ruled an unconstitutional "taking" of the Nollan's property. This ruling did great harm to the reasonable relationship standard while advancing the rational nexus.

At issue in impact fees is fundamental fairness. Existing residents and taxpayers argue that their taxes or user charges should not be increased in order to provide facilities to new development. This position has largely won out. Today cities and counties, in Hawaii and throughout the United States, and shift costs to new

development. But, new development cannot be seen as a means of subsidizing tax reductions or of paying for the sins of the past. In Hawaii, the issue of fairness is addressed in the statute: "[a]n impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development." This is an expression of the Rational Nexus Test.

D. EXACTIONS AND IMPACT FEES IN HAWAII

County governments in Hawaii have followed the national trend toward "privatization" in terms of shifting the financing of new public facilities from the entire community (taxes) to new development (exactions). Development exactions generally are defined to "include all manner of things that are compelled to be given or carried out by a developer as a condition of a project's governmental approvals" (Frank and Rhodes, 1987). This embraces not only impact fees but also the entire gamut of infrastructure and affordable housing requirements that are imposed through the mechanism of conditional zoning or as part of the subdivision approval process. There has been some confusion over these terms in Hawaii because of the City and County of Honolulu's much discussed but never implemented $100 million golf course exaction. This assessment was incorrectly labeled by some as an "impact fee." It was not since the proposed exaction did not even purport to bear a relationship to the capital facilities needed to serve the golf course development. In sum, all impact fees are exactions, but not all exactions are impact fees.

All four of Hawaii's counties make liberal use of conditional zoning, as does the State Land Use Commission through its statutory land reclassification process. For well over a decade, major development projects in Hawaii, at least those requiring rezoning, have been paying for or providing development-attributable public facilities through this ad hoc system. Zoning conditions generally require developers to help fund or dedicate land for capital improvements for off-site water, sewer, drainage, transportation, park, day-care, police, fire, and school facilities (Davidson and Usagawa, 1988). This is in addition to affordable housing set-asides.

Sewer and water connection fees, an early version of impact fees, are now common in Hawaii. The City and County of Honolulu collects wastewater system facility charges (Ordinance No. 90-80) and water system facility charges (Section 1-102, Board of Water Supply Rules). The sewer fees are based upon the per-unit cost of off-site treatment and conveyance systems. The water fees are the per-unit cost of off-site source development, transmission, and storage. These fees are one-time charges collected from all development at the time of building permit issuance or final subdivision approval. In 1992, these connection fees amounted to $1,146 (sewer) and $3,000 (water) for an average single-family home using a 5/8" meter. The fees for non-residential projects are based on meter size. A small office building using a 3/4" meter pays $4,400 (sewer) and $24,450 (water).

Maui County has established "Wastewater Assessment Fees for Facility Expansion and the Collection/Transmission System Upgrade" for one geographic area, the Kihei Regional Wastewater System (Ordinance 2057, 1991). The facility expansion fee is based upon project flow. In 1992, this fee was $2,800 for a typical single-family home. For non-residential projects, the fees are based upon flow calculations that must be approved by the Maui Public Works Department.

The wastewater collection/transmission fee is more variable. It ranges from $159 to $2,300 for a single-family home depending upon the location of the project within the Kihei region and the number of pumping stations that a line must go through. The Maui County Department of Water Supply has just adopted Chapter 8 of its Rules, entitled "Assessment Fees." This is a water system facility charge, based on meter size. The total per unit fee for a 5/8" meter is $3,350 and the total per unit fee for a 3/4" meter is $4,690.

Maui County also has enacted ordinances creating impact fee systems for traffic and roadway improvements for two geographic areas, namely West Maui and Kihei/Makena. (Chapters 14.62 and 14.68 respectively of the Maui County Code.) More sophisticated in approach than connection fees, these traffic ordinances carefully address all the legal requirements of modern impact fees in terms of calculation, assessment, credits, and planning. However, both ordinances require the development of a "base year road network system" and "roadway master plans," before they can be implemented. To date these consultant

studies have not been started so neither the West Maui nor the Kihei/Makena traffic impact fee system is in effect. As such, these are "shell" or enabling ordinances.

At present Hawaii County (Big Island), and Kauai County collect water facilities charges through their respective Departments of Water Supply. On the Big Island, the average single-family home in a new subdivision pays a $1,800 fee. Non-residential charges are variable depending meter size and project flow. A new 300 room hotel could pay up to $540,000. On Kauai, a single-family home in a new subdivision pays $420. Non-residential charges depend on meter size.

Hawaii County has come the closest to actually adopting a comprehensive system of impact fees. In August of 1990, the county administration submitted Bill 359 to the Hawaii County Council. A subsequent county administration submitted proposed amendments to Bill 359 in 1991. These amendments would also exempt broad classes of residential development from the payment of impact fees. Both versions of Bill 359 are pending at the Council.

Entitled "A Unified Impact Fee Code," Bill 359 sets up an impact fee system to pay for new capital improvements to public facilities for sewer, roads, parks, police and fire protection and sanitary land fills/solid waste. The bill is sufficiently well-drafted to serve as model legislation. (See Chapter VI, Drafting An Ordinance.) It starts with the requisite findings of growth and the demands that such growth has placed on the various public facilities. It sets forth the need for new development to contribute its fair share toward paying for these public facilities. The legal authority to adopt the impact fee ordinance is recited as is the clear linkage of the fees to the Hawaii County General Plan.

Different benefit areas are established in the bill for different facilities and fees collected in one benefit area must be spent in that area. Thus money collected from a West Hawaii developer for roadway improvements must be spent for roads in the West Hawaii Benefit District, which consists of North and South Kohala and North and South Kona. The thorny issues of credits, offsets, refunds, and time limits, are addressed in Bill 359. In addition, an administrative appeals system is established. After these general items, each public facility is dealt with separately. Unlike the Maui traffic impact fee ordinances, that enable the calculation of impact fees but do not establish them, Bill 359 includes the actual fee schedules for each public facility based on different land uses.

The details and methodology regarding how the fees in Bill 359 were calculated are set forth in a document entitled "Development Impact Fee Pricing Technical Report" dated August, 1990. In this document, the average estimated cost per development unit of providing capital facilities for parks, police, fire protection, solid waste, sewer (in sewer service areas) and roads at the County's current level-of-service were calculated. The costs were then set forth as the appliable impact fees for each type of public facility. As such, these fees represented 100% of the costs of paying for public facilities needed to accommodate growth, less credits for property taxes and fuel taxes.

Bill 359 allows for private calculation of impact fees by the fee payer, subject to the approval of the appropriate county department head. However, those electing to use the fees calculated in Bill 359 get a 5% discount as an incentive to use the schedule shown in Table 2.

TABLE 2: BILL 359
HAWAII COUNTY NET DEVELOPMENT IMPACT FEES
(INCLUDES THE 5% DISCOUNT - 1990 NUMBERS)

	PARKS	POLICE	FIRE	SOLID WASTE	ROAD (AVG DAILY)	SUBTOTAL*
per unit:						
S-F RESID UNIT	$3,316.31	$159.98	$315.98	$138.34	$2,946.60	$6,877.20
D-F RESID UNIT	$3,316.31	$159.98	$315.98	$138.34	$2,946.60	$6,877.20
M-F RESID UNIT	$2,176.82	$68.80	$211.63	$94.32	$1861.45	$4,413.03
per room:						
HOTEL/RESORT	$1,845.60	$0.00	$83.59	$40.87	$5,597.54	$7,567.61
per 1,000 FT2						
OFFICE:						
49,999 and under	N/A	$169.26	$280.27	$121.47	$5,352.10	$5,923.10
50,000 - 99,999	N/A	$140.09	$249.28	$108.51	$4,475.25	$4,973.13
100,000-149,999	N/A	$130.74	$239.35	$104.36	$4,028.75	$4,503.20
150,000-199,999	N/A	$125.97	$234.29	$102.24	$3,737.10	$4,199.60
200,000 and over	N/A	$122.87	$230.99	$100.86	$3,358.05	$3,812.78
MEDICAL CLINIC/OFC	N/A	$89.74	$274.26	$122.19	$11,269.57	$11,755.75
WAREHOUSE	N/A	$0.00	$36.91	$17.19	$1,060.65	$1,114.74
GEN INDUSTRIAL	N/A	$0.00	$34.26	$22.40	$2,098.88	$2,155.54
RETAIL/SHOPPING CTR:						
49,999 and under	N/A	$377.15	$477.49	$233.64	$9,960.31	$11,048.60
50,000-99,999	N/A	$388.32	$489.35	$246.64	$8,742.41	$9,866.73
100,000-199,999	N/A	$390.74	$491.92	$249.45	$7,702.16	$8,834.27
200,000-299,999	N/A	$359.64	$458.90	$213.27	$6,974.46	$8,006.27
300,000 and over	N/A	$338.17	$436.09	$188.29	$6,830.06	$7,792.61

NOTES: (1) Fees are charged as follows: for residential units, the fees are per dwelling units; for hotels and resorts, the fees are per hotel room; for commercial and industrial uses, the fees are per one thousand square feet, including any commercial space in resort projects or other mixed used developments.

(2) Park impact fees are charged to residential units and hotels/resorts only.

(3) Where net impact fees show "zero," the credit equals the fee.

*Does not include sewer impact fees that are to be levied only in the Hilo and Kailua Sewer Service areas. For single family dwellings this would amount to $1,896.98 per unit in Hilo and $3,759.99 per unit in Kailua. Other land uses would be assessed based on the amount of sewage generated.

*The SUBTOTAL does not reflect the sewer impact fee in sewer service districts. For the Hilo and Kailua-Kona sewer service areas, the sewer impact fee must be added to these subtotals, by land use type. For example, in the Kailua-Kona service area, the sewer impact fee for a typical single-family residential unit will be $3,957.83 based on an average of 400 gallons of wastewater generated per day. In the Hilo service area, the sewer impact fee for a typical single-family residential unit will be $1,995.98 based on an average of 400 gallons of wastewater generated per day.

TABLE 3
NATIONAL AVERAGE IMPACT FEES BY TYPE

TYPE OF IMPACT FEE	SINGLE HOME PER UNIT	GENERAL INDUSTRY	GENERAL OFFICE	GENERAL RETAIL
		—PER 1,000 SQUARE FEET—		
ROAD				
LOW	$16	$41	$79	$200
HIGH	$7,782	$5,210	$16,500	$36,063
AVERAGE	$1,567	$1,364	$2,141	$3,268
PARK				
LOW	$50	$130	$130	$130
HIGH	$12,000	$1,688	$1,688	$1,688
AVERAGE	$1,035	$702	$715	$703
PUBLIC FACILITY				
LOW	$49	$7	$57	$57
HIGH	$7,169	$12,000	$12,000	$12,000
AVERAGE	$910	$1,385	$1,447	$1,481
POLICE				
LOW	$14	$8	$8	$8
HIGH	$933	$520	$520	$520
AVERAGE	$120	$86	$110	$111
FIRE				
LOW	$21	$1	$3	$3
HIGH	$2,500	$1,000	$1,370	$2,400
AVERAGE	$217	$157	$204	$244
LIBRARY				
LOW	$30	$90	$90	$90
HIGH	$238	$150	$261	$158
AVERAGE	$130	$118	$167	$133
SCHOOL				
LOW	$135	$250	$250	$250
HIGH	$3,160	$280	$280	$280
AVERAGE	$2,663	$259	$259	$259
WATER				
LOW	$60	$30	$30	$30
HIGH	$11,660	$50	$104	$62
AVERAGE	$1,225	$37	$55	$41
SEWER				
LOW	$40	$60	$60	$60
HIGH	$9,405	$1,440	$1,440	$1,440
AVERAGE	$1,558	$750	$750	$750
TOTAL				
LOW	$415	$617	$811	$828
HIGH	$54,847	$22,538	$34,163	$54,611
AVERAGE	$9,425	$4,858	$5,848	$6,990
LESS WATER & SEWER				
LOW	$315	$527	$707	$738
HIGH	$33,782	$21,048	$33,519	$53,009
AVERAGE	$7,642	$4,071	$5,043	$6,199

SOURCE: J.C. Nicholas, et al, A Practitioner's Guide to Development Impact Fees, Chicago: Am. Planning Assoc. 1991.

E. USE OF IMPACT FEES

Impact fees are becoming a commonly used source of local government revenue. Table 3 shows typical impact fees charged around the country. Note might be taken of the tremendous range in the amount of fees charged. Research undertaken at the University of Florida found that impact fees had been rising at an annual rate of 29% for a single family home, 48% for industrial, 31% for offices, and 12% for retail. These dramatic rates of increase reflect a phase-in of impact fee programs but show as actual increases in the amounts of fees. Many governments have chosen to phase the implementation of impact fees and such phase-ins exaggerate the rate of increase. For example, Alpharetta, Georgia, charged fees at 25% for the first six months, 50% for the next six months and 75% for a third six months. Such phasing will be recorded as increases and thus overstate the rate of increase. Regardless, impact fees are rapidly becoming a significant component of housing costs.

While impact fees are to be found, in one form or another in all states, they are commonly used in Arizona, California, Georgia, Florida, Maryland, Oregon, Texas, Utah, Vermont, and Washington. While somewhat less common, impact fees are also used in Idaho, Illinois, Maine, Nevada, New Jersey, New York, North Carolina, Tennessee, West Virginia, and Wisconsin. Hawaii is added to this growing list.

F. LINKAGE FEES

Linkage is an approach to impact assessment. Some would argue that linkage programs differ from impact fees in one fundamental way. Whereas impact fees are typically used for so-called hard infrastructure, linkage fees tend to be used for social infrastructure (Connors & High 1987, and Nicholas 1991). Sacramento's affordable housing linkage programs is an example. Sacramento charges selected commercial developments for the affordable housing that the employees of those developments are presumed to attract to the city. San Francisco's mass transit fee is charged to certain downtown office buildings for their impact on the operating deficit of the Bay Area Rapid Transit system. Both of these linkage programs were subjected to litigation.[1] The interesting outcome of these cases is that the courts, both state and federal, reviewed these programs in a manner that is virtually indistinguishable from more tradition impact fee programs. Most commentators argue that there is in fact no fundamental difference between impact fee and linkage programs (Callies 1989, and Andrew & Merriam 1988). The practical implication, then, is that the rational nexus test must be employed for all such programs no matter how they are styled.

Linkage programs would be developed in exactly the same manner as impact fees. The first step is to conduct a needs assessment. The next would be to attribute need to new development based upon standards and levels of service. As with impact fees, linkage payments could not exceed proportionate shares of attributable costs. San Francisco's and Sacramento's successful defenses of their linkage programs could well be attributed to their following what is, in essence, an impact fee methodology. Any county wishing to employ "linkage" type fee programs, should take note of the fact that the more difficult step is the attribution of reasonable benefit to fee payers. (Callies 1989) Under Hawaii's statute, a county would have to be able to show reasonable benefit from, for example, child or day care facilities in order to comply with the statute.[2]

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[1] Russ Building Partnership v. City and County of San Francisco, 44 Cal 3d 839, and Commercial Builders v. City of Sacramento, 941 F.2d 872.

[2] In Section 2. § -1 of the Hawaii Impact Fee Law, Definitions, "required affordable housing" is excluded from the definition of Public facility capital improvement costs.

III. HAWAII'S IMPACT FEE LAW

This chapter will present a section by section discussion of the Hawaii Impact Fee Law, which is attached as Appendix A. The objective of this discussion is to explain thoroughly the provisions of the statute so that the requirements may easily be implemented.

A. AUTHORITY

The enablement provided by the statute reads as follows:

> *§ -2 **Authority to impose impact fees.** (a) The counties are authorized to assess, impose, levy, and collect impact fees for any development within their jurisdictions and to enact impact fee ordinances and to adopt rules to effectuate imposition and collection.*

This enabling section is clear and withholds no authority. However, it enables impact "fees" and not taxes or any other means of raising revenue. Insight can be gained by examining the definition of impact fee:

> *"Impact fees" means the charges imposed upon a developer by a county to fund all or a portion of the public facility capital improvement costs required by the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development.*

The key provision of this definition is the linkage, or nexus, to "the public facility capital improvement costs required by the development from which it is collected." This is the classic differentiation between a tax and a fee. Unquestionably, the statute is authorizing fees, with all of the restrictions and limitations that this implies.

The enabled authority is limited by part (b) of Sub-section 2:

> *(b) Except for any ordinance governing impact fees enacted before July 1, 1993, impact fees may be imposed only for those types of public facility capital improvements specifically identified in a county comprehensive plan or a facility needs assessment study. The plan or study shall specify the service standards for each type of facility subject to an impact fee; provided that the standards shall apply equally to existing and new public facilities.*

Authority to impose impact fees is limited to those facilities that the relevant county has planned for. This means that the county must first adopt a plan. This plan may be a general comprehensive plan or it may be a plan specific to a particular facility. The latter is simply a needs assessment study. This provision of the statute is consistent with the theory that impact fees are a form of land development regulation.

The plan or study must specify standards. This requirement invokes both objectivity and equity in establishing impact fees. An example of a standard would be the provision of public parks at 5 acres per 1,000 population. The objectivity of this standard is apparent and there can be no misunderstanding about interpretation.[3] Note should be taken of the fact these standards apply equally to the existing community as to new development. This would mean that if new development is to be held to a standard of 5 acres of parks per 1,000 population, then the same standard would apply to the existing community. The presumption is that to do otherwise would be inequitable.

The requirement for a common standard does not mean that the county cannot improve the standard of provision. Rather, counties are perfectly free to improve the standard of service. Lets assume that the existing provision of public parks is 4 acres per 1,000 and the county wishes to improve that to 5 acres. The cost of improving the existing situation from 4 to 5 would be considered an existing deficiency and the cost of correcting that existing deficiency could not be charged to new development. So, a county could increase the service standard provided that the existing deficiencies were identified and the provision of these deficiencies is financed by means other than impact fees.

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[3] However, this standard would need to define what a park is and what population is the relevant population for purposes of public parks.

B. SETTING IMPACT FEES

The statute sets out a clear methodology for establishing the amount of impact fees. The methods to be followed incorporate principles from other state enabling acts and also from case law in several states. There are three fundamental steps in setting fees.

1. NEEDS ASSESSMENT

The first step is to determine the quantity and cost of public facility capital improvements needed to accommodate new development at the adopted level of service. The provisions of sub-section 3 are:

*§ **-3 Impact fee calculation.** (a) A county council considering the enactment of impact fees shall first approve a needs assessment study that shall identify the kinds of public facilities for which the fees shall be imposed. The study shall be prepared by an engineer, architect, or other qualified professional and shall identify service standard levels, project public facility capital improvement needs, and differentiate between existing and future needs.*

The method of needs assessment begins with the service standard. Let us continue with the parks example. The service standard is 5 acres per 1,000. If the population at the end of the planning horizon were to be 100,000, then this county should have 500 acres of parks. If this county presently has 240 acres, then the need is for 260 acres of public parks. If the present population is 60,000, the existing need would be 300 acres and the existing deficiency would be 40 acres. New development would be 40,000 persons and, at 5 acres per 1,000, needed improvements to accommodate new development would be 200 acres.

The needs assessed can be for either future improvements or for existing improvements. An example of a need for an existing improvement would be a wastewater treatment plant that had been sized to accommodate future development. Impact fees charged for existing improvements are called "recoupment" in that they recoup costs that have already been incurred.

2. APPORTIONING COSTS

The statute is very clear in requiring an objective and quantitative based assessment. The basis for this quantitative assessment must be made public:

(b) The data sources and methodology upon which needs assessments and impact fees are based shall be set forth in the needs assessment study.

Examples of needs assessments are provided later in this document.

Once needs are apportioned between existing and future need, the next step is to apportion costs. This is done by attaching costs to the needed improvements. The statute speaks to establishing pro rata amounts. There are two issues within pro rata amounts. The first is the division between existing deficiencies and improvements needed for new development. The second is to divide costs among the various types of new development that will have impacts on the relevant facility. The requirement is:

(c) The pro rata amount of each impact fee shall be based upon the development and actual capital cost of public facility expansion, or a reasonable estimate thereof, to be incurred by the county.

There are several other provisions in (c) of sub-section 3. First, the costs to be assessed must be actual costs or reasonable estimates of actual costs. This is an admonition against "seat-of-the-pants" or "rule-of-thumb" approaches to cost estimation. Additionally, the costs of relevance are those to be incurred by the county. This means that costs incurred or borne by some other entity cannot be recouped by impact fees.

3. SETTING IMPACT FEES

Impact fees must be fair and reasonable. The statute provides direction in arriving at fair and reasonable fees. The general requirement is:

(d) An impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development.

The first part of (d) is a restatement of the first leg of the Rational Nexus Test. The second part invokes a criterion of equity that has been addressed in other states.

The Florida Supreme Court provided a general definition of the equity sought by an impact fee program. In Associated Builders and Contractors v. Dunedin, the Court wrote:

> A municipality should determine the relative burdens previously borne and yet to be borne by those [newly developed] properties in comparison with other properties in the municipality as a whole; the fee in question should not exceed the amount sufficient to equalize the relative burden of newly developed properties and other properties.[4]

The Florida court is providing a working definition of "proportionate share" as used in the Hawaii statute. A proportionate share would be an amount that equalized the relative cost burden between new and existing development.

The Florida Court, while providing a working definition of proportionate share, did not address how such matters would be empirically implemented. The Utah Supreme Court took up this question in Banberry Development Corp. v. South Jordan. At issue in Banberry was the fundamental issue of fairness. The plaintiff alleged that developer charges were "double taxation" in that the developer would be required to pay some or all of their public facility capital costs in the form of required contributions and then pay for the same capital facilities in the form of general or special taxation. The Court agreed and required that such matters be given "consideration." The Banberry opinion is the basis for the required considerations in sub-section 3(d)(1) through (7). The Hawaii restatement of these factors is:

> *The following seven factors shall be considered in determining a proportionate share of public facility capital improvement costs:*
>
> *(1) The level of public facility capital improvements required to appropriately serve a development, based on a needs assessment study that identifies:*
>
> *(A) Deficiencies in existing public facilities;*
>
> *(B) The means, other than impact fees, by which existing deficiencies will be eliminated within a reasonable period of time; and*
>
> *(C) Additional demands anticipated to be placed on specified public facilities by a development;*
>
> *(2) The availability of other funding for public facility capital improvements, including, but not limited to, user charges, taxes, bonds, intergovernmental transfers, and special taxation or assessments;*
>
> *(3) The cost of existing public facility capital improvements;*
>
> *(4) The methods by which existing public facility capital improvements were financed;*
>
> *(5) The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;*
>
> *(6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments; and*

[4] Associated Builders and Contractors v. Dunedin, 329 So. 2d 314 (Florida, 1976)

(7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, and any offsets payable to a developer because of this provision.

These considerations have the objective of achieving the equalization of relative burdens addressed by the Florida court. In a subsequent case, Lafferty v. Payson City, the Utah Court stated why these considerations are necessary:

> This [examination of financing the existing system] is necessary . . . to assure that a property owner involved in a new home development is not required to buy into the capital value of existing municipal services and then pay for the same capital value a second time by future indebtedness used to construct them originally.[5]

This latter statement makes the point of these considerations clear — to equalize burdens. The means to implement these considerations are discussed below.

Hawaii's statute is unambiguous on the subject of dealing with equity. The county must first assess the need for capital improvements and then disaggregate those needs into those attributable to new development and those that are existing needs. The impact fees charged to new development must be based on the needs attributable to new development. Additionally, the impact fees charged to new development must be net of other available funding and also net of any other payments or dedications by new development toward their capital facilities costs.

C. USE OF IMPACT FEES

The Rational Nexus Test has two sections or legs. The first is that the new development to be assessed impact fees must require the facilities for which they are being charged. The second is that the development paying impact fees must benefit from the facilities they were charged for. Sub-section 4 of the Hawaii Impact Fee Law deals with this second leg of the Rational Nexus Test. The statement of general principle holds:

> ***§ -4 Collection and expenditure of impact fees.*** *Collection and expenditure of impact fees assessed, imposed, levied, and collected for development shall be reasonably related to the benefits accruing to the development.*

This section of the statute is invoking the general principle of a fee, namely that a "fee" is a charge for benefit received. If a charge is not related to the benefit received, then that charge could not be a "fee."

The statute goes on in sub-section 4 to impose several requirements that would direct the provision of a reasonable benefit to feepayers. These provisions are:

> In order to determine whether the fees are reasonably related, the impact fee ordinance shall provide that:
>
> *(1) Upon collection, the fees shall be deposited in a special trust fund or interest-bearing account. The portion that constitutes recoupment may be transferred to any appropriate fund;*
>
> *(2) Collection and expenditure shall be localized to provide a reasonable benefit to the development. A county shall establish geographically limited benefit zones for this purpose; provided that zones shall not be required if a reasonable benefit can be otherwise derived. Benefit zones shall be appropriate to the particular public facility and the county. A county shall explain in writing and disclose at a public hearing reasons for establishing or not establishing benefit zones;*

[5] Lafferty v. Payson City, 642 P.2d 376 (Utah 1982)

(3) Except for recoupment, impact fees shall not be collected from a developer until approval of a needs assessment study that sets out planned expenditures bearing a substantial relationship to the needs or anticipated needs created by the development;

(4) Impact fees shall be expended for public facilities of the type for which they are collected and of reasonable benefit to the development; and

(5) Within six years of the date of collection, the impact fees shall be expended or encumbered for the construction of public facility capital improvements that are consistent with the needs assessment study and of reasonable benefit to the development.

There are several important points in sub-section 4. First, impact fee collections cannot be mixed with other funds. They must be separately accounted for. This is to allow for the tracking of impact fees so that their use for the stated purposes can be confirmed.

A second important point is that the expenditure must be "localized." The Texas Supreme Court stated this issue very well in City of College Station v. Turtle Rock Corp. with: "[U]nless the court considers the benefit, a city could, with monetary exactions, place a park so far from the particular subdivision that the residents receive no benefit."[6] Clearly the Texas court was equating proximity with benefit and associating reasonable benefit with the extent of the distance between the improvement and the development. This is the localization issue addressed in sub-section 4. Most statutes and cases that have addressed the benefit question have used distance between the development paying the fee and the improvement as a primary indicator of benefit. The Hawaii statute is employing the same criterion. However, localized benefit zones need not be used if the benefit to feepayers is reasonable without such zones. An example of this situation would be a service that is provided county wide from a central location. Because that one central location serves the entire county, localization would not be necessary.

The third major point in sub-section 4 is the requirement for the adoption of what is, in essence, a capital improvement plan (CIP) within the needs assessment. This CIP would identify the improvements to be provided within the planning horizon, typically 5 years, and the anticipated funding sources. Impact fees would be one of the anticipated sources.

The last major point is that the collecting county has up to six years to spend, or encumber, the impact fees collected on the facilities for which they were collected. This amount of time is given to provide the county a reasonable period to accumulate fees and to design and contract for the improvements. Any funds not expended or encumbered are to be refunded to the feepayer.

The refund provisions are contained in sub-section 5:

§ -5 ***Refund of impact fees.*** *(a) If impact fees are not expended or encumbered within the period established in section -4, the county shall refund to the developer or the developer's successor in title the amount of fees paid and any accrued interest.*

The refund provision completes the theory of the fee. Because the typical situation is that the facilities provided with impact fees will come in the future, there is always a chance that plans could be canceled and no benefit to fee payers could be forthcoming. The refund provision assures that if a reasonable benefit is not provided, the impact fees collected will be refunded.

[6] City of College Station v. Turtle Rock Corp 680 S.W.2d 802 (Texas 1984)

IV. CALCULATING IMPACT FEES UNDER THE HAWAII IMPACT FEE LAW

A. GENERAL

The Hawaii statute does not specify a list of facilities that may be financed with impact fees. Rather, the statute would allow the counties to charge an impact fee for any facility that is included within the comprehensive plan or, alternatively, for any facility for which a needs assessment had been done. Thus, the counties may consider a number of impact fees provided that a plan for those facilities has been developed.

The statute does not ordain a particular method or formula for setting impact fees. Instead, it establishes a set of principles that must be respected in setting impact fees. Thus, the counties are free to select a number of impact fees and to use a variety of implementation methodologies, as long as the fundamental issue of proportionality is respected.

There are several general principles that must be respected in developing impact fees. There are:

1. The county must have a plan (needs assessment) for the facility for which an impact fee is to be charged;
2. The county must establish a level for service the facilities or services to be financed with impact fees;
3. The need for improvements must be divided into those to meet existing deficiencies and those to accommodate new development;
4. The cost of deficiencies must be financed by means other than impact fees;
5. Impact fees must be related to the needs of individual types of development;
6. The level of individual impact fees must be no more than a proportionate share of actual or anticipated costs of accommodating different types of new development.

There is no single methodology to develop impact fees that respect these principles. However, there are some tried-and-true approaches that have withstood both the test of time and legal challenge. Several of these approaches are presented below.

B. ROAD IMPACT FEES

The most common impact fees are those for water and sewer facilities [Nicholas, 1988]. After these, the most common and perhaps the most difficult to calculate impact fee is for roads. The Big Island, Hawaii County, has developed a methodology for road impact fees that is instructive in terms of dealing with the statutorily required principles. Note should be taken of the fact that the Big Island developed this methodology before the Act 282 was passed into law and that the impact fees developed have not been adopted. Nevertheless, this experience is most relevant to the question of impact fees in Hawaii.

i. HAWAII COUNTY'S METHOD (NEEDS DRIVEN APPROACH)

In Bill 359, the Big Island employed what is known as the needs driven approach. The alternative methodology is the improvements driven approach and it will be presented later in this Chapter, at page 26. The distinguishing characteristic of the needs driven system is that it mathematically calculates the need for improvement to the particular facility, in this case roads, without reference to any specific improvement or set of improvements. For example, if it is accepted that one police officer is needed per 1,000 persons, a development with an anticipated population of 500 persons would need the services of one-half of a full-time police officer. This determination of need is accomplished without references to any specific location or patrol area of this officer.

(1) Level of Service

The needs driven approach begins with a specification of a level of service (LOS). The road LOS employed by the Big Island is "D."[7] This LOS translates into a capacity of 7,000 vehicles per lane per day or 900 vehicles per lane during the afternoon peak hour. The maintenance of this LOS is the stated goal of

the County. The County analyzed road impact fees employing both a peak-hour approach and an average daily approach (ultimately choosing the latter). A peak hour approach will be employed herein. This establishment of a level of service meets the requirement established in Sub-Section 3(a) of the statute.

(2) Needs Assessment

Once the LOS is set, the next step is to identify the quantity of improvements that individual units of new development will require. Lets look at the typical single family detached unit as an example. The average trip generation during the afternoon peak hour is 1.01 vehicular trips. This means that for every single family home, there will be an average of 1.01 automobiles on the road, per hour, between 4 and 6 P.M. Various studies have calculated that the average length of an automotive trip to or from a residence is 7.9 miles. Therefore, the typical single family home will have 1.01 trips per hour with a length of 7.9 miles. This means that this home will account for 7.979 miles of travel per hour (1.01 * 7.9). If a lane of roadway can accommodate 900 vehicles per hour, then 7.979 miles of travel per hour will require 0.008865 lane-miles of road capacity (7.979 / 900). Because this is a difficult unit of measure, it can be easily translated into one lane of roadway 46 feet long (0.00865 * 5,280). Thus, for every single family home, the Big Island will need 46 feet of one-lane roadway, 23 feet of two-lane road, etc. This calculation established the need for road improvement by a single family home. However, the convention in impact fees is to attribute the first one-half of a trip to the origin and the second one-half to the destination. This is done by simply dividing the trip length of 7.9 miles in half. The resulting attributable travel from or to a simply family home, per hour, would then be 3.9895 miles [1.01 * (7.9 * .5)] and the needed improvement would be 23 lane-feet of road [(3.9895 / 900) * 5280]. Note that this need is calculated without reference to which roads will require improvement.

The Big Island's methodology results in a set of needs that are "substantially related to the needs arising from the development . . ." as required by Sub-Section 3(d) of the statute. This is done by incorporating the trip generation characteristics from various types of developments. Table 4 shows this relationship. The establishment of this type of relationship is required by the statute and is a critical step in the establishment of proportionate share.

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[7] The level of service classification system is a means of defining a relationship between the number of vehicles using a defined segment of roadway and the capacity of that roadway segment to accept and move vehicles. As more vehicles are placed on a defined roadway segment, the closer the use of that segment comes to its capacity and thus the lower the level of service due to heavier usage. Roadway level of service (LOS) is typically expressed as "A", "B", "C", "D" or "E". "A" is the best LOS and has the lease number of vehicles present per unit of time (per hour or per day). Complete definitions of these measures way be found in the Highway Capacity Manual (1985), as published by the Transportation Research Board. At LOS "A", the total number of vehicles per hour or per day would not be greater than 71% of the maximum capacity of the roadway. LOS "E" is the condition when use is equal to 100% of capacity. LOS "B" has use of 75% of capacity while "C" represents 82%. LOS "D" is 92% of capacity while "E", as stated above, represents 100% of capacity. "F" represents total gridlock and breakdown of traffic flow.

TABLE 4
NEEDED IMPROVEMENTS BY LAND USE - HAWAII COUNTY

LAND USE TYPE (UNIT)	TRIP RATE	ADJUSTED AVG TRIP LENGTH	% NEW TRIPS	NEW LANE MILES	NEW LANE FEET
PER LIVING UNIT:					
Single Family Unit	1.01	7.90	100.0%	0.00443	23.4
Multi-Family Unit	0.63	7.90	100.0%	0.00277	14.6
HOTEL/RESORT (Per Room)	0.50	7.89	100.0%	0.00219	11.6
PER 1,000 FT² OF FLOOR AREA:					
OFFICE:					
49,999 and under	2.91	9.08	80.0%	0.01174	62.0
50,000-99,999	1.97	9.08	80.0%	0.00795	42.0
100,000-149,999	1.84	9.08	80.0%	0.00743	39.2
150,000-199,999	1.75	9.08	80.0%	0.00706	37.3
200,000 and over	1.63	9.08	80.0%	0.00658	34.7
MEDICAL CLINIC/OFFICE	3.63	9.08	80.0%	0.01465	77.3
WAREHOUSE	1.56	9.95	50.0%	0.00431	22.8
GEN INDUSTRIAL	1.04	9.95	75.0%	0.00431	22.8
RETAIL/SHOPPING CENTER:					
49,999 and under	8.69	5.30	50.0%	0.01279	67.6
50,000-99,999	6.23	5.50	54.0%	0.01028	54.3
100,000-199,999	4.49	5.70	58.0%	0.00825	43.5
200,000-299,999	3.85	5.90	62.0%	0.00782	41.3
300,000 and over	3.53	6.10	66.0%	0.00790	41.7

NOTE: The data contained in the above table are taken from respected sources and those sources are cited so that the public is fully aware of the origin of critical data [Institute of Transportation Engineers and U.S. Department of Transportation]. The result is a determination of needed road improvement, in lane-feet, by type of new development. Thus, the need for improvements is substantially related to the (individual) development. Note may be taken of the inclusion of events such as the multiple purpose trip in the New Trip column. This is a reduction in attributable travel for office and retail developments that reflects the "capture" of people that were driving that route for other primary purposes.

There are other issues to needs assessment that must be considered. The statute, in Sub-Section 3(a), requires that the needs assessment must "differentiate between existing and future needs." The Hawaii County needs assessment does not undertake this differentiation and a future iteration would have to meet this requirement.

(3) Cost of Improvements

The Big Island's next step was to add costs to the identified need for improvements. The staff examined the cost of 15 recent County road construction projects. The conclusion was that the average cost per lane-mile was $924,438. This number is multiplied by the lane-miles of need to arrive at the cost of accommodating growth. These costs are shown in Table 5.

Table 5
IMPROVEMENT COSTS - HAWAII COUNTY

LAND USE TYPE (UNIT)	LANE MILES	LANE FEET	COST
PER LIVING UNIT:			
Single Family Unit	0.00443	23.4	$4,096
Multi-Family Unit	0.00277	14.6	$2,561
HOTEL/RESORT (Per Room)	0.00219	11.6	$2,026
PER 1,000 FT² OF FLOOR AREA:			
OFFICE:			
49,999 and under	0.01174	62.0	$10,856
50,000-99,999	0.00795	42.0	$7,349
100,000-149,999	0.00743	39.2	$6,864
150,000-199,999	0.00706	37.3	$6,528
200,000 and over	0.00658	34.7	$6,081
MEDICAL CLINIC/OFFICE	0.01465	77.3	$13,542
WAREHOUSE	0.00431	22.8	$3,986
GEN INDUSTRIAL	0.00431	22.8	$3,986
RETAIL/SHOPPING CENTER:			
49,999 and under	0.01279	67.6	$11,827
50,000-99,999	0.01028	54.3	$9,503
100,000-199,999	0.00825	43.5	$7,624
200,000-299,999	0.00782	41.3	$7,233
300,000 and over	0.00790	41.7	$7,299

The result here is the cost of providing individual new developments with road improvements. The identification of cost is the third critical step is establishing (road) impact fees and is required by Sub-Section 3(c). The next step is to identify the proportionate share of those costs that may be imposed as impact fees.

(4) Proportionate Share of Cost

Most adopted impact fees, as well as Hawaii's statute in Sub-Section 3(d), presume that new development does make payments toward infrastructure costs. In fact, new development does pay toward costs, the problem is that such payments tend to be insufficient [Nicholas 1987]. These payments usually are made in the form of general taxation or in the form of developer contributions. In order to establish fees that are a proportionate share, these contributions would have to be subtracted from the cost. The statutory language is:

> *(d) An impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development.*

There are two significant points in this provision. The first is that an impact fee shall not exceed a proportionate share. The following sections discuss how a proportionate share of the cost is to be determined. But, an equally important issue is, the cost of what? The statute defines the relevant cost as that incurred or to be incurred by the county. This would mean that a county could not charge a cost incurred or to be incurred by some other entity, such as the state. In most states, and certainly in Hawaii, federal, state and local funds are combined to finance capital projects. In these cases, local jurisductions treat the state or federal contributions as an available revenue source and substract it from total cost to arrive at local cost. The local, or county, cost is the amount which can be charged as an impact fee. An example of this is shown below at page 27.

Hawaii's statute then proceeds to identify what must be "considered" in arriving at proportionate share. Some of these considerations will be discussed individually.

> (d)(2) *The availability of other funding for public facility capital improvements, including, but not limited to, user charges, taxes, bonds, intergovernmental transfers, and special taxation or assessments;*

This requirement simply asks what sources of funding are available other than impact fees to meet the community wide need for improvements. This specific requirement was not met by the Big Island's draft road impact fee. Means of meeting this requirement will be shown in the following section.

> (d)(3) *The cost of existing public facility capital improvements;*

The primary purpose of this requirement is to create a basis to observe the equitable treatment of new development. Hawaii County met this requirement when it determined that the cost of existing road improvements ran $924,438 per lane-mile. This is the cost used in calculating impact fees and thus it would appear that there is equitable treatment of new development because the same costs are used. This is not to say that the cost figures must be the same. Rather, it is saying that if the costs are different, there should be a real and substantial reason for such differences. In the case of the Big Island, there is no difference and thus no issue.

> (d)(4) *The methods by which existing public facility capital improvements were financed;*

This consideration, like the one above, goes to equitable treatment of new development. It simply requires the county to identify how road improvements were financed in the past. Once this identification is made, some credit may be needed if new developments have paid toward existing capital improvements.

This issue is not addressed by Hawaii County's road impact fee methodology. Therefore, is would have to be included in a future iteration of the needs assessment/methodology. Accomplishing this task is very straight forward. It simply involves the examination of capital budgets for the past 5 years and a percentage distribution of the general sources of funds. For example, state assumption of cost could be 40%, federal grant-in-aid could be 40% and county general fund could be 20%. This approach should be sufficient for this consideration. The point here is to provide data and information for the consideration that follows.

> (d)(5) *The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;*

This consideration goes to the heart of the equity debate over impact fees. Critics of impact fees have often argued that they are unfair because new development has been on the tax roles for years and because the property had been undeveloped, no benefit had been received. Several courts have agreed that this was an important point in establishing a proportionate share. Of course, the Hawaii legislation clearly requires this consideration and thus the debate is ended.

The Big Island did include the consideration of past contributions by new development. The County had issued general obligation debt to fund, among other facilities, roads. The total outstanding debt for roads was $9,819,992. The average maturity of these bonds was 20 years and the average existing age was 8.5 years, leaving 11.5 years to be paid. The interest rate on this debt was 8.09%. The annual debt service charge on this outstanding debt is $0.1826 per $1,000 for taxable value. Using these data, the County crafted a credit for past contributions toward the cost of existing road improvements. Given a taxable value of $35,296.38 for a vacant single family lot, it follows that this lot would be paying $6.44 per year:

TAXABLE VALUE	$35,296.38
TAX RATE	$0.1826 Per $1,000
ANNUAL PAYMENT	$6.44 Per Lot.

Without the guidance of the present statute, the annual payment was multiplied by 20 to arrive at a credit for past payments of $128.89.

The statute, in Sub-Section 3(d)(5), only requires consideration of the past 5 years, not 20. However, equity could require attributing interest on those payments. Thus, the Hawaii County credit for past payments toward road bond payments would be:

ANNUAL PAYMENT	$6.44
INTEREST RATE	8.09%
YEARS	5
VALUE OF CREDIT	$37.91.

This credit was calculated as being the future value of $6.44 for five years at 8.09% annual interest. The entire credits for past payments are shown in Table 6:

TABLE 6
PAST CREDITS - HAWAII COUNTY

	AVERAGE LAND & BLDG TAXABLE VALUE	AVERAGE TAXABLE LAND VALUE	PAST CREDIT
S-F Dwelling, per unit	$100,011.59	$35,296.38	$128.89
M-F Dwelling, per unit	$137,410.00	$17,595.43	$64.25
Hotel/Resort, per room	$119,898.03	$25,163.58	$91.89
Office, per 1000 FT2	$77,686.02	$20,967.82	$76.56
Medical, per 1000 FT2	$191,134.71	$17,609.41	$64.30
Warehouse, per 1000 FT2	$31,640.47	$8,851.55	$32.32
Indus, per 1000 FT2	$146,401.31	$40,620.36	$148.33
Retail, per 1000 FT2	$72,129.41	$11,290.08	$41.23

SOURCES: (1) "1989-'90 Amended Certification of Net Taxable Value," Real Property Tax Division, Finance Department, County of Hawaii, August 15, 1990.

(2) "Closed Building Permit Report Within Posting Dates of 01-01-88 - 12-31-88," County of Hawaii.

(3) Real Property Assessment Information Books, County of Hawaii, 1990.

(4) Real Property Tax Office Field Books, County of Hawaii.

(5) Real Property System Inquiry Program, County of Hawaii as of 06-16-89.

(6) Building Permits Inquiry Program, County of Hawaii as of 05-15-90.

The inclusion of such a credit would comply with the requirements of Sub-Section 3(d)(5).

The above discussion of credits for past payments deals only with general obligation taxes devoted to specific categories of infrastructure. Typically the only payments by vacant land, i.e., land that will become new development, are ad valorem property taxes. If some other payments are made, such as special assessments, they would be treated in a like manner. Such means were not used by the Big Island and thus are not discussed.

A final point on payments for past credit. The statute specifically exempts from consideration payments for which a "reasonable benefit" was received. In most situations vacant land does not receive a "reasonable" benefit from public facilities. Rather, benefits begin to be received when the site is occupied. There can be exceptions to this norm. An example could be fire protection because the provision of fire protection services

benefits vacant as well as built-on sites. Vacant sites can and do burn and it could be argued that the lessened threat of destruction for the vacant site constitutes a reasonable benefit. This may be contrasted with police protective services. Police protection provides little if any benefit to vacant sites and a credit for past payments toward police capital facilities would appear to be in order. Note may be taken of the fact that the Big Island's draft credits for past payments included both police and fire protection. Thus, a decision had been made not to invoke a reasonable benefit argument.

> (d)(6) *The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments;*

This consideration is an extension of (d)(5) above. Most jurisdictions have general funding sources for infrastructure. New developments will pay those taxes, fees, service charges and the like. Therefore, "consideration" needs to be given to these payments as funding of infrastructure.

Hawaii County employs two regular means of funding road improvements. The first is the bonds previously noted. The second is motor fuel taxes. Motor fuel taxes were not discussed in (d)(5) because there are no motor fuel tax payments attributable to vacant sites.

The credit for future tax payments toward outstanding indebtedness is very similar to those for past payments except that the period is 20 years and the relevant amount is the present value of future payments. Again using the single family home as an example, the calculations can be demonstrated:

TAXABLE VALUE	$100,011.59
TAX RATE	$0.1826 Per $1,000
ANNUAL PAYMENT	$18.26 Per Dwelling Unit.
INTEREST RATE	8.09%
YEARS	11.5
VALUE OF CREDIT	$133.44 Per Dwelling Unit.

The calculations employ only the next 11.5 years rather than the 20 years referenced in the statute. The reason for the use of 11.5 years is that this is the amount of time that remain on the bonds. This is also an implicit assumption that no new bonds are anticipated. If new bonds are to be anticipated, then the 20 year period should have been used and the results would be:

TAXABLE VALUE	$100,011.59
TAX RATE	$0.1826 Per $1,000
ANNUAL PAYMENT	$18.26 Per Dwelling Unit.
INTEREST RATE	8.09%
YEARS	20
VALUE OF CREDIT	$178.08 Per Dwelling Unit.

The entire range of credits for future bond debt service payments developed by the Big Island are shown in Table 7:

TABLE 7
FUTURE CREDITS - HAWAII COUNTY

	AVERAGE LAND & BLDG TAXABLE VALUE	AVERAGE TAXABLE LAND VALUE	FUTURE CREDIT 11.5 YRS	FUTURE CREDIT 20 YRS
S-F Dwelling, per unit	$100,011.59	$35,296.38	$133.43	$178.08
M-F Dwelling, per unit	$137,410.00	$17,595.43	$183.33	$244.71
Hotel/Resort, per room	$119,898.03	$25,163.58	$159.96	$213.52
Office, per 1000 FT2	$77,686.02	$20,967.82	$103.65	$138.35
Medical, per 1000 FT2	$191,134.71	$17,609.41	$255.00	$340.40
Warehouse, per 1000 FT2	$31,640.47	$8,851.55	$42.21	$56.35
Indus, per 1000 FT2	$146,401.31	$40,620.36	$195.32	$260.72
Retail, per 1000 FT2	$72,129.41	$11,290.08	$96.23	$128.45

SOURCES: see above.

These credits comply with Section 3(d)(6). However, motor fuel taxes also need to be considered.

The primary means of funding road improvements is motor fuel taxes. These taxes are imposed on the sale of motor fuels and go into a special fund. The traffic to and from new developments will consume motor fuels and thus will pay motor fuel taxes. Hawaii County crafted a credit for motor fuel and other automotive related payments.

To provide consideration of all payments, the County developed an "equivalent motor fuel tax." This was done by aggregating all receipts available for road projects and calculating those receipts as if that total were to be raised by a motor fuel tax. While the State of Hawaii imposes only a $0.11 per gallon tax, the total receipts available for roads is an equivalent of a $0.328 per gallon tax. The funds available for roads must be divided between new construction and maintenance. Over the past five years, approximately 58% of total receipts have been used for new road construction or, more correctly, capital improvements. Thus, the equivalent motor fuel tax rate for capital improvements is $0.192 per gallon (.328 * .58). Therefore, it was accepted that motor fuel consumption would contribute toward Hawaii County road capital facilities at a rate of $0.192 per gallon consumed. The details of these calculations follow:

	1985	1986	1987	1988	1989
REVENUES ($000):					
FEDERAL	37,972.5	42,641.6	36,844.6	50,472.4	60,720.8
STATE					
FUEL TAXES	29,733.3	38,030.8	40,856.8	42,031.0	43,079.9
(RATE $.11)	$0.11	$0.11	$0.11	$0.11	$0.11
NON-FUEL REVENUES	24,544.0	31,151.1	31,241.4	34,278.0	37,041.5
TOTAL STATE	54,277.3	69,182.0	72,098.2	76,309.1	80,121.4
TOTAL REVENUES:	92,249.84	111,823.53	108,942.72	126,781.43	140,842.24
(EQUIVALENT RATE)	$0.34	$0.32	$0.29	$0.33	$0.36
EXPENDITURES ($000):					
NON-CAPITAL	31,064.5	36,298.7	43,425.3	48,913.5	48,524.5
CAPITAL	45,283.1	52,909.6	51,638.9	56,821.7	85,299.6
% CAPITAL	59.3%	59.3%	54.3%	53.7%	63.7%
CAPITAL TAX RATE	$0.20	$0.19	$0.16	$0.18	$0.23
5-YEAR AVERAGE					$0.192

SOURCES: State of Hawaii, Department of Transportation, Highways Division, "Combined Statement of Revenues and Expenditures, and Changes in Fund Balance," 1985 to 1989.

U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1988 to 1990, Table 988.

The engineering data and sources used to project the need for road improvements were employed to estimate future payments toward road improvements. The single family home would have the following motor fuel payment characteristics:

TRIPS PER DAY	10.06
AVERAGE LENGTH	7.9 Miles
TRAVEL PER DAY	79.474 Miles
ATTRIBUTABLE TRAVEL	39.737 Miles
ANNUAL TRAVEL	14,504 Miles
MILES PER GALLON	15.06
ANNUAL FUEL CONSUMPTION	963 Gallons
CAPITAL TAX RATE	$.192 Per Gallon
ANNUAL CAPITAL PAYMENT	$184.91.

These payments would be made over an extended period in the future. The statute addresses 20 years and this is what the County used. To determine the motor fuel tax credit, the County calculated the present value of the annual payments over 20 years:

ANNUAL CAPITAL PAYMENT	$184.91.
PERIOD	20 Years
INTEREST RATE	7.5%
MOTOR FUEL CREDIT	$1,884.

The entire calculation of motor fuel tax credits is shown below in Table 8.

TABLE 8

MOTOR FUEL CREDITS - HAWAII COUNTY

LAND USE/UNIT	TRIP RATE	TRIP LENGTH	% NEW TRIPS	ANNUAL FUEL USE GALLONS	ANNUAL CAPITAL PAYMENT	FUEL TAX CREDIT
SINGLE-FAMILY RESID UNIT	10.06	7.90	100%	963.08	$184.91	$1,884
MULTI-FAMILY RESID UNIT	6.60	7.90	100%	631.84	$121.31	$1,236
HOTEL/RESORT (by room)	18.40	7.89	100%	1759.27	$337.78	$3,442
per 1,000 square feet:						
OFFICE:						
49,999 and under	16.31	9.08	80%	1026.63	$197.11	$2,009
50,000-99,999	13.72	9.08	80%	863.61	$165.81	$1,690
100,000-149,999	12.40	9.08	80%	780.52	$149.86	$1,527
150,000-199,999	11.54	9.08	80%	726.39	$139.47	$1,421
200,000 and over	10.42	9.08	80%	655.89	$125.93	$1,283
MEDICAL CLINIC/OFFICE	34.17	9.08	80%	2150.83	$412.96	$4,208
WAREHOUSE	4.88	9.95	50%	210.38	$40.39	$412
GENERAL INDUSTRIAL	6.97	9.95	75%	450.72	$86.54	$882
RETAIL/SHOPPING CENTER:						
49,999 and under	94.71	5.30	50%	3041.44	$583.96	$5,951
50,000-99,999	74.31	5.50	54%	2674.49	$513.50	$5,233
100,000-199,999	58.93	5.70	58%	2360.90	$453.29	$4,619
200,000-299,999	48.31	5.90	62%	2141.50	$411.17	$4,190
300,000 and over	43.00	6.10	66%	2097.88	$402.79	$4,104

Note should be taken of the different trip generation rates used here as contrasted with those used in estimating cost. Roads are designed to accommodate peak-hour conditions and thus the cost assignment is done on a peak-hour basis. However, motor fuels are consumed on an annual basis so daily trip rates were used to get daily and then annual travel.

These two credits are employed as reductions in the assigned cost. The result is the proportionate share of costs that may be collected through impact fees. The proportionate shares as set out in the draft road impact fees are shown in Table 9: (By way of contrast, see Table 2 for "Average Daily" road impact fees.)

TABLE 9

ROAD IMPACT FEES - HAWAII COUNTY

LAND USE TYPE (UNIT)	HIGHWAY BOND CREDIT	VACANT LAND PROP. TAX CREDIT	FUEL TAX CREDIT	COST TOTAL	PEAK HOUR NET COST
S-F RESID UNIT	$133.43	$128.89	$1,884.00	$4,096	$1,949.68
M-F RESID UNIT	$183.33	$64.25	$1,236.00	$2,561	$1,077.42
HOTEL/RESORT (PER RM)	$159.96	$91.89	$3,442.00	$2,026	$0.00
per 1,000 FT2:					
OFFICE:					
49,999 and under	$103.65	$76.56	$2,009.00	$10,856	$8,666.79
50,000-99,999	$103.65	$76.56	$1,690.00	$7,349	$5,478.79
100,000-149,999	$103.65	$76.56	$1,527.00	$6,864	$5,156.79
150,000-199,999	$103.65	$76.56	$1,421.00	$6,528	$4,926.79
200,000 and over	$103.65	$76.56	$1,283.00	$6,081	$4,617.79
MEDICAL CLINIC/OFFICE	$255.00	$64.30	$4,208.00	$13,542	$9,014.70
WAREHOUSE	$42.21	$32.32	$412.00	$3,986	$3,499.47
GEN INDUSTRIAL	$195.32	$148.33	$882.00	$3,986	$2,760.35
RETAIL/SHOPPING CTR:					
49,999 and under	$96.23	$41.23	$5,951.00	$11,827	$5,738.54
50,000-99,999	$96.23	$41.23	$5,233.00	$9,503	$4,132.54
100,000-199,999	$96.23	$41.23	$4,619.00	$7,624	$2,867.54
200,000-299,999	$96.23	$41.23	$4,190.00	$7,233	$2,905.54
300,000 and over	$96.23	$41.23	$4,104.00	$7,299	$3,057.54

(d)(7) *The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, and any offsets payable to a developer because of this provision.*

This final component of the equity or proportionate share considerations does not deal with impact fees as such. Rather, it is a requirement, or a limitation, that developers be given a fair credit or "offset" for any non-site related improvement. This provision would be followed in the implementing ordinance with a provision that provides developers with impact fee offsets for the reasonable value of dedicated capital facilities. The subject of offsets is fully discussed in Chapter V.

ii. IMPROVEMENTS DRIVEN METHOD

As pointed out above, an improvements driven method is an alternative. The advantage of an improvements driven approach is that it makes reference to a specific set of improvements. Most road impact fees are needs rather than improvements driven. By contrast, most water and sewer impact fees are improvements driven rather than needs driven.

The City of Alpharetta,[8] Georgia, implemented an improvements driven road impact fee. To a great extent, the approaches are very similar. The equity provisions are identical. The heart of the Alpharetta program is the following capital improvement program:

PROJECT/PRIORITY	COST (000)	STATE (000)	CITY COST DEF.	CITY COST GRWTH	CITY FINANCE BONDS	CITY FINANCE GEN.
1. Windward Parkway West, from SR 9 to Ga. 400	$1,122.0		0%	100%	$0.0	$1,122.0
2. Westside Arterial from Windward Pkwy west to Mansell Rd. Extension	$22,710.0		0%	100%	$0.0	$22,710.0
3. Webb Bridge Road from Westside Pkwy to Kimball Bridge Road	$7,685.0		50%	50%	$3,842.5	$3,842.5
4. Haynes Bridge Rd. from Haynes Bridge connector to Duluth Street	$3,250.0		10%	90%	$325.0	$2,925.0
5. Eastside Dr. from Windward Parkway to Mansell Rd. Extension	$7,695.0		0%	100%	$0.0	$7,695.0
6. Mansell Road Extension from Old Roswell Rd. to Old Alabama Rd. with interchange to Ga. 400	$24,434.7	$6,990.7	0%	100%	$0.0	$17,444.0
7. Rucker Rd./Marietta St. from Main Street to Charlotte Road	$4,871.0	$974.2	0%	100%	$0.0	$3,896.8
8. Haynes Bridge connector from Mansell Road extension to Haynes Bride Road	$1,000.3		0%	100%	$0.0	$1,000.3
9. Mayfield Road Extension	$830.0		0%	100%	$0.0	$830.0
10. SR 9 from Wills Road to Cumming Street	$4,485.0		100%	0%	$4,485.0	$0.0
TOTALS	$ 78,083.0	$7,964.9		$8,652.5		$61,465.6

TOTAL ALPHARETTA ROAD CAPITAL COST $70,118.1 Million

SOURCES: 1) Southland Services, Inc., October 10, 1988.
2) City of Alpharetta, "Capital Improvement Program."
3) City of Alpharetta, "Major Thoroughfare Plan," p.39ff.
4) RBA Group, "Update of City of Alpharetta Thoroughfare Plan," August 29, 1990.

Note that every improvement is identified in terms of whether it needed to correct an existing deficiency or whether it accommodates new development. As is frequent, most planned improvements in Alpharetta are both an existing need and will provide capacity for new development. Therefore, a percentage allocation was used. Note also may be taken of the inclusion of other funding sources, however limited, in the base document. The result is a differentiation between existing and future needs (Sub-Section 3(a)) and the availability of other funding (Sub-Section 3(d)(2)).

Alpharetta calculated a local cost, which is total cost less state funding, per new vehicular trip during the afternoon peak hour of $1,801.67. This cost was then multiplied by the respective trip generation rates to arrive at the cost of accommodating new development.

[8] Alpharetta is a rapidly growing suburb of Atlanta. It has a present population of approximately 15,000 and anticipated growth of approximately 1,000 dwellings and 1 million square feet of commercial area per year.

Like the Big Island, Alpharetta has outstanding road improvement bonds. Because these bonds were issued coincident with the passage of the impact fees, there was no need to calculate a past credit. There was a need to calculate a future credit that was done in exactly the same manner as Hawaii. Also, Alpharetta did not need to calculate a motor fuel credit because no motor fuel receipts are allocated to a municipality in Georgia and state funded projects were not included in the $1,801.67 cost.

Alpharetta's improvements driven road impact fee method yielded the following results:

ROAD IMPACT COST BY LAND USE TYPE
ALPHARETTA, GEORGIA

COST BY LAND USE TYPE		IMPACT COST	BOND CREDIT	NET COST
Residential:				
Single Family Detached	1 unit	$1,802	$413	$1,389
Multi-Family Unit	1 unit	$1,261	$206	$1,055
Mobile Home	1 unit	$1,063	$138	$925
Temporary Lodging	Room	$1,315	$159	$1,156
Office:				
General Office	1,000 sf	$2,926	$380	$2,546
Research Center	1,000 sf	$1,297	$181	$1,116
Warehouse/Distribution	1,000 sf	$378	$81	$297
Retail:				
All Types	1,000 sf	$4,864	$240	$4,624

The basic issues between improvements driven and needs driven are the same. The only difference is in the specificity of the improvements to be provided with impact fees.

There is no known reason why a community should prefer one approach over the other. Rather, the deciding factor appears to be the extent of capital improvement planning that the community has undertaken. Those with detailed capital improvement plans seem to prefer improvements driven systems and those with less evolved CIPs tend to prefer needs driven. The City and County of Honolulu, for example, may well choose an improvements driven system because the Development Plan Public Facilities Maps are so comprehensive. Some, such as Martin County, Florida, begin with a needs driven system and then shift to a needs driven system later. Alpharetta shifted from the improvements driven system shown above to a needs driven system. This shift was made at the request of the development community, with Alpharetta taking the position that either system was equally acceptable.

Those jurisdictions electing to use improvement driven systems, especially for roads, tend to have a problem in over ascribing future needs. It is very common for there to be "needs capital improvement plans" and "cost feasible capital improvement plans" for road improvements. The obvious difference between these two is the availability of funds. Some jurisdictuions simply take the "needs plan" off the shelf and use it as the base for impact fees. The result is usually unacceptable because it greatly increases the level of service, at the expense of new development, and results in impact fees that are excessive. When the jurisdiction properly assigns the cost of increasing the levels of service to the existing community, it discovers that there are insufficient funds available. The better approach is to begin with the "cost feasible plan" because it is based upon more realistic assumptions concerning funding.

V. ADMINISTERING AN IMPACT FEE PROGRAM

Developing an impact fee is only the first step toward establishing an effective program of capital finance. The equally important steps are the collection and use of impact fees. Prior to discussing these points, it is first necessary to discuss general administration and "offsets."

A IMPACT FEE ADMINISTRATOR

A well crafted impact fee implementing ordinance should designate an impact fee administrator. This individual could be the chief administrative officer or some other executive such as the planning director. There are many administrative tasks to be performed in dealing with impact fees and ordinances usually assign these tasks to the "administrator." Therefore, it is important that there be a designated administrator.

Another reason for designating an administrator is that it eliminates, or at least lessens, any problems relating to the legal exercise of what may be argued is legislative authority by an administrative officer. Providing for an appeal of the actions of the administrator to the legislative body also lessens this problem.

B. OFFSETS

The Hawaii Impact Fee Law defines offsets as:

> *"Offset" means a reduction in impact fees designed to fairly reflect the value of non-site related public facility capital improvements provided by a developer pursuant to county land use provisions.*

It is a common practice for local jurisdictions to condition a development approval on the developer providing certain specified capital improvements. These required dedications are commonly divided into "site related" and "non-site related" improvements. The Hawaii statute follows this convention.

A site related improvement is one that is for the exclusive use or benefit of a particular development or for the provision of safe and adequate public facilities related to that development. Either internal or access roads would be examples of site related improvements. By contrast, non-site related improvements are those that are not for either the direct access or for the exclusive use or benefit of a particular development. Widening a major road would be an example of a non-site related improvement. Impact fees are used to finance non-site related improvements. To the extent that a developer is required to construct or dedicate a non-site related improvement, there is an overlap between such a requirement and impact fees. Sub-Section 3(d)(7) of the statute requires consideration of any non-site related required dedications:

> *(7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, <u>and any offsets payable to a developer because of this provision</u>.*

The most common approach to offsets is to include a provision in the implementing ordinance that treats the reasonable value of any non-site related dedicated improvements as impact fee payments and, thus, an offset to the amount of impact fees otherwise due.

Many jurisdictions administer offset policies by allowing the developer to submit any claim for offsets that the developer believes are warranted. The program administrator then directs the review of the submission. This review is sometimes done in-house and sometimes consultants are used for part or all of the review. Many jurisdictions also impose a reasonable cost to cover the review costs.[9] After the review, the impact fee administrator assigns a reasonable value to the required dedication. This assigned value may be a variance from that proposed by the developer. Under some policies the developer may appeal the amount of the offset to the Commission or Council while in others there is no internal appeal available.

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[9] Some have tried the approach of having the developer retain certain named consultants for this revw and thus free the jurisdiction of the necessity of retaiaying the reviewers. This approach has had a very poor record.

Once the amount of the offset has been determined, the developer may use that credit to pay impact fees of the same type for which the credit was given. For example, offsets granted for the dedication of a park site could only be used against park impact fees and no other.

A common problem with offsets is assigning ownership. One option is to assign offsets to the site. This has the advantage of simplicity in assignment but not in some other aspects of impact fees. The alternative is to assign the ownership of the offset to the individual or entity that actually dedicated the improvement. This has the disadvantage of being somewhat complex in initial assignment but there is a great advantage later on.

When all construction is carried out by the developer, there is no difference between the two approaches. Likewise, when the amount of the offset equals or exceeds the amount of impact fees due, either approach works just as well. The problems occur when the developer is not the builder and when the amount of the offset is less than the total impact fee due. In this situation, the manner of offset assignment becomes very important.

For purposes of this discussion, assume that a developer of a 2000 lot single family community has submitted a request for an offset for widening an arterial road with a cost for the widening of $2 million. The road impact fees to be paid by this development amount to $3 million. Further assume that the impact fee administrator assigns a value of $1.5 million, subtracting out the value of "extra" landscaping and other improvements associated with the entrance to the development. Lastly, assume that the developer accepts this valuation. The offset may be assigned to the developer as an individual or it may run with the land.

1. Offsets Running With The Land

Under this approach, an offset of $1.5 million is assigned to the development. Given a projected amount of $3 million due in impact fees, the net amount due is $1.5 million. By assigning the offset of $1.5 million to the land, the remaining $1.5 million is not addressed. If the typical situation of developer selling lots to builders occurs, it will be unclear how to collect this amount. Moreover, some portion of the credit would transfer with the land, but what portion? One possibility is that the first one-half of the homes pay no impact fee and the second half pay the full fee. Another option is that all pay one-half the fee. This latter option raises a problem if the fee schedule is subsequently changed.

The central issue of the problem is that the land changes ownership and with that change some part of the offset also would change. If a jurisdiction were to elect to follow this approach, the administrator's granting of the offset could spell out the method of assignment to the individual parcels. For example, if there were 2000 lots in this new community, the offset could be granted on the basis of $750 per lot.

2. Offsets Assigned to an Entity

The alternative is to assign the offset to the entity that made the donation. It would then be up to the entity to disperse the offsets as it sees fit. It might be that the offsets would be assigned on the $750 per lot basis. But whatever method used would be at the discretion of the owner.

The most common way of implementing this approach is to create an offset balance. Whenever the owner wishes to draw from that balance, this owner must so inform the jurisdiction and that amount is withdrawn until the balance is reduced to zero. This means is very similar to a checking account. The authorized signatory would indicate to whose credit a stated amount is to be transferred. Under the assumptions employed herein, the total fee due per lot would be $1,500. The authorized signatory could indicate that $1,500 of the balance could be used to the favor of an individual builder or anything less. The jurisdiction would only be concerned with the availability of the balance and how to distribute the offset. As more experience is gained with impact fees, more jurisdictions are employing the assignment to an individual approach.

A commonly raised issue with this approach is whether the balance could be used to pay impact fees outside of the development. If so, this means that the offset is transferable. Some jurisdictions use this approach and find that it is very popular with developers. Additionally, it deals with a difficult issue that arises when the offset is greater than the impact fee. If the total fees due in the above example was $1 million rather than $3 million, there would be a problem with the offset being $500,000 higher than the total fees. Assignment of a transferable offset to the donor would allow that entity to recoup that excess. Other jurisdictions provide for no transfer and deal with any excesses on a case by case basis.

C. COLLECTING IMPACT FEES

In many communities the timing of the collection of impact fees is a major issue. Around the country, the most common time of collection is at the issuance of the building permit. The Hawaii statute greatly reduces the scope of any debate on this subject:

> *§ -6* ***Time of assessment and collection of impact fees.*** *Assessment of impact fees shall be a condition precedent to the issuance of a grading or building permit and shall be collected in full before or upon issuance of the permit.*

This is in accord with typical practice.

The building permit is the simplest time for assessment and collection because at that time what is to be built is a certainty. The assessment of the fee is normally done in the process of reviewing the building permit application. Many jurisdictions have the zoning administrator actually do the assessment. Regardless of which individual does it, the following must be done:

Identification of the type of land use according to the categories employed in the impact fee ordinance;

Identification of the number of units, either dwelling units, rooms or thousands of square feet, to be built;

Calculation of the total impact fee due for the building being permitted.

If the building is a single family unit, it is very simple. The single family use of the structure would be confirmed, the number of units is obvious (1), and the amount to be paid is simply taken from the impact fee ordinance. If the building had 25 multi-family units, the fee per multi-family unit would be multiplied by 25 to calculate the impact fee due for the building.

Most jurisdictions add the impact fee to other charges payable at the issuance of a building permit and collect it all together. Usually the clerk in the building department actually collects the fee. The clerk would collect the amount calculated during building permit review, unless there is an applicable offset. Virtually all jurisdictions impose the responsibility for indicating the availability of offsets on the applicant for a building permit. Thus, the applicant would have to indicate to the clerk that all or part of the impact fee would be paid by offsets. Therefore, it is important that there be a rational and simple system of confirmation of offsets. When all or part of a fee is paid with offsets, the clerk would record a non-cash receipt and subtract the amount from the offset balance.

D. BENEFIT ZONES

The Hawaii statute, as well as typical practice around the country, requires the consideration of geographically limited benefit zones. In Sub-Section 4(2), the statute provides as follows:

> *(2) Collection and expenditure shall be localized to provide a reasonable benefit to the development. A county shall establish geographically limited benefit zones for this purpose; provided that zones shall not be required if a reasonable benefit can be otherwise derived. Benefit zones shall be appropriate to the particular public facility and the county. A county shall explain in writing and disclose at a public hearing reasons for establishing or not establishing benefit zones . . . .*

It is important that there be a separate account for each type of fee and for each benefit district. Based upon Bill 359, the Big Island would have six different fees and seven districts for those fees. The result is that Hawaii County would have to establish thirteen separate impact fee trust funds.

The objective of benefit zones is to provide a degree of assurance of benefit to feepayers. The distance between the location of the development being charged impact fees and the improvement provided is the most common definition of benefit. The presumption is that the further away the improvement is, the less the benefit. This presumption is not always correct and the statute does not tie a county to this approach. Rather, the objective of the statute is to assure benefit and benefit zones is one very commonly used means of such assurance. However, if reasonable benefit can be attained without benefit zones, a county is free to employ

other approaches. Around the country, counties, being geographically large, tend to employ some type of benefit zones while municipalities, which usually are much smaller, tend not to use benefit zones. For facilities or services that are available county wide, such as administrative buildings, benefit zones need not be used. Any county not employing benefit zones must develop a justification for non-use and disclose that justification at a public hearing.

E. EAR-MARKING RECEIPTS

Because impact fees are not taxes or general receipts, they may not be placed in the general fund. However, recoupment fees are an exception and they can be placed in any relevant fund, including the general fund. Sub-Section 4(1) of Hawaii's act establishes the procedure:

> *(1) Upon collection, the fees shall be deposited in a special trust fund or interest-bearing account. The portion that constitutes recoupment may be transferred to any appropriate fund.*

A jurisdiction is free to follow it's own established system of financial management. These required trust funds need not be special or different accounts, although some jurisdictions elect to establish separate accounts. Rather, impact fee receipts must be accounted for separately.

Jurisdictions that employ automated accounting systems direct the impact fees to the appropriate account at the time of collection by the clerk. Each component of the payment would be identified by account number and posted directly at that time. Those without automated systems usually keep a simple ledger of receipts by account.

F. ACCOUNTING FOR IMPACT FEES

Once deposited, impact fees are managed and accounted for in the same manner as any other public trust fund. Hawaii's statute is silent on the subject of account. Some state enabling acts require an annual accounting for impact fee trust funds. This accounting is usually done in conjunction with the development of the general budget. The norm is for this report to summarize receipts, including interest, by type and area, and expenditures, also by type and area. Because the Hawaii law requires a refund if receipts are not spent within six years, the annual accounting normally discusses the timing of projected expenditures.

G. APPROPRIATION OF IMPACT FEES

The implementing ordinance would restrict the use of funds in these trust funds to legal expenditures of impact fees. This restriction should spell out the type of expenditures allowed and also may identify the projects that these funds may be spent on. This latter is typically done in improvements driven systems.

Hawaii's Impact Fee Law restricts the use of impact fees to capital improvements and provides the definition:

> *"Capital improvements" means the acquisition of real property, improvements to expand capacity and serviceability of existing public facilities, and the development of new public facilities.*

The key terms in the above definition are "improvements to expand capacity." Thus, impact fees may be used to acquire real property and other assets that expand the capacity of the particular public facility to serve the public. Further clarification on legal use of impact fees is provided with:

> *"Public facility capital improvement costs" means costs of land acquisition, construction, planning and engineering, administration, and legal and financial consulting fees associated with construction, expansion, or improvement of a public facility. Public facility capital improvement costs do not include expenditures for required affordable housing, routine and periodic maintenance, personnel, training, or other operating costs.*

H. REFUND OF IMPACT FEES

The charges to developers are deemed to be fees and not taxes because there are facilities provided that benefit the development being assessed. It would follow, then, that if that benefit was not forthcoming, then the required payment could not be a fee, unless it was refunded. To conform to the general theory of benefit fees, the statute requires that:

> *§ -5* ***Refund of impact fees.*** *(a) If impact fees are not expended or encumbered within the period established in section -4, the county shall refund to the developer or the developer's successor in title the amount of fees paid and any accrued interest. Application for a refund shall be submitted to the county within one year of the date on which the right to claim arises. Any unclaimed refund shall be retained in the special trust fund or interest bearing account and expended as provided in section -4.*

There is no known instance where impact fees have been refunded because of non-expenditure. Nevertheless, refund provisions are important in order to adhere to basic theory.

An issue in refund programs is accounting. Hawaii counties have six years to spend or encumber receipts. Thus, there must be a means to know when receipts have been expended or encumbered and there must be a means to know when this has not occurred.

Some jurisdictions employ a system that is similar to an accounts payable ledger. Every payment is logged by name of payee and date of payment. When that amount is encumbered or spent, there is a debit to that account that would show the project that the amount was used for. This approach is not commonly used due to cost. A more common approach is to record cumulative receipts by impact fee trust account by date. These cumulative totals could be used to determine whether a particular payment had been encumbered or spent. For example, a park impact fee payment in the amount of $5,000 was made on July 1, 1993. At the close of business on July 1, 1993, assume cumulative collections in that account was $500,000. If, on July 1, 1999, cumulative encumbrances or expenditures from that account equaled or exceeded $500,000, then the subject payment had been used. The advantage of this approach is low cost and the disadvantage is the inability to match individual payments with individual improvements.

Refund programs must be taken seriously even though no one expects that there ever will be a refund. A county should have a means of accounting that is consistent with a refund. At the same time, it would appear to be wasteful to expend great amounts on programs that will not be used.

There is a second type of refund. Not all buildings issued building permits are built. Some building permits expire without commencement of construction. In these cases, many jurisdictions will refund impact fees paid, less a reasonable service charge. Those that do not allow refund usually credit any amounts previously paid against any future amount due.

VI. DRAFTING AN ORDINANCE

The passage of the Hawaii Impact Fee Law provided each county in Hawaii with the legal authority to enact impact fees to fund public facilities. While it is virtually certain that the counties already possessed this authority pursuant to general county police powers (see Kudo, 1988 and Callies, 1989), the statute also presents clear guidelines to the counties as to the applicability, calculation and administration of impact fees. It is these guidelines, together with the original version of Hawaii County's Bill 359, (1989) and the West Maui Traffic Impact Fee law (Chapter 14.62, Maui Code), that are most instructive when it comes to drafting an ordinance.

Each county ordinance should include the following:

A. Findings and Purpose. It should be stated in the ordinance that new development will place burdens on public facilities and that it is fair and reasonable to require new development to pay its fair share of the costs to provide the needed public facilities. It should further be set forth that the purpose of the bill is to accommodate orderly growth and development through the imposition and collection of impact fees. See Bill 359, Art.1, Sec.3.

B. Definitions. All relevant legal, planning and engineering terms should be defined. See Bill 359, Art.1, Sec.2, and Maui Code Section 14.68.020.

C. Conformance with Planning. The provision of adequate infrastructure to accommodate growth is a critical planning issue. Impact fees need to be expressly linked to a county's general plan, to its regional land use plans and to its specific capital improvement plan. See Maui Code Sections 14.68.040 and 14.68.050, and Bill 359, Art.1, Sec. 4.

D. Calculation and Setting of Impact Fees. The methodology for calculating proportionate-share impact fees needs to be set forth in the ordinance. See Chapter IV, supra at pages 16 through 28 where calculation is discussed in detail. Then the actual fees should be listed by different land use category. See Bill 359, Article 2 (sewer), Article 3 (Roads), Article 4 (Parks), Article 5 (Police), Article 6 (Fire), Article 7 (Solid Waste). Setting the fees in the ordinance is preferable to establishing the methodology and calling for a study to determine the fees as was done by Maui. The Maui impact fee ordinances have yet to be implemented.

E. Administration of the Program. Kudo's 1988 "Guidelines for Drafting a Defensible Impact Fee Ordinance" include the following check list for impact fee administration[10], all of which is consistent with Chapter V.

- **Creation of a Separate Fund.** The funds should be earmarked and placed into a separate fund designed for the improvement(s) for which they were collected.
- **Fees Must be Spent to Benefit the Development.** The improvement should be located where one may reasonably expect that occupants of the new development would use the improvements. [See Chapter V, regarding benefit zones.]
- **Fees Must be Spent Within a Reasonable Time or Refunded.** The ordinance should address the timing of the expenditure, since courts will require that impact fees be spent within a reasonable time. [Hawaii Impact Fee Law specifies 6 years.]
- **Mechanism to Challenge the Fee and Exemptions.** The ordinance should allow those who pay the fee to challenge the criteria on which the fee is based. This may be accomplished through a hearing or appeals procedure that would allow developers to present their own studies and data to support a lesser fee amount. [This must include a system to administer offsets. (See Chapter V.B.)]

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[10] Kudo, Benjamin A. 1988. "Impact Fees and Housing Exactions Programs: A Legal Analysis," In Paying For Growth. Honolulu: 3:116

- **Equal Application** The ordinance should assess fees on every development that creates a need for the infrastructure similarly. Both small and large developments should be assessed fees.
- **Fees Should Only be Used for Construction.** The fees should be used only for construction of facilities, and not for the maintenance, repair or operation of the facilities once constructed.
- **Time of Payment.** The time of payment of the fee should be considered. A typical scenario is to provide for the payment of the fee when the building permit is issued or at subdivision approval.

Both Bill 359 and the West Maui Traffic Impact Fee Ordinance address each of these important issues.

F. Authority. Prior to passage of the Hawaii Impact Fee Law, it was important for the counties to set forth the sources of legal authority to enact impact fees. Ordinances should now cite the statute as the primary authority for the enactment of an impact fee ordinance.

VII. INTEGRATION OF IMPACT FEES WITH OTHER METHODS OF FINANCE

Impact fees are simply one way of raising necessary funds for capital improvements. There are several deficiencies with impact fees, not the least of which is that they dribble in. There are three ways of dealing with impact fees that reduce or eliminate these deficiencies. These are advanced provision, employing impact fees together with special districts, and using impact fees with development agreements. Since Hawaii counties are actively considering these other financing tools right now, it is an ideal time to integrate them with impact fees.

A. ADVANCED PROVISION

Advanced provision is when a jurisdiction will find some means to finance the needed facility in advance of need. The impact fees charged for such facilities are called "recoupment." Recoupment fees are used to repay the costs of the advanced provision.

A very common way to provide utilities is to sell revenue bonds. The proceeds from these revenue bonds are then used to construct the facilities. Recoupment impact fees would then be charged to pay the interest and principal payments on those debts. Of course, it is possible that impact fee receipts may not be sufficient and thus there must be some secure pledge in order to satisfy bondholders. In the case of utilities, this is usually the revenues of the utility. In the case of other facilities, it could be any secure revenue. The Alpharetta, Georgia, program mentioned in Chapter IV employed a general obligation bond issue in conjunction with impact fees. The impact fees received by Alpharetta may be used to repay this debt, and interest, in proportion to the amount of the bonds used to provide capacity for new development.

B. USING IMPACT FEES WITH SPECIAL DISTRICTS

Another way to obtain advanced provision of facilities is to create a special district. Bonds would be issued pledging taxes to be assessed within that district. This would provide the needed secure pledge of revenue and do so without encumbering the host jurisdiction. Impact fees received within the confines of the special district would be used to make debt service payments and any shortfalls would be made up by special taxes. This approach has been very successfully used in California and, to a lesser extent, Florida. In 1992, the Hawaii Legislature passed Act 226, establishing "Community Facilities Districts" for financing infrastructure. Modeled after the California "Mello-Roos" bond financing program, this enabling legislation must be implemented by county ordinance. Financing improvements through the use of these community facilities districts and then using impact fees to pay debt service as stated above should work well for the counties.

C. USING IMPACT FEES WITH DEVELOPMENT AGREEMENTS

Hawaii was the second state in the country (after California) to enact a Development Agreements statute. This enabling legislation was passed in 1985 and is found in Chapter 46, Hawaii Revised Statues, Sections 121-132. County implementation has been slow although Hawaii County now is considering Bill 593 (Draft 4) that closely tracks the state law.

The concept of development agreements is entirely different from the dual rational nexus principle that guides impact fees, and the two systems should work well together. A development agreement is a bargained for exchange whereby the developer is granted assurances that applicable land use regulations will not change for a specified period of time (vested rights) in exchange for which the county can obtain an enforceable commitment from the developer for exactions and other public benefits that is not constrained by the rational nexus test. (See Callies and Grant, 1991) In fact, Section 2.§ -8 of the Hawaii Impact Fee Law expressly exempts "development contributions or payments made under a [Chapter 46] development agreement" from the proportionate share limitation, or first leg of the rational nexus test, that is imposed on all other public facility exactions.

Development agreements are particularly well-suited for large, multi-phase projects with extensive up-front infrastructure requirements. A developer of such a project may deem it beneficial to obtain vested rights notwithstanding the cost of providing additional public benefits. The county, on the other hand, may elect to enter into a development agreement so as to ensure that it can legally obtain these extra public benefits. As is now the case with exactions and dedications obtained through conditional zoning, a developer providing public facilities under a development agreement would receive a fair offset against any impact fees on account of these contributions.

Clearly, development agreements will always be the exception rather than the rule since most development activity triggering the need for additional public facilities will not be subject to these voluntary, negotiated agreements. This is why a comprehensive system of impact fees to help finance infrastructure is so important. The Hawaii Impact Fee Law sets the stage for each county to adopt fair and reasonable impact fees, applicable to all development, so as to foster orderly growth in accordance with the county's land use plan.

APPENDIX A

HAWAII IMPACT FEE LAW
HB 3787

AN ACT
RELATING TO IMPACT FEE AUTHORIZATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that development and construction for residential, commercial, industrial, hotel, and other purposes have placed a significant burden upon existing public facilities. The legislature further finds that present and future development will place severe burdens upon existing public facilities, resulting in a substantial and detrimental impact upon the quality of life, health, and general welfare of our population. The legislature recognizes that in order to maintain an acceptable capacity of public services and to preserve the quality of life in the region, some counties have adopted impact fee ordinances that establish a system of financing the development of public facilities by assessing, on a pro rata basis, the reasonably anticipated costs of developments and improvements. The legislature finds that the imposition of an impact fee to provide for public facilities and services required by such development is both fair and reasonable.

In response to county interest in impact fee legislation, the legislature finds that there is a need to establish general guidelines and provisions for adoption of impact fee ordinances and assessment of impact fees.

The purpose of this Act is to set forth general guidelines for the adoption of impact fee ordinances and to establish uniform general provisions for county impact fee ordinances adopted after the effective date of this Act.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

CHAPTER

IMPACT FEES

§ -1 **Definitions**. As used in this chapter, unless the context requires otherwise:

"Capital improvements" means the acquisition of real property, improvements to expand capacity and serviceability of existing public facilities, and the development of new public facilities.

"Comprehensive plan" means a coordinated land use plan for the development of public facilities within the jurisdiction of a county based on existing and anticipated needs, showing existing and proposed developments, stating principles to which future development should conform, such as the county's general plans, development plans, or community plans, and the manner in which development should be controlled. In the case of the city and county of Honolulu, public facility maps shall be equivalent to the comprehensive plan required in this chapter.

"County" or "counties" means the city and county of Honolulu, the county of Hawaii, the county of Kauai, and the county of Maui.

"Credits" means the present value of past or future payments or contributions, including, but not limited to, the dedication of land or construction of a public facility made by a developer toward the cost of existing or future public facility capital improvements, except for contributions or payments made under a development agreement pursuant to section 46-123.

"Developer" means a person, corporation, organization, partnership, association, or other legal entity constructing, erecting, enlarging, altering, or engaging in any development activity.

"Development" means any artificial change to real property that requires a grading or building permit as appropriate, including, but not limited to, construction, expansion, enlargement, alteration, or erection of buildings or structures.

"Discount rate" means the interest rate, expressed in terms of an annual percentage, that is used to adjust past or future financial or monetary payments to present value.

"Impact fees" means the charges imposed upon a developer by a county to fund all or a portion of the public facility capital improvement costs required by the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development.

"Needs assessment study" means a study required under an impact fee ordinance that determines the need for a public facility, the cost of development, and the level of service standards, and that projects future public facility capital improvement needs; provided that the study shall take into consideration and incorporate any relevant county general plan, development plan, or community plan.

"Non-site related improvements" means land dedications or the provision of public facility capital improvements that are not for the exclusive use or benefit of a development and are not site-related improvements.

"Offset" means a reduction in impact fees designed to fairly reflect the value of non-site related public facility capital improvements provided by a developer pursuant to county land use provisions.

"Present value" means the value of past or future payments adjusted to a base period by a discount rate.

"Proportionate share" means the portion of total public facility capital improvement costs that is reasonably attributable to a development, less:

(1) Any credits for past or future payments, adjusted to present value, for public facility capital improvement costs made or reasonably anticipated to be contributed by a developer in the form of user fees, debt service payments, taxes, or other payments; or

(2) Offsets for non-site related public facility capital improvements provided by a developer pursuant to county land use provisions.

"Public facility capital improvement costs" means costs of land acquisition, construction, planning and engineering, administration, and legal and financial consulting fees associated with construction, expansion, or improvement of a public facility. Public facility capital improvement costs do not include expenditures for required affordable housing, routine and periodic maintenance, personnel, training, or other operating costs.

"Reasonable benefit" means a benefit received by a development from a public facility capital improvement that is greater than the benefit afforded the general public in the jurisdiction imposing the impact fees. Incidental benefit to other developments shall not negate a "reasonable" benefit to a development.

"Recoupment" means the proportionate share of the public facility capital improvement costs of excess capacity in existing capital facilities where excess capacity has been provided in anticipation of the needs of a development.

"Site-related improvements" means land dedications or the provision of public facility capital improvements for the exclusive use or benefit of a development or for the provision of safe and adequate public facilities related to a particular development.

§ -2 **Authority to impose impact fees.** (a) The counties are authorized to assess, impose, levy, and collect impact fees for any development within their jurisdictions and to enact impact fee ordinances and to adopt rules to effectuate imposition and collection.

(b) Except for any ordinance governing impact fees enacted before July 1, 1993, impact fees may be imposed only for those types of public facility capital improvements specifically identified in a county comprehensive plan or a facility needs assessment study. The plan or study shall specify the service standards for each type of facility subject to an impact fee; provided that the standards shall apply equally to existing and new public facilities.

§ -3 **Impact fee calculation.** (a) A county council considering the enactment of impact fees shall first approve a needs assessment study that shall identify the kinds of public facilities for which the fees shall be imposed. The study shall be prepared by an engineer, architect, or other qualified professional and shall identify service standard levels, project public facility capital improvement needs, and differentiate between existing and future needs.

(b) The data sources and methodology upon which needs assessments and impact fees are based shall be set forth in the needs assessment study.

(c) The pro rata amount of each impact fee shall be based upon the development and actual capital cost of public facility expansion, or a reasonable estimate thereof, to be incurred by the county.

(d) An impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development. The following seven factors shall be considered in determining a proportionate share of public facility capital improvement costs:

(1) The level of public facility capital improvements required to appropriately serve a development, based on a needs assessment study that identifies:

(A) Deficiencies in existing public facilities;

(B) The means, other than impact fees, by which existing deficiencies will be eliminated within a reasonable period of time; and

(C) Additional demands anticipated to be placed on specified public facilities by a development;

(2) The availability of other funding for public facility capital improvements, including, but not limited to, user charges, taxes, bonds, intergovernmental transfers, and special taxation or assessments;

(3) The cost of existing public facility capital improvements;

(4) The methods by which existing public facility capital improvements were financed;

(5) The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;

(6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments; and

(7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, and any offsets payable to a developer because of this provision.

(e) The impact fee ordinance shall contain a provision setting forth the process by which a developer may contest the amount of the impact fee assessed.

§ -4 **Collection and expenditure of impact fees**. Collection and expenditure of impact fees assessed, imposed, levied, and collected for development shall be reasonably related to the benefits accruing to the development. In order to determine whether the fees are reasonably related, the impact fee ordinance shall provide that:

(1) Upon collection, the fees shall be deposited in a special trust fund or interest-bearing account. The portion that constitutes recoupment may be transferred to any appropriate fund;

(2) Collection and expenditure shall be localized to provide a reasonable benefit to the development. A county shall establish geographically limited benefit zones for this purpose; provided that zones shall not be required if a reasonable benefit can be otherwise derived. Benefit zones shall be appropriate to the particular public facility and the county. A county shall explain in writing and disclose at a public hearing reasons for establishing or not establishing benefit zones;

(3) Except for recoupment, impact fees shall not be collected from a developer until approval of a needs assessment study that sets out planned expenditures bearing a substantial relationship to the needs or anticipated needs created by the development;

(4) Impact fees shall be expended for public facilities of the type for which they are collected and of reasonable benefit to the development; and

(5) Within six years of the date of collection, the impact fees shall be expended or encumbered for the construction of public facility capital improvements that are consistent with the needs assessment study and of reasonable benefit to the development.

§ -5 **Refund of impact fees.** (a) If impact fees are not expended or encumbered within the period established in section -4, the county shall refund to the developer or the developer's successor in title the amount of fees paid and any accrued interest. Application for a refund shall be submitted to the county within one year of the date on which the right to claim arises. Any unclaimed refund shall be retained in the special trust fund or interest bearing account and expended as provided in section -4.

(b) If a county seeks to terminate impact fee requirements, all unexpended or unencumbered funds shall be refunded as provided in subsection (a) and the county shall place a notice of termination and availability of refunds in a newspaper of general circulation at least two times. All funds available for refund shall be retained for a period of one year at the end of which any remaining funds may be transferred to the county's general fund and expended for any public purpose as determined by the county council.

(c) Recoupment shall be exempt from subsections (a) and (b).

§ -6 **Time of assessment and collection of impact fees**. Assessment of impact fees shall be a condition precedent to the issuance of a grading or building permit and shall be collected in full before or upon issuance of the permit.

§ -7 **Effect on existing ordinances**. This chapter shall not invalidate any impact fee ordinance existing on the effective date of this Act.

§ -8 **Transitions**. Any county requiring impact fees or imposing development exactions, in order to fund public facilities, shall incorporate fee requirements into their broader system of development and land use regulations in such a manner that developments, either collectively or individually, are not required to pay or otherwise contribute more than a proportionate share of public facility capital improvements. Development contributions or payments made under a development agreement, pursuant to section 46-123, are exempted from this requirement."

SECTION 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 4. This Act shall take effect upon its approval.

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