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Impact fees and non-home rule municipalities: Oil and water can mix

By Richard G. Flood and Ruth A. Schlossberg

As discussed in the article preceding this by John Brechin, a recent decision of the Second District Appellate Court in the case of *Raintree Homes, Inc. v. the Village of Long Grove* has people thinking again about the authority of non-home rule municipalities to impose impact fees for schools or parks. In fact, the *Raintree* case was not new law. It stands only for the proposition that impact fees calculated and levied incorrectly are not enforceable, a long-standing precedent.[1] It is still possible to levy defensible and reasonable school and park impact fees for non-home rule municipalities.[2]

At least since *Krughoff v. City of Naperville*, 41 Ill.App.3d 334 (1976), the law has been settled in Illinois that it is possible to create impact fees in lieu of the land dedication requirements of state subdivision law and that these fees can satisfy the very high "specifically and uniquely attributable" standard used in Illinois. In the *Naperville* case, the court considered a model that sought to link the "impact" of a development to the fee in lieu of land dedication that was exacted by the City. Since that time, impact fees have been imposed throughout the state, and when they adhere closely to the standards outlined in the *Naperville* case, they have not been successfully challenged. Accordingly, we offer here a short summary of how to draft a defensible impact fee ordinance. For convenience, we refer to impact fees for schools, but municipalities can impose such fees for parks and public lands as well.

First, impact fees must measure impact. The trick here is that "impact," at least as defined under Illinois state law, does not mean the operational costs associated with running a school to serve new students, and it does not even mean the "impact" associated with the full cost of building schools to accommodate new students generated by a new subdivision. Instead, by state law "impact fees" may be assessed only for the cost of acquiring school "grounds" even though the land is only a small fraction of the total cost associated with building schools. (65 ILCS 5/11-12-5 and 5/11-12-8). In 2003, the Illinois state legislature partly addressed this problem by permitting impact fees that have been collected based on the cost of land to be spent on buildings for schools. (65 ILCS 5/11-12-5(7)). However, fees cannot be assessed based on the cost of those buildings.

Second, impact fees must be linked to the creation of a new subdivision. Illinois state law permits a municipality to require dedication of land for schools, parks or public lands as a condition of subdivision (65 ILCS 5/11-12-5 and -8). This applies not only to the municipality itself, but also to subdivisions in its planning jurisdiction up to 1.5 miles from the municipal boundaries.[3] These subdivision-based fees apply at the time of final plat approval. Thus, any impact fee in lieu of a land dedication imposed must be specifically and uniquely attributable to the new students generated by a new subdivision.

Third, the formula for defining the link between the new subdivision and the impact must be carefully tailored to measure impact. The formula that was approved in the *Naperville* case essentially looks at three different variables to determine how an impact fee can be specifically and uniquely attributable to the number of students generated by a development. The questions to ask are:

(a) How much land does a school need for each student?
(b) How much does that land cost?
(c) How many students will each new housing unit generate?

Combining these three variables results in a formula for determining the cost of land needed per student generated by the subdivision.

A municipality must first determine how much acreage will be required for new schools to serve the subdivision, considering primary, middle and high schools. Generally speaking, schools may look to their own internal planning standards as well as to national and local standards. Thus, a rural or suburban district may require larger school campuses than might an urban district or a school in a densely populated area.

Once you know how much land is needed for each new student, you then need to determine how much that land would cost. In order to do this, we generally recommend using appraisers to develop a fair market value based upon the type of land that actually would be needed to develop a school. Thus, the fair market value is usually for land that is subdivided, zoned and buildable (with sewer and water available). The type of land we value is not just wetlands or other nonbuildable land. We also recommend annually adjusting the fair market value employing a CPI adjustment, but if land values have changed dramatically over time (either up or down), a reappraisal might be in order.

Finally, the last variable is the number of students generated by the new subdivision. We use a defensible method to estimate how many students will be generated by the type of housing being built. There are some gen-

erally accepted formulas. The most frequently used formula is a table that was developed several years ago by the Illinois School Consulting Services (ISCS). Some schools use other data, but it has been our experience that the ISCS numbers have been accepted by school districts and developers alike for predicting how many students will be generated by each type of residential unit built. The ISCS ably distinguishes between apartments, townhomes, and houses. It uses a bedroom-based method for predicting new student population from each new housing unit. If, in fact, smaller dwelling units are ultimately constructed, the ordinance we use allows the developer to petition for a refund on the basis that the population generated by the unit was smaller than predicted.

Fourth, a defensible ordinance should provide a developer the opportunity to object to its application. The ordinance that we recommend contains a comprehensive, concise objective procedure. This gives both the developer and the municipality the chance to correct any deficiencies or challenges without resorting to lawsuits. Usually, the initial objection petition is undertaken through the same process by which the original subdivision plat was considered—most often an appeal to the Plan Commission of the municipality. Thus, the developer is put on notice that it may appeal the assessed impact fee to the municipality before it has to pay it. We recommend that our municipalities ensure that developers are well informed of their right to object, and we recommend saving any documentation ultimately signed by the developer as proof that they were informed of and waived the right to object. The goal here is to ensure that the developer is not forced to pay under duress, but has a clear, straightforward procedure for claiming that the numbers assessed are not fairly applied or are not fairly calculated. Increasingly, we also have provided an administrative procedure to make it easier for fees to be waived for senior and assisted living communities that will not generate any kind of meaningful student impact. This is all meant to satisfactorily address the types of duress issues raised in *Raintree*.

Land dedications, and by extension impact fees, are due at final subdivision platting. The ordinance that we have developed for our clients permits developers to pay later than final platting, at the time of issuance of a building permit, when actual money is more likely to be available to the developer. However, as a condition of granting this right to delay payment, the developer must agree, in writing, that fees are properly calculated and that they will not challenge the fees. They are reminded that they have had an opportunity to object, and they put in writing that they waive this opportunity. Again, regarding *Raintree's* consideration of "duress," the goal here is to create a clear record that a developer knew what the fees were, that they had an opportunity to object, and that they agreed to pay them without objection. We believe this should present a reasonable defense to any duress claim.

Fifth, the risk of challenges to impact fee ordinances should be borne by their beneficiaries. Because of cases like *Raintree* and others and because of repeated objections to impact fees by developers, we urge our municipalities to include an indemnification provision in any of their ordinances that requires the benefiting school or park district to fully indemnify the municipality before the municipality will collect impact fees. This is designed to further minimize the risk to municipalities of any challenges to the ordinance. In addition, we generally recommend that the benefiting schools and park districts undertake an ongoing needs assessment which they must share with the municipality. The nature of these assessments may vary by municipality, but the goal is to ensure coordinated planning between municipalities and schools and to ensure that the ordinances remain accurate, narrowly tailored and defensible over the years.

Sixth, impact fees are distinct from transition fees. The *Raintree* case does not really consider impact fees. Rather, the type of fees imposed in *Raintree* are what are known as "lag" or "transition" fees designed to make up for a delay in the collection of tax revenue from new homes. These are not authorized under the subdivision statute. If a developer wants to agree to these in an annexation agreement, (a matter which was not addressed in *Raintree*), we have no reason to believe that this would not continue to be acceptable. Nonetheless, the *Raintree* court's finding that such fees based on operating costs were not acceptable should not be read to mean that well-drafted impact fee ordinances are not acceptable. In fact, the contrary is true.

Conclusion

Despite the publicity it has received and the concerns it has generated, *Raintree* is not new law. Impact fee ordinances which are properly drafted and which employ reasonable assumptions are enforceable. ■

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1. In fact, one of the co-authors of this article said much of the same thing in the April 1991 issue of the ISBA Local Government Law Newsletter in Naperville Revisited by Richard G. Flood.

2. The state rules governing impact fees apply equally to counties as well as municipalities.

3. The comments contained in this article refer to statutorily applied impact fees. They do not apply to impact fee agreements reached as a part of an annexation agreement. Annexation agreements are contractual in nature, and are therefore, a contract between the landowner and the municipality. As such, they may exceed statutory authority if the parties mutually agree.