

Model Impact Fee Bylaw

Cape Cod Commission Model Bylaws and Regulations

Model Impact Fee Bylaw with Administrative Procedure Provisions

Background

The towns of Barnstable County are the only communities in Massachusetts with express legislative authorization to adopt an impact fee system. That express legal authority exists under the Cape Cod Commission Act and it extends to towns with a Cape Cod Commission certified Local Comprehensive Plan. Authority to adopt impact fees may also exist outside of the Commission Act under home rule authority.

Impact fees are one-time assessments which may be applied by municipalities to new development to fund the expansion or construction of municipal facilities and infrastructure that benefit the development. Impact fees may be collected to assist in funding construction of streets, sewers, water supplies, parks, schools, police and fire facilities, affordable housing, libraries, open space, or other capital facilities. Impact fees may be imposed only for future facilities and infrastructure which are identified in the town's Local Comprehensive Plan. They provide a regulatory mechanism for generating revenue which will help to pay for new growth in a community and, therefore, are most useful for municipalities that are experiencing or are anticipating growth. The adoption of an Impact Fees System is a voluntary action which each town may or may not choose to pursue.

Impact fees help shift the burden of paying for new capital facilities and infrastructure from municipalities to new development and offer a pay-as-you-grow system for accommodating new development. They contribute to "concurrency" management by helping to fund facilities and infrastructure within a reasonable time of the construction of a new development. Therefore, impact fees help synchronize the construction of new or expanded development with the construction of new capital facilities. Impact fees do not pay for the entire cost of capital facility improvements, but they can help to defray those costs and may help communities to hold the line against large tax increases to fund such facilities. Under an impact fee system, new development pays a proportional share that is reasonably attributable to the new development, less credits and other adjustments. Under a typical impact fee system, the larger share of the cost of providing facilities is still paid from the municipality's general revenue fund through a variety of taxes or from other financing sources. Impact fees cannot be used to upgrade existing facilities which are serving the existing population.

Impact fee systems are relatively new in Massachusetts, although they are used extensively in many other states. Because impact fees are relatively new in the Commonwealth, they may become the subject of legal challenges until their validity is firmly established by local courts. Therefore, towns must be very careful in drafting impact fee systems to ensure that they will survive legal challenges. To avoid or survive a legal challenge the town should ensure that the impact fee system is fair, that it is based

on defensible planning and other studies, and that it utilizes a simple and clear methodology.

This model bylaw is intended to be used together with the provisions of Section 15 of the Cape Cod Commission Act, c. 716 of the Acts of 1989, as amended, and "Impact Fee Enabling Regulations," Barnstable County Ordinance 98-6 (hereinafter the "County Ordinance"), and the Impact Fee Guidance Document, as published and amended by the Cape Cod Commission. Towns should consult with legal counsel before adopting an impact fee bylaw.

A bylaw to amend the Bylaws of [TOWN] by adding a new Chapter "Impact Fees" establishing impact fees for [SPECIFIC CAPITAL FACILITY] and procedures for the implementation of same, and to insert a new Appendix A - Impact Fee Districts, and Appendix B - Independent Fee Calculations.

Commentary: Towns may adopt a bylaw to implement a single-purpose impact fee system or a multiple-purpose impact fee system. In the case of a multiple-purpose system, the bylaw should specify the purposes, cite supporting studies and append individual fee schedules. Towns may wish to adopt each impact fee as a separate bylaw.

01.0. Short Title: This bylaw shall be known and may be cited as the "[SPECIFIC CAPITAL FACILITY] Impact Fee Bylaw."

Commentary: Types of Impact Fees may include but are not limited to: Transportation System Impact Fee Bylaw, Water and Sewer Impact Fee Bylaw, Library Impact Fee Bylaw, Schools Impact Fee Bylaw, Police and Fire Service Impact Fee Bylaw or Open Space Impact Fee Bylaw.

02.0 Findings:

The Town of [TOWN] finds, determines and declares that:

02.1 The purpose of this bylaw is to regulate the use and development of land to ensure that new development bears a proportionate share of the cost of capital expenditures necessary to provide [SPECIFIC CAPITAL FACILITY] in [TOWN] as contemplated by the [TOWN] Local Comprehensive Plan.

02.2 The [TOWN] Local Comprehensive Plan establishes that land development shall not be permitted unless adequate capital facilities and/or infrastructure exist or are assured, and that land development shall bear a proportionate share of the cost of the provision of the new or expanded capital facilities required by such development;

02.3 Existing revenue sources are not sufficient to fund capital improvements necessary to accommodate new development.

02.4 The [TOWN] Local Comprehensive Plan establishes that the imposition of impact fees is one of the chosen methods of regulating land development in order to ensure that it bears a proportionate share of the cost of capital facilities necessary to accommodate the development and to promote and protect the public health, safety, and welfare.

02.5 The report entitled [SPECIFIC FACILITY FEE SYSTEM], dated [DATE], and prepared by [CONSULTANT], sets forth a reasonable methodology and

analysis for the determination of the impact of new development on the need for and costs for additional [SPECIFIC FACILITY] improvements in [TOWN].

02.6 Studies and reports [LIST THEM] show that the impact fee formula contained herein establishes a fair and conservative method of assessing new development its fair share costs, and fees do not exceed the costs of providing additional improvements necessitated by the new development for which the fees are levied.

02.7 The impact fee will not fully pay for the costs of [SPECIFIC CAPITAL FACILITY] improvements necessary for new development and the town recognizes that the shortfall will have to come from other revenue sources.

02.8 The impact fee formula is not established at a rate to correct existing facility deficiencies.

02.9 The [TOWN] has the authority to adopt this Bylaw pursuant to Section 15 of the Cape Cod Commission Act, Chapter 716 of the Acts of 1989, as amended, the Impact Fees Enabling Regulations, Barnstable County Ordinance 98-6, Article 89 of the Constitution of Massachusetts and M.G.L. c. 40 sect. 21(1);

Commentary: M.G.L. c. 40 sect. 21(1) establishes that towns may adopt bylaws "For directing and managing their prudential affairs, preserving the peace and order, and maintaining their internal police". Chapter 40 sect. 21(1) was included in the Town of Franklin's Impact Fee Bylaw.

02.10 The Town Meeting has accepted the provisions of Section 22F, Chapter 40 of the Massachusetts General Laws;

Commentary: M.G.L. c. 40 sect. 22F establishes the authority of elected municipal boards and officers empowered to issue a license, permit, or certificate to fix reasonable fees for such approvals, and establishes the authority of municipal boards and officers appointed by an elected body to fix reasonable fees with the approval of the elected body. See the text of M.G.L. c. 40 sect. 22F for additional information.

02.11 [TOWN] held duly posted public hearings as required by law; and

02.12 [TOWN] received public testimony, Staff and Consultant recommendations, documents, and other evidence in establishing this Impact Fee Bylaw/Ordinance.

Now, therefore, be it ordained by the [TOWN] Town Meeting:

03.0 Rules of Construction: The provision of this bylaw shall be liberally construed so as to effectively carry out its purpose in the interest of the public health, safety, and welfare.

04.0 Definitions

Commentary: See [EXHIBIT 1](#) for suggested definitions and add only definitions relevant for use in this bylaw. It is recommended to carefully define terms which serve as the basis for fee calculations (e.g. square feet).

Unless specified, the definitions contained in the [TOWN] Zoning Bylaw shall be deemed applicable to this bylaw.

04.1 Affordable Housing - dwelling units available at a cost of no more than 30% of gross household income to households at or below 80% of the county median income as reported by the U.S. Department of Housing and Urban Development (HUD), including units listed under MGL c. 40B and the state's Local Initiative Program (LIP).

Commentary: The definition of the term "affordable housing" is set forth in the 1996 Regional Policy Plan.

04.2 Credit - the present value of past, present, or future payments, or a portion thereof, made by new developments towards the cost of existing or future related capital improvements (i.e. property tax, gasoline tax, betterment, user fee, or the contribution, payment, development or dedication of land or the payment of other consideration) accepted and received by the municipality.

Commentary: The definition of the term "credit" is set forth in Section 1(d) of the County Ordinance.

04.3 Fee Payer - an applicant for a development permit for a land use listed in Section 6 (Schedule of Fees)

04.4 Impact Fee Administrator - The Town Planner, or his or her designee, shall be the Impact Fee Administrator for the purposes of administering this bylaw.

Commentary: Fee administrators are typically town planners, building commissioners, or employees of the town management/ administrative department. It is permissible to expend 2% to 5% of collected fees to pay for the administration of an Impact Fee system. This bylaw assumes a 3% charge for program administration. (See section 9D)

04.5 Impact Fee Service Area - The boundaries of the Town of [TOWN].

Commentary: See section 7 of this bylaw for further discussion of impact fee service areas.

05.0. Procedures

The procedures and provisions of this Section shall apply to all types of impact fees established by this Chapter.

05.1 Imposition of Impact Fees:

05.1.1 Time of Collection: Within twenty (20) days of receipt in [TOWN] of an application for a building permit or a certificate of use and occupancy, the Impact Fee Administrator shall determine whether the proposed use is required to pay an impact fee under this bylaw. If an impact fee is required to be paid, the Impact Fee Administrator, within his or her sole discretion, shall determine the applicable use category from the Schedule of Fees at Section 6 of this Bylaw (the "Schedule"). If an impact fee is required, the Impact Fee Administrator shall provide a written notice of said determination and of the assessment to the Fee Payer, including the amount of the fee and the due date. A copy of said notice of assessment shall be filed with the town clerk. No building permit for any new or expanded building or structure and no certificate of occupancy for any

change of use (consistent with Section B(3) below) containing the types of uses set forth in Section 6 of this bylaw shall be issued unless and until the impact fees hereby required have been secured or paid, unless exempted by this Bylaw.

Commentary: Pursuant to Section 3(l) of the County Ordinance, the administrator must provide written notice to the Fee Payer of the amount due and the due date, and said notice must be filed with the town clerk.

Impact fees may be charged at the time of subdivision approval or prior to issuance of a building or other permit. However, if the fee is assessed at the time of subdivision, previously subdivided property will not be subject to the fee even though the subsequent development of the subdivision may impact the infrastructure addressed by the fee system. Other options include assessing and collecting the fee at the time of application for a preliminary or definitive subdivision approval or a building permit, whichever occurs first, or assessing and collecting the fee at the time of application for a certificate of occupancy. The point of collection of fees will significantly impact your impact fee system and should be given careful consideration. Collection of the fee prior to issuance of building permits for new and expanded developments, and collection at the time of issuance of a certificate of occupancy for use changes is recommended and assumed in this model bylaw.

05.1.2 Phased Developments: When a development is to be constructed in a phased sequence, the Impact Fee administrator may determine the fee based solely upon that segment of the development for which the developer is about to commence construction.

Commentary: Section 3(p) of the County Ordinance provides for phasing of fees for phased developments.

05.1.3 Application to Relocated Structures: In the case of structures or mobile homes which are moved from one location to another, an impact fee shall be collected for the new location if the structure or mobile home is a type of land development listed in Section 6 of this bylaw, regardless of whether impact fees were paid at the old location, unless the use of the new location is a replacement of an equivalent use. If the structure or mobile home so moved is replaced by an equivalent use, no impact fee shall be owed for the replacement use. In every case, the burden of proving past payment of relevant impact fees or equivalency of use rests with the fee payer.

05.1.4 Securing Payment of Impact Fees: The Impact Fee Administrator may secure unpaid fees through the following means: 1) by a deposit of money or negotiable securities sufficient to secure the full payment of the fee in which case the Impact Fee Administrator shall specify the time within which such fee shall be paid; or 2) by a covenant executed and duly recorded by the owner of record, running with the land, whereby the impact fee shall be provided before any lot may be built upon or conveyed.

Commentary: The methods of securing payment set forth above are authorized and specified in Section 3(o) of the County Ordinance. It is recommended that the town require cash payments.

05.2 Determination of Uses:

05.2.1 Uses Not Listed on Schedule: When an application is requested for a building or structure containing a proposed use which is not specified on the Schedule, the Impact Fee Administrator shall impose the fee applicable to the most nearly comparable type of use. In determining comparable uses, the Impact Fee Administrator shall be guided by the [TOWN] Zoning Bylaw.

Commentary: In selecting a comparable land use type, the Impact Fee Administrator may rely on other factors including the following:

1. the Standard Industrial Classification (SIC) manual;
2. the Massachusetts state tax classification;
3. for transportation, by the Institute of Transportation Engineers' "Trip Generation: An Informational Report (latest edition)" and studies or reports done by the United States Department of Transportation, the Commonwealth of Massachusetts Department of Transportation, the [TOWN] Department of Transportation, and articles or reports appearing in the ITE Journal.

If the Impact Fee Administrator will rely on other factors they should be specifically cited in the bylaw.

05.2.2 Multiple Uses: When an occupancy classification covers more than one land use type listed in the Schedule, the impact fee shall be determined by reference to the actual or proposed use of the building or structure as determined by the Impact Fees Administrator, regardless of how the fee payer would choose to characterize the use for purposes of marketing, land sale registration, permit applications, or any other purpose.

When an application is requested for a building with mixed uses, the Impact Fee Administrator shall determine the fee by apportioning the space committed to uses specified on the schedule.

05.2.3 Modification, Change of Use: When an application is requested following the redevelopment, modification, alteration, extension or change of use of an existing building or structure, the impact fee shall be based upon the net positive increase in impacts to the [SPECIFIC FACILITY] as determined by the Impact Fee Administrator in his or her sole discretion. However, should the change result in a net decrease, no refunds or credits for past impact fees paid shall be made or created.

05.2.4 Impacts in More Than One Municipality: In the event the proposed development is located in or impacts more than one municipality, the impact fee shall be rationally apportioned between the Town of {TOWN} and any adjacent municipality with a duly authorized impact fee system which is also impacted by the development, in accordance with the land area of the proposed development in

each municipality or in such other allocation as may be jointly agreed upon by the town and other impacted municipalities.

Commentary: The language set forth above is required by Section 3(f) of the County Ordinance. Fees may only be charged for impacts which occur within the municipality. A municipality may not collect fees for impacts to neighboring municipalities. Please also see the discussion of interlocal service districts at Section 7 of this bylaw.

05.3 Computation of Impact Fees:

Commentary: The Cape Cod Commission Act and Section 3 of the County Ordinance require that impact fees shall have a rational nexus and be roughly proportional to an impact created by the development, and shall reasonably benefit the new development. The act and regulations further require that fees shall be used for the development or improvement of municipal capital facilities in accordance with the capital facilities element of the local comprehensive plan. (See Impact Fees Guidance Document and Section 6 below.)

05.3.1 Schedule of Fees: At the option of the fee payer, the amount of the fee may be determined by the Schedule in Section 6. The fees contained in the Schedule reflect a percentage discount of three (3) percent from net cost to encourage use of this schedule in order to avoid the expenditure of administrative time on the processing of independent fee calculation studies.

Commentary: It is recommended to add language here specifying the basis of program-wide credits reflected in the fee schedule (e.g. "the road impact fees include a credit for future motor fuel tax payments", or "the school impact fee system includes a credit based upon past taxes paid on vacant lands".)

05.3.2 Independent Fee Calculation: When the fee payer opts not to have the impact fee determined according to the preceding paragraph, then the fee payer shall prepare and submit to the Impact Fee Administrator an independent fee calculation study for the land development activity for which a building permit or a certificate of occupancy is sought. In addition, the Fee Payer shall attend at least one pre-application conference with the Impact Fee Administrator to present the independent fee calculation. If an acceptable independent fee calculation study is not presented, the Fee Payer shall pay the impact fees based upon the Schedule of Fees.

If an acceptable independent fee calculation study is presented, the Impact Fee Administrator may adjust the fee to that appropriate to the particular development. The adjustment may include a credit against the fee otherwise payable, as set forth in this bylaw. The independent fee calculation study shall measure the impact of the development in question on the [SPECIFIC FACILITY] by following the prescribed methodologies and formats for the study established in Appendix B, as may be amended from time to time. The Impact Fee Administrator shall consider the documentation submitted by the Fee Payer, but is not required to accept such documentation as he/she shall reasonably deem to be inaccurate or not reliable and may, in the alternative, require the Fee Payer to submit additional or different documentation for consideration.

The documentation submitted shall show the basis upon which the independent fee calculation was made. This documentation shall be prepared and signed by qualified professionals in their respective fields and shall follow best professional practices and methodologies.

Commentary: It is recommended to adopt and append specific informational requirements for independent fee calculations (e.g. assumptions, methodology, certifications). Some communities require the Fee Payer to provide the same report which is presented to the bank to secure a construction loan.

06.0 Schedule of Fees:

Commentary:

See [EXHIBIT 2 for SAMPLE FEE SCHEDULES](#) - The sample schedules presented in this model bylaw are used to illustrate possibilities and should be adapted to specifically fit the conditions in each town.

Definitions - The bylaw or schedule should include a definition of terms which serve as the basis of fee calculations. The terms used in the impact fee schedule(s) should be consistent with defined terms in the town Zoning Bylaw or they should be defined in Section 2 of this bylaw.

Setting Fees - There are two basic rules of thumb in determining impact fees: (1) be conservative in your assumptions and numbers; and (2) keep the methodology clear. Your impact fee system must be fair and understandable. Fees are set by establishing the costs of providing capital facilities to new development and subtracting system-wide credits, and then dividing those costs among expected new development based upon type of land use. (See the Impact Fees Guidance Document.) Most communities apply an across-the-board discount after calculating reasonable fees. However, be aware that significantly undercharging fees may result in a failure to acquire sufficient funds to complete the capital facility. In such a case the town may have to refund monies collected through the impact fee system.

07.0 Impact Fee Service Areas Established: There is hereby established a [SPECIFIC FACILITY] Impact Fee Service Area, which area shall include all land within the boundaries of the town of [TOWN], as shown in Appendix A attached hereto and incorporated herein by reference.

Commentary: Appendix A should include a narrative description of each service area in addition to a map. Unless there is a rationale to create different service areas, it is recommended that a service area include the entire town. Inter municipal districts may be created consistent with an approved interlocal agreement, so long as the boundaries of the interlocal service area are specified in Appendix A. (See Impact Fees Guidance Document.)

08.0 Impact Fee Accounts Established: All funds collected pursuant to this bylaw shall be properly identified by Impact Fee Service Area as shown on Appendix A and promptly transferred for deposit into the appropriate impact fee account to be held separately as set forth in this Bylaw and used solely for the purposes specified in this Bylaw.

Funds withdrawn from these accounts must be used in accordance with the provisions of Section 9 (Use of Funds) of this bylaw.

Commentary: Section 3(e) of the County Ordinance states that funds "shall be paid to and held in a separate account(s) for each type of impact fee assessed in the municipality in which the proposed development is located". Thus, collected fees must be separated by type and service district.

09.0 Use of Funds:

09.1 Purpose of Expenditures: Impact Fees collected shall be used solely for the purpose of acquiring and/or making [SPECIFIC FACILITY] capital improvements under the jurisdiction of [TOWN] as set forth in the certified Local Comprehensive Plan, and shall not be used for the maintenance or operation of existing facilities. Such improvements shall be of the type made necessary by the new development and shall not be used to remedy existing deficiencies in level of service. Except as provided in the Administrative Fee section below, funds shall be used exclusively for capital improvements within the [SPECIFIC] service area from which funds were collected, or for projects in other [SPECIFIC] service areas that are of direct benefit to the [SPECIFIC] impact fee district from which the funds were collected.

09.2 Timing of Expenditures: Funds shall be tracked and expended in the order in which they are collected. Funds may be used or pledged in the course of bonding or other lawful financing techniques, so long as the proceeds raised thereby are used for the purpose of capital improvements to the [SPECIFIC] capital facilities. If these funds or pledge of funds are combined with other revenue sources in a dual- or multi-purpose bond issue or other revenue-raising device, the proceeds raised thereby shall be divided and segregated in such a fashion that the amount of such proceeds reserved for [SPECIFIC] purposes bears the same ratio to the total funds collected that the [SPECIFIC] impact fee funds used or pledged bear to the total funds used or pledged.

Commentary: If the town plans to use impact fees to retire bond debt, it is advisable to check bond covenants to be sure that you can get more time to pay the bond in the event the fee system generates less revenue than anticipated.

09.3 Annual Report: Each fiscal period the Impact Fee Administrator shall, after consultation with participating Town Boards and consistent with the provisions of any interlocal agreements, review and present to the [TOWN] Town Meeting a proposed Capital Improvements Plan (CIP), assigning funds, including any accrued interest, from the several [SPECIFIC] impact fee accounts to specific capital improvement projects. Monies, including any accrued interest, not assigned in any fiscal period shall be retained in the same [SPECIFIC] impact fee trust funds until the next fiscal period, except as provided by the refund provisions (Section 10) of this bylaw.

09.4 Administrative Fee: The Town of [TOWN] shall be entitled to include and retain an additional charge of up to three percent (3%) of [SPECIFIC] impact fees it collects as an administrative fee to offset the costs of administering this bylaw. This administrative fee is included in the Schedule of Fees at Section 6.

010.0 Refund of Fee Paid:

010.1 Revocation or Voluntary Suspension of Permit: If a building permit or certificate of occupancy is revoked or is voluntarily surrendered and is, therefore, voided, and no construction or improvement of land or change of use has been commenced, then the fee payer shall be entitled to a refund of the [SPECIFIC] impact fee paid as a condition for its issuance, except that up to three percent (3%) of the fee paid shall be retained as an administrative fee to offset the cost of processing the refund. The fee payer is entitled to seek a refund equal to the impact fee paid less administrative costs. No interest shall be paid to the fee payer on refunds due to non commencement.

010.2 Expiration: Any funds not expended or encumbered by the end of ten years from the date the [SPECIFIC] impact fee was paid shall, upon application of the fee payer, or the party legally entitled to it as a result of an assignment, within one hundred eighty (180) days of that date, be returned to the fee payer with interest at the rate equal to the prevailing savings passbook interest rate per annum.

Commentary: The refund period is specified in Section 3(d) of the County Ordinance. Fee Payers are entitled to expect the construction of capital facilities within a reasonable time of paying their impact fee. The ten-year limit provides the town with the incentive to provide the facilities during those ten years so as not to lose the benefit of the impact fees.

010.3 Errors and Misrepresentations: If the [SPECIFIC] impact fee has been calculated and paid based on error or misrepresentation, it shall be recalculated and, if found to be less, the difference shall be refunded to the original Fee Payer. If [SPECIFIC] impact fees are owed, the Fee Payer shall immediately pay the fees owed to the TOWN. No municipal permits of any type may be issued for the building or structure in question, or for any other part of a development of which the building or structure is a part, while the fees remain unpaid unless said fee is secured consistent with Section 5 of this bylaw. The Impact Fee Administrator, other official or municipal agency may bring any action permitted by law or equity to collect unpaid fees.

011.0 Exemptions and Credits:

Commentary: Equal Protection Challenges - Exemptions must be given careful consideration to avoid equal protection challenges. Generally speaking, granting exemptions reduces the fairness of an impact fee system. This can present legal problems and can also reduce the willingness of Fee Payers to cooperate with the system. For example, an exemption for religious uses on the basis that such uses are tax exempt will not likely survive a legal attack. Thus, it is recommended that uses which the town wishes to exempt should be assessed a fee and the fee can then be paid through a public or private revenue source. (See Section 11(A)(5) below.) Another option is to exempt an area of a town on basis that there is sufficient infrastructure in that area or there is no new growth proposed in that area. However, you must be certain that the exempted area has a sufficient level of service for the particular capital facility before establishing an area-wide exemption.

011.1 Exemptions: The following shall be exempted from payment of the [SPECIFIC] impact fee:

011.1.1 Alterations or expansion of an existing building or land use where no additional living units will be produced over and above those in the existing use of the property, the use is not changed, or where no additional impacts will be produced over and above those produced by the existing use.

Commentary: This section may further clarify what is exempt by specifying that the change to a commercial or industrial use from a less intensive use; enlargement of a structure; additions to usable interior floor area within residential, commercial and industrial buildings; and the conversion of a seasonal use or dwelling to year-round use shall be deemed to produce impacts over and above those produced by the exiting use.

011.1.2. The construction of residential accessory buildings or structures which will not produce additional impacts over and above those produced by the principal building or land use.

011.1.3. The replacement of a lawfully permitted building or structure, for which the building permit which was issued on or before the effective date of this bylaw; or the replacement of a building or structure constructed subsequent to the effective date of this bylaw, with a new building or structure of the same use and at the same location, provided that no additional impacts or vehicular trips will be produced over and above those produced by the original use of the land and provided building or structure to be replaced has paid or secured an impact fee.

011.1.4. A building permit obtained by or for the Federal Government, the Commonwealth of Massachusetts, Barnstable County, or a [TOWN] local agency.

Commentary: It is recommended that the bylaw charge an impact fees for these uses and then offset the impact fee with other available public or private monies.

011.1.5 A building permit or certificate of occupancy for affordable housing developments, in proportion to the percentage of affordable housing in the project. In such a case, the exempted fees shall be paid from the [TOWN] reserve fund.

Commentary: Both the Cape Cod Commission Act, Section 15(a), and Section 3(h) of the County Ordinance require a waiver of fees for affordable housing, with such fees to be paid from an identified public or private funding source. Such fees must be paid from an alternative funding source, rather than simply exempted, to avoid potential equal protection challenges. Such funds may be paid through town accounts, county housing funds, etc. Similarly, your fee system may include a waiver to promote economic opportunities, consistent with Sections 3.1.3 - 3.1.6 of the 1996 RPP, so long as such fees are paid by an identified public or private funding source consistent with Section 3(i) of the County Ordinance.

011.2 Credits:

Commentary: Section 1(d) of the County Ordinance establishes that a credit is "the present value of past, present, or future payments, or a portion thereof, made by new developments towards the cost of existing or future related capital improvements (i.e. property tax, gasoline tax, or the contribution, payment, development or dedication of land or the payment of other consideration) accepted and received by the municipality".

The proper use of credits can help a town to achieve the goals of its local comprehensive plan, since a town can grant the highest amount of credit for the improvements it most wants. For example, the impact fee system can grant 100% credit for actual improvements which are listed on the town's approved capital improvements plan.

011.2.1 No credit shall be given for site-related improvements, interior roads, or payments to special assessment or taxing districts unless a benefit was derived from the payment to such assessment or taxing district.

011.2.2 (a) The value of in-kind, voluntary improvements to public facilities, or payments made by a Fee Payer to the municipality may be credited against the assessed fee so long as (1) the improvement or payment is for the same impact as the assessed fee; and (2) the improvement or payment was made within ten (10) years of the assessment of the fee; and (3) for off-site improvements, the improvement is consistent with a prior written agreement between the Fee Payer and the [TOWN] and with these regulations. Credits for off-site improvements shall be allowed only when they are presented to and approved by the town prior to the work being done.

(b) The value of in-kind improvements to public facilities or payments made by a Fee Payer to the Cape Cod Commission may be credited against the assessed fee so long as (1) the improvement or payment is for the same impact as the assessed fee; and (2) the improvement or payment was made within ten (10) years of the assessment of the fee; and (3) for off-site improvements, the improvement is consistent with a Development of Regional Impact approval and these regulations. Credits for off-site improvements shall be allowed only when they are presented to and approved by the town prior to the work being done.

Commentary: Section 3(n) of the County Ordinance provides that "Credit against the impact fee may also be provided for off-site improvements made to public property consistent with a prior written agreement between the Fee Payer and the municipality".

011.2.3 (a) When a person requests that a credit be created toward the payment of impact fees required for construction of an approved facility, he shall submit a description of the improvement in sufficient detail and with complete cost estimates prepared by qualified professionals to be utilized by the Impact Fee Administrator in determining the amount of the credit, if any, the Impact Fee Administrator may approve.

(b) When a person requests credit for land dedication for approved facilities, he shall present: (1) a specimen of the deed which he proposes to use to convey title to the Town of [TOWN]; and (2) a title opinion written by a licensed Commonwealth of Massachusetts attorney and rendered within sixty (60) days of submission thereof, the content of which is satisfactory to the town attorney and verifying that the proffered deed will convey unencumbered fee simple title to the appropriate governmental body; and (3) property appraisals prepared by qualified professionals; and (4) a certified copy of the most recent assessment of the property for tax purposes to be used by the Impact Fee Administrator in making his decision or recommendation for the amount of the credit.

(c) In preparing their reports, appraisers shall value the land at its then current zoning and without the improvements for which the dedication is offered or the permit in question is sought, unless the land in question is subject to a valid development agreement or building permit which prescribes a different valuation, in which case the agreement or building permit shall control. However, the Impact Fee Administrator retains the right to independently determine the amount of credit to be approved or recommended at the Fee Payer's expense by securing other engineering and construction cost estimates and/or property appraisals for those improvements and/or right-of-way dedications.

011.2.4 In every case, [SPECIFIC] impact fee credits shall be calculated so as to be consistent with Cape Cod Commission Act statutory and Barnstable County Ordinance requirements.

011.2.5 [SPECIFIC] impact fee credits shall be in transferable form and may be sold, assigned, or otherwise conveyed as set forth in the [TOWN] Administrative Code. They may be used to pay or otherwise offset [SPECIFIC] impact fees required by this bylaw, consistent with any interlocal agreements made with participating municipalities. Unless a longer period is specifically authorized by the Impact Fee Administrator, such transferable credits must be used within five (5) years of the date they are created, which date is the date the instruments conveying legal title to the land or improvements, which were given in exchange for credits, were recorded in the Town's official record book. If, during this period, [SPECIFIC] impact fees are increased, unused credits shall also be increased proportionately. Credits not used during this period shall be canceled by the Impact Fee Administrator. Any person who accepts credits in exchange for the dedication of land or improvements does so subject to the limitations on the use, duration, non refund provision, and other restrictions prescribed in this bylaw.

Commentary: Many jurisdictions allow for the limited transfer of impact fee credits. Such transfers are always limited to the same impact and it is recommended that credits follow the land, or the Fee Payer, or both.

011.2.6 In lieu of cash, up to ninety-seven percent (97%) of the impact fee may be paid by the use of credits created in accordance with the provisions of Section 11 (Exemptions and Credits) of this bylaw.

011.2.7 Exemptions or credits must be claimed by the fee payer at the time of the application for a building permit or, in the case of a modification or change of use, a certificate of use and occupancy. Any exemptions or credits not so claimed shall be deemed waived by the fee payer.

012.0 Variance Procedure

Commentary: Towns must establish a process through which a developer may challenge the amount of impact fees charged. It is necessary for the town to provide a procedure in this impact fee bylaw, or in a separate bylaw, for land owners to apply for a variance if they feel that mitigating circumstances would reduce the impact fee being assessed. Pursuant to county ordinance, the procedure should include the following:

012.1 Appeals Procedure:

012.1.1 Any decision made by the Impact Fee Administrator, or his designee, or by the building official in the course of administering this bylaw may be appealed. Any Fee Payer may apply for an appeal from the amount of the assessed fee, in whole or in part, by filing a written Notice of Appeal with the Town Clerk within fourteen (14) days of the assessment of the Fee. Failure to file said Notice of Appeal in a timely manner shall constitute a waiver of the Fee Payer's right to protest the fee assessed.

Commentary: It is recommended that appeals be filed with the Town Clerk's office to establish the precise time of filing.

012.1.2 Said filing shall include a statement of the facts setting forth the basis for the appeal, including whether full or partial relief is sought, and an alternative calculation of the Fee Payer's proper contribution with supporting documentation.

012.1.3 Within forty-five (45) days of receipt of a Notice of Appeal at the Town Clerk's office, the Planning Board shall hold a duly noticed public hearing to consider any appeal from the assessment of a fee. The Planning Board shall produce minutes of all said hearings and shall produce written findings supporting its determination.

Commentary: Towns may create an Impact Fees Appeals Board or may use an existing board, such as the Planning Board.

012.1.4 The Planning Board shall grant relief if it determines that the fee assessed is disproportionate to the need for additional services attributable to the proposed development.

Commentary: Towns may add additional criteria for granting full or partial relief from the provisions of the impact fee bylaw.

Some communities charge a fee to process an appeal. In other communities the 3% of fees held for administrative costs covers the costs of appeals.

012.2 Appeals and Interlocal Impact Fee Systems:

So as to provide continuity in the interpretation and administration of this bylaw, every interlocal agreement made pursuant to this bylaw shall specifically incorporate this appeal procedure; each participating municipality shall agree to be bound by the results of the administrative appeal.

Commentary: Towns with interlocal service districts may address coordinated legal defense provisions within their bylaws.

013.0 Penalty and Enforcement Provision: A violation of this bylaw shall be prosecuted in the same manner as other bylaws of the Town of [TOWN]. The Town of [TOWN] shall have the power to sue in equity to enforce the provisions of this bylaw. Knowingly furnishing false information to the Impact Fee Administrator, his designee, the building official, or any municipal official who is charged with the administration of this bylaw on any matter relating to the administration of this bylaw shall constitute a violation thereof.

014.0 Severability: If any section, phrase, sentence, or portion of this bylaw is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

015.0 Codification, Inclusion In Codes, and Scrivener's Errors: It is the intention of the town that the provisions of this bylaw shall become and be made a part of the [TOWN] Code; and that sections of this bylaw may be renumbered or relettered and the word bylaw may be changed to ordinance, section, article, or such other appropriate word or phrase in order to accomplish such intentions; and regardless of whether such inclusion in the code is accomplished, sections of this bylaw may be renumbered or relettered and typographical errors which do not affect the intent may be authorized by the Impact Fee Administrator or his designee without need of public hearing, by filing a corrected or recodified copy of same with the Town Clerk.

016.0 Adoption and Amendment: This bylaw is adopted as a general bylaw upon a vote of the [TOWN] Town Meeting. This bylaw may be amended from time to time, through the same procedure used to adopt the bylaw.

Commentary: Section 4 of the County Ordinance provides the following procedures for adoption and amendment of impact fee bylaws:

1. it shall be adopted as a general bylaw and approved by town meeting/town council;
2. the Town shall hold at least one (1) public hearing on the proposed bylaw;
3. it shall be submitted to the Cape Cod Commission for comment at least 30 days prior to a town meeting or town council vote;
4. it shall be approved by the Massachusetts Attorney General if required by law.

017.0 Decertification of Local Comprehensive Plan: Revocation of certification of a Local Comprehensive Plan will result in the loss of ability to assess impact fees. Revocation of certification shall not affect the validity or retention of any impact fees collected by the town, or required under a binding agreement or development permit fully executed or issued prior to such revocation.

Commentary: The language above is set forth in Section 5 of the County Ordinance.

018.0 Effective Date:

This bylaw shall become effective on _____.

Passed and duly adopted this _____ day of _____, 19____.

Attest: _____ Town Clerk of [TOWN], Massachusetts.

Approved as to form:

By: _____

[TOWN] Attorney's Office