

Negotiations or Impact Fees?

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With the recent taxpayer revolts aimed at rising property taxes and the rapid and steep decline of federal funding for capital projects in the 1980's, Maine municipalities are gradually turning to private financing of local infrastructure through the use of development fees.

"Development fees" have the express purpose of ensuring that growth pays its own way. For purposes of this article, "development fees" include both voluntary and required cash fees, land donations or capital improvements made by a developer to assist a municipality with the financing of local infrastructure and community facilities. They should be distinguished from application fees which are tied to the review and permitting process.

The underlying premise of development fees is that costly public infrastructure improvements necessitated by development should be paid for by the developer, not the community at large.

Until the development boom of the eighties, particularly in southern and coastal Maine, little thought had been given by Maine's local officials to the need for development fees. With various forms of federal assistance available for infrastructure improvements, such as wastewater treatment grants, EDA grants for industrial parks, CDBG and UDAG, and FmHA's community facilities programs, there was no real impetus for private financing of public facilities.

Development fees seem to be evolving in Maine from informal, sometimes haphazardous, negotiations to the more equitable, albeit more complex, impact fees. Due to the complexity of instituting impact fees, movement from negotiating to impact fees has been slow in coming. Although many Maine municipalities are presently studying the use of impact fees, only the Town of Brunswick has an impact fee ordinance.

Negotiating Fees

Negotiations with developers has been and continues to be used by municipalities as a way to get developers to "voluntarily" donate land or rights of way, make capital improvements, or pay cash in lieu of land donations or infrastructure improvements. Although the oldest, and perhaps the least fair way to have development pay its own way, some municipal officials, and even some developers, prefer to negotiate development fees rather than have a formula used to determine the amount that will be paid.

The Town of Scarborough is a good example of a Maine municipality that has used the negotiations process very effectively as a form of development fee.

"Our big advantage in Scarborough was the desirability of the town for development," says Jim Lysen, former assistant planner in Scarborough and now Lewiston's city planner. "When you have that desirability, developers are willing to negotiate with you." Scarborough kind of fell into the idea of negotiating off-site improvements via development fees. A local developer who was in the pre-application stage of a sizeable residential development project voluntarily came forward with a cash contribution to help the town construct a recreational area with ballfields.

What had formerly been the site of the town's landfill will, when finished, be a \$120,000-\$150,000 community recreational area. Two diamonds, a baseball and a softball, and two soccer fields, located inside the diamonds, have already been constructed.

The town had very limited resources to improve the area at the time the developer came forward with his proposal. The developer's donation got the project off the ground, and to put icing on the cake, it was matched by a recreation grant from the state Department of Conservation. Other developers subsequently joined in to help finance the project.

According to Lysen, Scarborough went the negotiations route because it didn't have time to develop impact fees. Part of the planning department's philosophy, however, was to use the impact fee concept in the negotiations process. The town planners used \$500 per lot (regular sized) as a development fee benchmark. This amount was suggested by the developer who made the voluntary contribution and was used thereafter by the town planners for other developer negotiations.

The basic approach was to be fair and not greedy. "Don't be a pig, pigs get slaughtered," recited Lysen, quoting a nationally prominent urban planner.

"Negotiate honestly, do it up front," he says. He also feels it is important for the town to be consistent and not arbitrary, and to put as much flexibility into the negotiations as possible.

"We never wanted to reach the stage of being adversarial," he said. His advice to municipal officials is to keep the negotiations process open. "They (the developers) may have some things that they want to bring to the table."

"I think that developers realize that it (development fees) is something that's going to happen one way or the other," he says.

Madge Baker, executive director of the Southern Maine Regional Planning Commission, says that negotiating development fees is regaining its popularity. "Nationally, you're seeing more and more negotiated agreements between towns and developers (particularly for off-site improvements)."

Most developers don't mind the idea of negotiating fees, according to Baker, "they just want to know the rules up front."

Exactions and Impact Fees

Exactions and impact fees are alternatives to negotiating for infrastructure financing. These development fees come in the form of local ordinances which require improvements, land dedications or cash assistance from the developer.

By traditional definition, exactions are requirements that subdividers "dedicate land for public use, such as streets, parks, water and sewer lines, or pay a fee in lieu thereof which will become part of a fund to purchase lands or facilities." The exaction has historically been tied to subdivision regulation and therefore has less scope than the impact fee.

Impact fees take the concept of the exaction a step further by assessing a fee in accordance with a predetermined, standard formula. Impact fees add uniformity and fairness to the idea of development fees by using a systematic process.

The ultimate source of authority for exactions and impact fees resides in local government's exercise of police powers. The major difference between exactions and impact fees is that exactions have been used primarily to require developers to make on-site improvements such as constructing streets, sewers and stormwater drains in new subdivisions and then dedicating these improvements to the municipality for public use and maintenance, while impact fees are more directed at off-site infrastructure improvements.

Exactions have a longer legal history than impact fees and should be more defensible in court. They are also simpler than impact fees and less difficult to administer. They are usually incorporated into the municipality's subdivision and/or site plan review ordinances.

Impact fee and exaction ordinances are judged by a standard of reasonableness. It is important to note that court interpretation of reasonableness has changed over the years and what may have been unconstitutional 10 years ago, may be perfectly legal and acceptable today.

The limited flexibility of exactions to fund infrastructure improvements has been their chief criticism. Since exactions generally just apply to subdivisions they are less versatile than impact fees which could be levied on commercial and industrial development, and residential development outside subdivision review.

The state's new Growth Management Law enacted last year sets up criteria, most of which was based on existing case law, for instituting impact fees. That section of the law states that "any ordinance which imposes or provides for the imposition of impact fees must meet the following requirements:

- 1) The amount of the fee must be reasonably related to the development's share of the cost of infrastructure improvements necessitated by the development.
- 2) Funds received from impact fees must be segregated from the municipality's general revenues. The municipality shall expend the funds solely for the purposes for which they were collected.
- 3) The ordinance must establish a reasonable schedule under which the municipality is obliged to use the funds in a manner consistent with the capital investment component of the comprehensive plan.
- 4) The ordinance must establish a mechanism by which the municipality may refund impact fees, or a portion of impact fees, actually paid which exceed the municipality's actual costs or which were not expended according to the schedule under this paragraph."

"The jury is still out on impact fees," says Kay Rand, director of the Office of Comprehensive Planning, State Department of Economic & Community Development.

Rand says that communities need to do an economic analysis before adopting impact fees to determine if the public interest is being served. "Some communities will find that impact fees are in the community's best interest and others will find they are not necessary," says Rand.

Impact fees can redress the fiscal imbalance resulting from overly rapid community development and shift the burden of financing new infrastructure away from the community at large. A major, and often expensive, impact of new development occurs with a community's transportation system.

Targeted impact fees for roads and other transportation infrastructure have gained popularity nationwide because the cost is relatively easy to identify and calculate. The Institute of Transportation Engineers (ITE) says that over 21 percent of all local governments in the nation use traffic impact fees. California and Florida are the two states that rely most heavily on this targeted impact fee.

In Maine, traffic impact analysis is conducted on large developments under the Site Location of Development law. The Department of Environmental Protection has the responsibility for administering the law with the help of the Department of Transportation.

The Site Law applies to developments over 20 acres or structures exceeding 60,000 square feet.

According to John James of DEP's Land Bureau, "Most applications under the Site Law do not end up requiring traffic studies... most (developments) meet traffic standards quite easily."

Under the law, DEP must consider such standards as "adequate provision made for traffic movement" and "sufficient capacity" and "within the vicinity of the development." Interpretation of these standards has been debated and is gradually being refined with each new project that comes before the DEP.

"We never require the developer to do anything," says James. However, if the traffic impact analysis shows that the standards of the law are not being met, DEP denies the developer his permit.

According to James, only one project in the 20 years that the law has been in effect has been denied. Permits for other projects, however, have been contingent upon the traffic standards being met. In one case, this meant that a Portland developer had to spend \$1 million for traffic infrastructure improvements necessitated by his development project.

If a project requires a traffic study, the developer must prepare one and submit it to DEP. The actual review of the study is conducted by MDOT personnel and then returned to the DEP with comments. Based on those comments, DEP decides whether or not to issue the permit.

The process is a little cumbersome and many people feel the traffic impact analysis should fall entirely upon the MDOT where the expertise lies. Another criticism of the process is that major developers are being saddled with the cumulative costs of development since the traffic analysis uses a "threshold concept" - i.e., when the sufficient capacity standard is not met, the next applicant would have to increase capacity to get permitted.

Also, most developers "don't like the idea that they are making improvements that other people (outside the development) will benefit from," says James.

Paul Minor of MDOT says, "Most development isn't paying anything" and that creates additional problems of fairness.

One proposal that has surfaced recently is the idea of a regional traffic impact fee. Discussion of the idea, according to Minor, is in the very early stages.

"We'd like to do something," says Minor, who believes a regional or statewide traffic impact fee would be more equitable.

Some of the existing problems that the regional or statewide impact fee would address, according to MDOT, is the ability to charge all sizes of development a traffic impact fee, and the ability to deal with the traffic impact of development outside the locality in which the development is located. A redistribution of the impact fee, based on the road systems affected, would be made to communities surrounding a development project.

Summary

Instead of approaching development review as a bargaining process to be won or lost, both local officials and developers would benefit by keeping an open mind about development fees. Growth should certainly pay its own way, but in so doing a development fee system that is equitable and reasonably easy to administer should be devised.

There is something to be gained through development fees even for the developer. Impact fees could be viewed as implying a locality's acceptance of the inevitability of growth, so long as the developer pays for certain specified facilities. Local efforts to pursue exclusionary policies and arguments against growth, based on presumed fiscal impact, can be countered by the acceptance of the development fee approach.

While impact fees can produce significant benefits, they do have some downside risks. Impact fees are regressive in their effect on affordable housing since they are applied uniformly as a user fee and not based on the structure's value. For example, a \$3,000 impact fee would, in most cases, place a much greater financial burden on the purchaser of a \$50,000 house than a \$100,000 house. Also, becoming too reliant on impact fees poses the risk that there would be increased public resistance to the use of general fund monies to finance community facilities in low-growth sections of the community.

Since impact fees are a relatively new concept in Maine, the legal battles are yet to be fought. As with most new ideas, the scope of what impact fees can be used for has probably been overstated. For off-site improvements,

the impact on recreation, open space and road systems appear easier to identify and calculate. For that reason, impact fees, as well as negotiations, often focus on these areas. Large scale and expensive infrastructure improvements to wastewater and solid waste facilities are under evaluation for impact fees, but a host of legal and administrative hurdles must be overcome before any type of development fees can be applied in these areas.