DEVELOPMENT IMPACT FEES

IN THE ROCKY MOUNTAIN REGION

Editors

Valerie E. Hart
Research Associate
Rocky Mountain Land Use Institute

Christopher J. Duerksen
President
Rocky Mountain Land Use Institute

ABOUT THE INSTITUTE

The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sector, also undertakes and supports research and service projects related to land use and development in the Rocky Mountain Region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Institute is entirely financially self-sustaining with funds generated by its activities and publications and by gifts from Institute sponsors.

College of Law, University of Denver
1900 Olive Street, Denver, Colorado 80220
Phone (303) 871-6275, Fax (303) 871-6711

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ACKNOWLEDGEMENTS

This book would not have been possible without the generous contributions of the many people involved in this Institute research project. The Institute gratefully acknowledges the imagination and foresight of Tom Ragonetti and Chris Duerksen without whom this project would not have been undertaken. The Institute also wishes to extend its warmest thanks to Ralph Becker, Rulon Dutson, Chuck Hauser, Doug Jorden, Rick Lind, Anita Miller, Tom Ragonetti, and Rich Weddle. Their individual contributions form the heart of this book.

The Institute also extends its appreciation to Esther Jones, of the College of Law staff, whose cooperation and computer skills made the timely production of this book possible. Finally, a special thanks to Valerie Hart for her extraordinary efforts as both a contributing author and co-editor of this book.

Edward H. Ziegler
Professor of Law
Executive Director
Rocky Mountain Land Use Institute

CONTRIBUTING AUTHORS

Ralph Becker is a planner and lawyer with the consulting firm of Bear West in Salt Lake City. He also teaches courses as an adjunct professor at the University of Utah in environmental planning, policy and law, environmental assessment, and public lands. He serves as Chair of the Salt Lake City Planning Commission and chairs the Salt Lake City's Zoning Rewrite Committee. He is a past president of the Utah Chapter of APA.

Christopher J. Duerksen is the Senior Vice President of Clarion Associates, Inc., a national real estate counseling firm. He directs the firm's Denver Office. Mr. Duerksen is a lawyer who has written and spoken nationally on a variety of land use, planning, and environmental topics. He has also drafted many land use and environmental ordinances and regulations and represents both public and private sector clients. He is a past chairperson of the American Bar Association's Committee on Land Use, Planning and Zoning, and formerly directed Denver's Gateway/Stapleton Development Office.

Rulon Dutson is a planner with Bear West in Salt Lake City. He is a Masters candidate in the University of Utah's Public Administration Program.

Valerie E. Hart is a graduate of the College of St. Benedict in Minnesota and is a J.D. candidate at the University of Denver, College of Law. She is a research associate for the Rocky Mountain Land Use Institute.

Charles K. Hauser is a Deputy District Attorney with the Clark County (Las Vegas) District Attorney's Office, Civil Division. For the past ten years, he has specialized in zoning, land use planning and water related issues. Mr. Hauser graduated from Southern Methodist University in Dallas, Texas, with a Bachelor of Arts in Business Administration/Real Estate in 1978 and received a Juris Doctor Cum Laude from Loyola Law School in Los Angeles, California in 1981. He has been admitted to practice in both California and Nevada.

Douglas A. Jorden is a founding member of the Kane Jorden & von Oppenfeld law firm in Phoenix, Arizona. He was Town Attorney for the Town of Paradise Valley, Arizona from 1978 to 1982 and has been in private practice since 1982. His practice now emphasizes land use and zoning, municipal law, environmental regulation, and real estate transactions. From 1990 until 1992, Mr. Jorden served as Zoning Hearing Officer for the City of Phoenix. He is currently the Chairman of the City of Phoenix Environmental Quality Commission and Chairman of the State Bar of Arizona's Continuing Legal Education Committee. Mr. Jorden is the co-author of *Arizona Land Use Law*, published by the State Bar of Arizona, and has lectured extensively on land use and environmental issues.

Richard J. Lind is a Deputy County Counselor for Johnson County, Kansas. He received his B.A. from the University of Kansas in 1976, and his J.D. from the Washburn University School of Law in 1983. His area of municipal government practice emphasizes land use law. Prior to his joining the Johnson County Legal Department, he also served as an Assistant City Attorney for the City of Topeka, Kansas.

Anita P. Miller is a practicing land use attorney in Albuquerque, New Mexico, in the firm of Anita P. Miller, P.C., representing New Mexico municipalities and counties, as well as the State of New Mexico and Indian tribes, on land use, growth management and environmental matters. She is Executive Director of the Southwest Land Use Institute, a non-profit corporation which provides education programs on land use issues, and is an adjunct professor, teaching Land Use Law, at both the University of New Mexico School of Architecture and Planning and School of Law. Miller is the 1993-94 Chair of the Section of Urban, State and Local Government Law of the American Bar Association.

Thomas Ragonetti is a senior shareholder and director of Otten, Johnson, Robinson, Neff and Ragonetti, P.C., a leading commercial law firm in Denver, where he specializes in land use, government regulation and urban and real estate development law. He represents private sector clients locally and nationally in matters involving complex governmental approvals and large-scale development, and he is active in civic matters including the same issues. He has degrees from Harvard Law School and in City Planning from Cornell University. He is an adjunct professor in the School of Architecture and Planning, University of Colorado at Denver and the University of Denver, College of Law. He serves on the Colorado Land Use Commission, and is a member of the board of the Rocky Mountain Land Use Institute.

Richard M. Weddle is staff attorney for the Local Government Assistance Division of the Montana Department of Commerce, Helena, MT. He is a graduate of DePauw University, Greencastle, Ind., and received his Juris Doctor degree from the Indiana University School of Law, Bloomington. Mr. Weddle concentrates his professional efforts in the area of land-use law and is the author of the *Montana Zoning Digest* (1989) and the *Montana Subdivision Law Digest* (1992 and 1994) published by the Department of Commerce.

FOREWORD

Christopher J. Duerksen[1]

This second in a series of research monographs published by the Rocky Mountain Land Use Institute focuses on the increasingly controversial subject of development impact fees–charges assessed against new development to pay for the cost of improvements like water and sewer lines, roads, drainage facilities, and the like.

As detailed in the report that follows, impact fees are becoming a way of life in many communities across the Rocky Mountain West. While fees for services such as water and sewage treatment have been imposed for years in many communities, local governments, faced with growing taxpayer resistance to general tax increases to pay for new facilities, are expanding the use of impact fees to cover schools sites and buildings, parks and trails, and public safety facilities like police and fire stations. Not surprisingly, this broader use has met with resistance from the real estate and development community. As a result, we are witnessing an increasing number of challenges to impact fees in the courts, and legislative action in some states.

Impact fees are likely to become more firmly established as a fact of life as local governments face increasing fiscal constraints. Indeed, if experience in other states is any guide, we can expect local governments in some jurisdictions to push the use of impact fees for a variety of new services, improvements, and impacts. For example, in California, a state that has over two decades of experience with impact fees, a growing number of communities are experimenting with development fees to mitigate impacts on wildlife habitat. In other states, fees are being assessed not just for school sites, but buildings as well, and for libraries, community centers, and other public buildings for which new developments create a need. And in Texas, hardly a bastion of liberal land-use practices, state officials have proposed that golfers who want to expand a golf course at a state park pay a "toad fee" in addition to greens fees to provide funds to protect an endangered toad on the property.

As the use of impact fees expand, an increasing number of legal questions are being raised. Proper enabling authority is often a key issue. In some Rocky Mountain states like Idaho and New Mexico, authority can be found in detailed state enabling legislation. In others, like Colorado, local governments look to home rule authority or powers implied through court decisions when enacting impact fees. Implementation and administration of impact fees is another significant issue. And overlaying all of this is the uncertainty about some aspects of impact fees created by the United States Supreme Court in a land dedication case, *Nollan v. California Coastal Commission*, which raised as many questions

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[1]Chris Duerksen, Senior Vice President and manager of the Denver office of Clarion Associates, is President and Chairman of the Board of the Rocky Mountain Land Use Institute.

as it answered. The Court has recently decided to review a true impact fee case, which may help to settle some of these issues.

Given this state of flux and uncertainty, the Institute felt that a thoughtful examination of impact fee law and practice in the Rocky Mountain States was overdue. This report is intended to provide a general overview of key legal issues involved in enacting an impact fee program in any state with tips and advice on how to implement and administer impact fees in a way that is not only legally defensible, but efficient and equitable to landowners and developers. This general discussion is followed by chapters that focus on impact fee law and practice in each Rocky Mountain state.

This report would not have been possible without the important contribution of leading lawyers from across the region who authored the individual state chapters. The Institute is indebted to them for their excellent work. A special note of recognition is in order for Ms. Valerie Hart, a third-year student at the University of Denver School of Law, who did an exemplary job not only in writing part of the report, but in riding herd on a group of lawyer authors who can be as hard to handle as a bunch of maverick yearlings. Due to her conscientious efforts, the report was produced on time in record fashion.

We at the Rocky Mountain Land Use Institute hope that the land use and development community finds this publication to be valuable, one that serves the Institute's goal of promoting rational, thoughtful consideration and debate of key land use issues facing the Rocky Mountain West today.

Chapter I.

DEVELOPMENT IMPACT FEES: AN OVERVIEW

Valerie E. Hart

Unprecedented growth in the Rocky Mountain region[1], combined with increasing reluctance on the part of taxpayers to approve tax increases,[2] has forced local governments to explore alternative methods of financing infrastructure and services for new development. Impact fees are emerging as the land use tool of choice to grapple with serious capital financing shortages.[3]

Impact fees are charges levied by local governments against new development in order to generate revenue for capital funding necessitated by new development.[4] Impact fees generally include five elements:

1. The fee takes the form of a predetermined money payment;

2. It is assessed as a condition to the issuance of a building permit, occupancy permit, or plat approval;

3. It is imposed pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;

4. It is levied to fund large-scale, off-site public facilities and services necessary to serve new development;

5. The amount of the fee is proportionate to the need for public facilities generated by new development.[5]

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[1] Rocky Mountain states enjoyed economic growth rates of up to 5% in the past two years while the national average was 1%. Jordan Bonfante, *Sky's the Limit*, Time, Sept. 6, 1993, at 20.

[2] For example, in 1991 Colorado voters amended the state constitution to require voter approval of any new tax or tax increase. Co. Const. art. X, sect. 20.

[3] Only 3 states had explicit impact fee enabling legislation prior to 1987. That number has now risen to twenty states as of the close of the 1993 legislative session. Martin L. Leitner & Susan P. Schoettle, *A Survey of Impact Fee Enabling Legislation*, 25 Urb. Law. 491, 492 (1993).

[4] Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 Fla. St. U. L. Rev. 415, 417 (1981).

[5] Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: the "Second Generation"*, 38 Wash. U. J. Urb. & Contemp. L. 55, 64 (1990).

Impact fees shift the cost of providing new development with infrastructure or services onto developers, and, in cases of residential development, ultimately to homebuyers. Some critics have attacked impact fees as adding to the cost of development and decreasing the availability of affordable housing.[6] Others believe developers are forced to pay for pre-existing needs of the community which are more appropriately redressed through general revenue funds.[7] Despite these criticisms, the use of impact fees continues to grow.

Impact fees are generally collected prior to issuance of a building permit in the form of a flat "per unit" fee or are calculated based on the proportion of demand the development will have on public facilities. Examples of public facilities that may be financed by impact fees include: sewer lines, storage tanks, and treatment plants; drainage facilities; solid waste recycling stations and landfills; libraries; parks and recreational land and facilities; fire/emergency medical service stations and vehicles; police facilities; administrative facilities; and schools.[8]

Legal Issues

Impact fees generate three principal legal issues. First, the local government must have sufficient legal authority to impose impact fees. Second, the impact fee must comply with state and federal constitutional limitations.[9] Finally, the fee must be crafted in such a manner as to not be a tax.

Enabling Authority

Many states have resolved the problem of authority through passage of explicit enabling legislation.[10] In the Rocky Mountain region, the Idaho,[11] New Mexico[12] and Arizona[13] legislatures have enacted legislation specifically authorizing impact fees. Impact fee enabling legislation has the effect of requiring local governments to follow explicit procedures for imposing impact fees. In those states that have not passed explicit enabling legislation, local governments have traditionally relied on police power and home rule authority to impose impact fees. For example, in Colorado, cities and counties have successfully relied on statutes authorizing local governments to impose fees and charges for

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6 Leitner & Schoettle, *supra* note 3, at 491 n. 2; *See generally* Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 Real Est. L. J. 195, (discussing economic effects of impact fees on housing markets).

7 Stephen J. Roy, *Developer Exactions and Impact Fees*, Colo. Law. (Jan. 1990) p. 67.

8 Martin L. Leitner, *Introduction: The "Gameboard" and the Rules of the Game*, 25 Urb. Law. 481 (1993).

9 Leitner & Shoettle, *supra* note 3, at 493.

10 *See* chart of state enabling legislation *infra* at Appendix B.

11 Idaho Code 67-8201 *et. seq.* (Supp. 1992).

12 1993 New Mexico Laws Ch. 122.

13 Ariz. Rev. Stat. 9-463.05; Ariz. Rev. Stat. 11-1101-1109.

public improvements,[14] or on home rule or charter provisions to justify imposition of impact fees or dedication requirements.[15] In contrast, Montana courts found general police powers to be a sufficient basis for some exaction authority. Specific authority for each Rocky Mountain state is addressed in subsequent chapters.

Constitutional Limitations:

Traditionally, state courts have applied one of two tests to assess the constitutionality of impact fees:

1) *The Specifically and Uniquely Attributable Test.* This is the more restrictive standard. Under it, an impact fee may only be imposed to alleviate impact that is "specifically and uniquely attributable" to the development.[16] This test is generally not applied in any of the Rocky Mountain states.[17]

2) *The Rational Nexus/Reasonable Relationship Test.* There is some dispute among commentators as to whether the "rational nexus" standard is more restrictive than the "reasonable relationship" test.[18] While most Rocky Mountain state courts have interpreted them to be the same, the issue has yet to be definitively resolved. Hopefully, this will be settled in 1994 as the U.S. Supreme Court has accepted an impact fee case for review. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

The rational nexus/reasonable relationship test was actually used by states long before the United States Supreme Court adopted it in *Nollan v. California Coastal Commission.*[19] Despite the fact it involves a land dedication, not an impact fee, *Nollan* is considered the landmark case for impact fees. In *Nollan*, a California regulatory agency conditioned approval of a building permit for a beachfront home on the owner's grant of a lateral easement which would permit the public to cross the private beach behind the house. The stated purpose of the condition was to prevent the new house from creating "psychological" and "visual" barriers to the public's view of the beach. The United States Supreme Court

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[14] *City of Arvada v. City and County of Denver*, 662 P.2d 611 (Colo. 1983) (storm drainage charges).

[15] Co. Const., art. XX. *City of Colorado Springs v. Smart*, 620 P.2d 1060 (1980); *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1983).

[16] *See Krughoff v. City of Naperville*, 369 N.E.2d 892 (Ill. 1977).

[17] *But see* discussion of Monger v. City of Helena, Lewis and Clark, No. 43004, 1979, an unreported Montana case, in Chapter VI. of this publication where "specifically and uniquely attributable" test applied in Montana.

[18] Most notably, the reasonable relationship test is utilized in Colorado. *See* discussion of Colorado impact fees in this publication. Colorado courts have interpreted the rational nexus and the reasonable relationship standards to be one and the same.

[19] 107 S.Ct. 3141 (1987). Many other states applied the "rational nexus" test or a version of the test prior to *Nollan*. The test was first seen in *Longridge Builders Inc. v. Planning Board*, 52 N.J. 348, 245 A.2d 336 (1968). Arizona courts stated the rational nexus test in *Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 533 P.2d 693, 698 (1975), Utah applied the rational nexus test *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980)(*Call II*), *rev'd on other grounds*, 727 P.2d 180 (Utah 1987), and Colorado courts applied it in *Beaver Meadows v. Larimer County*, 709 P.2d 928 (Colo. 1985) and *Loup-Miller Construction Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984).

held this easement unconstitutional because it failed to "substantially advance a legitimate government purpose." The easement failed because there was no relationship between allowing public traverse across the private beach and ensuring the public's view of the beach from the street.

After *Nollan*, it is generally agreed that a municipality may compel a developer to shoulder only those costs that bear a rational nexus to the impact created by the development.[20] The fee must then be earmarked and expended only for the stated need.[21] In addition, most courts allow the imposition of an impact fee only to the extent necessitated by the development. This precludes developers from being forced to pay more than their "fair share" of a public facility. However, courts have generally granted broad deference to a municipality's method of calculating impact fees as long as the method results in a proportionate distribution of the burden among the development creating the impact.[22]

Tax vs. Fee Distinction

Impact fees are frequently challenged as unauthorized taxation.[23] As a result, courts carefully scrutinize impact fees to ensure they are not an invalid tax. The distinction between a tax and a fee is simple: a tax is a general revenue-raising measure, whereas a fee is assessed only to defray the costs of a specific facility or service.[24] If a fee is substantially in excess of the proportionate cost of the new facilities, or is not specifically earmarked for a proposed improvement, it will be characterized as a revenue-raising measure and struck down as an invalid tax.[25]

An Impact Fee Checklist

The following are some general guidelines, applicable in all jurisdictions, that might be considered when crafting workable, legally defensible impact fees.[26]

1. Ascertain proper enabling authority for each type of impact fee.

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[20] Bernard V. Keenan & Peter A. Buchsbaum, *Report of the Subcommittee on Exactions and Impact Fees*, 23 Urb. Law. 627, 635 (1991) (citing *Leroy Land Development v. Tahoe Regional Planning Agency*, 733 F.Supp. 1399 (D.Nev. 1990)(clarifying that the rational nexus test is based on the needs created by, not the benefits conferred upon, a development)).

[21] *St. John's County v. Northeastern Florida Builder's Association, Inc.*, 583 So.2d 635 (Fla. 1991).

[22] *See Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986)(rational basis for calculating fees sufficient to satisfy equal protection clause).

[23] Keenan & Buchsbaum, *supra* note 20, at 629.

[24] *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d (1990)

[25] DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE, 386 (1986).

[26] Christopher J. Duerksen, *Development Impact Fees – The Colorado Experience*, (May, 1993) (prepared for 1993 Colorado Land Use Planning Workshops).

2. Establish a direct link between the impact fee or exaction being imposed and the development. This may be done by relying on national standards (in the case of parks, for example) or evidence of actual need for facilities or services based on past community experience.

3. Provide clearly articulated and, where possible, detailed standards for assessing the amount of the impact fee or exaction. Again, this might be done by relying on national standards or on the actual cost of improvements.

4. Establish the cost of the facility or improvement to be provided through the impact fee and an equitable method to apportion the cost among developments that necessitated the expenditure. Remember the key word: "Proportionality." Guard against overassessment.

5. Adopt and follow proper accounting procedures. Do not commingle funds from several different fees.

6. Make sure funds collected are actually spent for prescribed improvements.

Chapter II.

ARIZONA
DEVELOPMENT IMPACT FEES

Douglas A. Jorden

Introduction

The use of development fees is common in Arizona. Development fees "are charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development."[1] Several Arizona cases upheld various types of development fees in the 1970's, even though there was no explicit "development fee" statutory enabling authority. In 1982, the home building industry supported legislation intended to establish state-wide standards for municipal development fees. As a result, Ariz. Rev. Stat. § 9-463.05 was adopted which authorized municipal development fees.[2] Legislation authorizing county development fees was added in 1990

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[1] J. Juergensmeyer & R. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla. St. U. L. Rev. 415, 417 (1981).

[2] Ariz. Rev. Stat. § 9-463.05 provides as follows:

§ 9-463.05. Development fees; imposition by cities and towns

A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development.

B. Development fees assessed by a municipality under this section are subject to the following requirements:

1. Development fees shall result in a beneficial use to the development.

2. Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Interest earned on monies in the separate fund shall be credited to the fund.

3. The schedule for payment of fees shall be provided by the municipality. The municipality shall provide a credit toward the payment of a development fee for the required dedication of public sites and improvements provided by the developer for which that development fee is assessed. The developer of residential dwelling units shall be required to pay development fees when construction permits for the dwelling units are issued.

4. The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide additional necessary public services to the development. The municipality, in determining the extent of the burden imposed by the development, shall consider, among other things, the contribution made or to be made in the future in cash by taxes, fees or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee.

with the enactment of Ariz. Rev. Stat. §§ 11-1101 through 11-1109.[3]

In October 1993, Division One of the Arizona Court of Appeals handed down the first appellate decision directly interpreting either the municipal or county statutory scheme. In *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*,[4] the court approved the imposition of development fees by the City of Scottsdale for the financing of future water sources by holding that a municipality's factual determination as to the need for and amount of development fees "should be upheld unless clearly erroneous, arbitrary, or wholly unwarranted."[5] This paper will focus on the statutory provisions, pre-statute cases which may provide some guidance for post-statute litigation, and this recent appellate decision that has broadly construed municipal authority to impose development fees.

Enabling Authority

The statutory provision allowing the imposition of development fees is different for municipalities and counties. These differences are significant.

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5. If development fees are assessed by a municipality, such fees shall be assessed in a non-discriminatory manner.

6. In determining and assessing a development fee applying to land in a community facilities district established under title 48, chapter 4, article 6 [Ariz. Rev. Stat. § 48-701 et seq.], the municipality shall take into account all public infrastructure provided by the district and capital costs paid by the district for necessary public services and shall not assess a portion of the development fee based on the infrastructure or costs.

C. A municipality shall give at least thirty days' advance notice of intention to assess a new or increased development fee and shall release to the public a written report including all documentation that supports the assessment of a new or increased development fee. The municipality shall conduct a public hearing on the proposed new or increased development fee at any time after the expiration of the thirty day notice of intention to assess a new or increased development fee and at least fourteen days prior to the scheduled date of adoption of the new or increased fee by the governing body. A development fee assessed pursuant to this section shall not be effective until ninety days after its formal adoption by the governing body of the municipality. Nothing in this subsection shall affect any development fee adopted prior to July 24, 1982.

[3] The county development fee enabling statute is Ariz. Rev. Stat. § 11-1102, which provides as follows:

§ 11-1102. Development fees; limitations

A. Counties may assess, impose, levy and collect development fees for new development within their jurisdictional limits only pursuant to the development fee requirements of this chapter. A county may not assess, impose, levy or collect a development free for a public facility unless it had adopted a development fee ordinance for the public facility for which the development fee is collected.

B. Development fees may be imposed only for one or more public facilities which are identified in a benefit area plan.

[4] 1993 WL 440537, 150 Ariz. Adv. Rep. 47 (1993).

[5] *Id.*

Municipalities

Municipalities are given the authority to assess development fees by Ariz. Rev. Stat. § 9-463.05.[6] Fees must be used to offset costs to the municipality associated with providing "necessary public services" to a development. Unfortunately, "necessary public services" is not defined in the statute, and there are no Arizona appellate decisions directly interpreting this phrase. Guidance on the proper interpretation of "necessary public services" may be gleaned from pre-statute decisions,[7] local ordinances implementing the statute,[8] and the more-detailed development fee statute relating to Arizona counties.

Counties

Counties are granted the authority to impose development fees to pay a proportionate share of the cost of public facilities required to serve a new development.[9] "Public facilities" are defined as "capital improvements for roadways, wastewater collection systems and treatment facilities, effluent delivery systems and treatment facilities, flood control, neighborhood parks intended to serve development within a one-half mile radius, and potable water distribution systems and treatment facilities which have a life expectancy of three or more years."[10]

The October 1993 Appellate Decision

Home Builders Ass'n of Cent. Ariz v. City of Scottsdale,[11] has been warmly received by municipal attorneys, as it is a boon to the ability of cities and towns to impose development fees for an increasing variety of capital funding needs.[12] In upholding a City of Scottsdale, Arizona, development fee ordinance, the court applied to the city's implementation of Ariz. Rev. Stat. § 9-463.05 the extremely deferential standard of judicial review traditionally reserved for statutory interpretation by the state legislature and state

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[6] In several cases predating the statute, the imposition of a development fee or tax was upheld. *See, e.g., City of Mesa v. Home Builders Ass'n of Cent. Ariz., Inc.*, 111 Ariz. 29, 523 P.2d 57 (1974) (residential development tax on mobile homes and trailer spaces upheld); *Home Builders Ass'n of Cent. Ariz., Inc. v. City of Scottsdale*, 116 Ariz. 340, 569 P.2d 282 (Ct. App. 1977) (water development fee upheld against equal protection claim). *But see Home Builders Ass'n of Cent. Ariz., Inc. v. Riddel*, 109 Ariz. 404, 510 P.2d 376 (1973) (parks and recreation tax declared invalid due to insufficient constitutional or statutory authority).

[7] *See Home Builders Ass'n of Cent. Ariz., Inc., v. City of Scottsdale, supra* (water); *City of Sierra Vista v. Cochise Enter.*, 144 Ariz. 375, 697 P.2d 1125 (Ct. App. 1984) (sewers).

[8] The City of Phoenix has adopted a development fee ordinance which lists the necessary public services: equipment repair, fire, libraries, major streets, storm sewers, parks, police, solid waste, storm drainage, wastewater, and water. § 29-5(B)(1), Phoenix City Code.

[9] *See* Ariz. Rev. Stat. § 11-1102, supra at note 3.

[10] Ariz. Rev. Stat. § 11-1101(14).

[11] 1993 WL 440537, 150 Ariz. Adv. Rep. 47 (1993).

[12] It is assumed that the Home Builders Association will seek review of this decision by the Arizona Supreme Court.

agencies.[13] Moreover, the court stated that "[a] municipality should be given deference when determining whether an ordinance meets" the requirements of Ariz. Rev. Stat. § 9-463.05.

As to the statute itself, the court, after review of several early development fee cases from other jurisdictions, concluded that Ariz. Rev. Stat. § 9-463.05 adopts criteria similar to the less restrictive "dual rational nexus test" discussed in *Jordan v. Village of Menomonee Falls*,[14] for determining municipal compliance with the statutory requirements.[15] Based upon this interpretation, the court stated that a "municipality need only show some rational basis for setting the amount of the fee in order to avoid it being 'clearly erroneous, arbitrary, and wholly unwarranted.'"[16] The court held that both the municipality's method of computing the development fee and its determination that the new development will be benefitted by the fee should receive deference in considering whether there is a rational basis.[17]

The court of appeals' decision was somewhat predictable given the broad language of Ariz. Rev. Stat. § 9-463.05. The statute declares generally that "[d]evelopment fees shall result in a beneficial use to the development."[18] This is the only restriction placed upon a municipality's authority to adopt development fee ordinances. Conversely, as discussed below, the county development fee statutory scheme is much more detailed and restrictive. Counties may only impose development fees upon a "benefit area" within an identified "benefit area plan," and the fee must be of "direct benefit" to the new development.[19] It is unlikely that an Arizona appellate court would apply the same deferential standard of review to a county's implementation of the county development fee statutes. In fact, it is possible that a court in the future would find the more stringent "direct benefit" or

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[13] 150 Ariz. Adv. Rep. at 48 (quoting *Edwards v. State Bd. of Barber Exam.*, 72 Ariz. 108, 113, 231 P.2d 450, 452 (1951)).

[14] 137 N.W.2d 442 (Wis. 1965).

[15] The Court of Appeals found that in passing Ariz. Rev. Stat. § 9-463.05, the Arizona Legislature apparently "adopted the less restrictive standards espoused by the dual rational nexus test." 150 Ariz. Adv. Rep. at 49. In reaching this conclusion, the court implicitly rejected the more stringent "direct benefit test" of *Gulest Assocs., Inc. v. Town of Newburgh*, 209 N.Y.S. 2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962), *overruled by Jenad, Inc. v. Village of Scarsdale*, 271 N.Y.S.2d 955 (1966), and the "specifically and uniquely attributable" test of *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961). *Id.*

[16] 150 Ariz. Adv. Rep. at 50.

[17] *Id.*

[18] Ariz. Rev. Stat. § 463.05(B)(1).

[19] *See* Section IV(A) *infra*.

"specifically and uniquely attributable" tests more appropriate standards of review.[20] Accordingly, it is doubtful that the Arizona Court of Appeals' recent decision will have significant value as precedent in a future appeal concerning the county development fee statutory scheme.

Development Fee Statutory Scheme

Municipalities

The municipal development fee statute is relatively short and straight forward. Development fees "shall result in a beneficial use to the development."[21] Fees, which are paid when construction permits are issued,[22] must be placed in a separate account.[23] Development fees "must bear a reasonable relationship to the burden imposed on the municipality"[24] and must be assessed in a "non-discriminatory manner."[25]

Counties

Under a more detailed and restrictive statute, county development fees may only be imposed on a "benefit area" for public facilities that are identified in a "benefit area plan."[26] "Benefit area" is defined as "a geographic area in which public facilities are of direct benefit to development within the area," and "benefit area plan" is defined as "a map identifying the benefit area of a public facility and a budget for the public facility's capital

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[20] *See Gulest Assocs., Inc. v. Town of Newburgh*, 209 N.Y.S. 2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962), *overruled by Jenad, Inc. v. Village of Scarsdale*, 271 N.Y.S.2d 955 (1966) ("direct benefit" test); *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961) ("specifically and uniquely attributable" test).

[21] Ariz. Rev. Stat. § 9-453.05(B)(1).

[22] *See* Ariz. Rev. Stat. 9-463.05(B)(3), [22]12 *supra* at note 2.

[23] *See* Ariz. Rev. Stat. § 9-463.05(B)(2), *supra* at note 2.

[24] The United States Supreme Court established the "rational nexus" test which requires that the government regulation must "substantially advance legitimate state interests" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Arizona courts stated a similar requirement years before *Nollan* in holding that the power to impose conditions on rezoning is an exercise of the police power and such conditions are valid as long as the conditions are reasonably conceived. *See Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 533 P.2d 693, 698 (1975) (fulfillment of public needs emanating from proposed land use considered *sine qua non* of exaction's reasonableness). This requirement has been codified as a requirement for municipal and county development fees in Arizona. *See, e.g.*, Ariz. Rev. Stat. §§ 9-463.05(B)(4) and 11-1105(A)(1).

[25] *See* Ariz. Rev. Stat. § 9-463.05(B)(4) and (B)(5), *supra* at note 2.

[26] *See* Ariz. Rev. Stat. §§ 11-1101(7) which defines a "development fee" as "a fee imposed on a benefit area by the [county] board [of supervisors] to pay for a proportionate share of the public facilities required to serve a development." *See also* Ariz. Rev. Stat. § 11-1102(B) which provides that "[d]evelopment fees may be imposed only for one or more public facilities which are identified in a benefit area plan."

costs."[27]

Implementation/Administration

Credit

Like many jurisdictions, Arizona provides credit against development fees for certain payments or actions that offset development costs. For example, a municipality must provide a credit toward the payment of a development fee for the required dedication of public sites and improvements provided by the developer for which that development fee is assessed.[28] In addition, in determining the extent of the burden imposed by the development, a municipality must consider among other things, the contribution made, or to be made in the future, in cash by taxes, fees, or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee.[29]

Similarly, "[a] county shall not require as a condition of development approval the construction of any public facility or other exaction for which a development fee ordinance has been adopted unless the county credits the reasonable value of facilities advanced, dedicated or improved by a developer against the development fees."[30] Furthermore, "the county shall reasonably provide for credits [against development fees] that reflect the present value of contributions or exactions that new development may have made for the same public facility."[31]

Accounting and Fee Calculation

With respect to municipalities, the monies received from development fees must be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by the statute.[32] However, the statute does not prescribe a method for determining the amount of the fee.

On the other hand, certain requirements for determining the amount of the fee are imposed on counties. For example, before adopting a development fee, a county must

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[27] Ariz. Rev. Stat. § 11-1101(1) and (2).

[28] *See* Ariz. Rev. Stat. § 9-463.05(B)(3), *supra* at note 2.

[29] *See* Ariz. Rev. Stat. § 9-463.05(B)(4), *supra* at note 2.

[30] Ariz. Rev. Stat. § 11-1104.

[31] Ariz. Rev. Stat. § 11-1106(D). Also, "[i]f a development fee ordinance has been adopted to provide for neighborhood parks, credit shall be given for any existing and planned on-site parks or recreational facility provided by the developer." Ariz. Rev. Stat. § 11-1106(E).

[32] *See* Ariz. Rev. Stat. § 9-463.05(B)(2), *supra* at note 2. *See also Home Builders Ass'n of Cent. Ariz., Inc. v. Riddel*, 510 P.2d at 379 (park tax struck down in part because no indication that monies collected would be used for stated purpose).

conduct a needs assessment for the public facilities for which the fee is to be assessed. The needs assessment "must distinguish between existing deficiencies and new development needs and must contain components which inventory existing facilities and identify level of service standards for which the fee is to be assessed."[33] The amount of development fees imposed must be "based on actual public facilities capital costs or reasonable estimates of capital costs for the expansion of public facilities incurred as a result of anticipated new development."[34] The amount of the development fee cannot "include the cost of remedying existing public facilities deficiencies."[35]

In addition, a county development fee ordinance "shall not be adopted for that cost of a public facility which is funded by general obligation bond proceeds, highway user revenue fund proceeds, community facilities districts or improvement districts."[36] However, county development fees "may be used to repay a developer for public facilities constructed or paid for by the developer pursuant to a development agreement."[37] Also, a county "may recoup through a development fee the costs of excess capacity in existing public facilities to the extent [new] development is served by existing public facilities."[38]

Finally, a county in its discretion may waive development fees for (1) "all development that constitutes affordable housing to moderate, low or very low income households [as defined by federal regulations]," and (2) "particular types and locations of development that are determined to serve an overriding public interest," provided in both cases that "the waiver does not result in an increase in the development fee for other properties in the benefit area."[39]

Timing of Assessment

No particular statutory requirement for the timing of assessing development fees is imposed on municipalities. Moreover, the Arizona Court of Appeals has recently held that the municipality is not required to yield results within a given period of time before it may assess development fees.[40] However, county development fees are required to be assessed at the time a building permit is issued and may be collected, at the option of the county,

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[33] Ariz. Rev. Stat. § 11-1106(A).

[34] Ariz. Rev. Stat. § 11-1106(C).

[35] Ariz. Rev. Stat. § 11-1106(G).

[36] Ariz. Rev. Stat. § 11-1104.

[37] Ariz. Rev. Stat. § 11-1105(D).

[38] Ariz. Rev. Stat. § 11-1105(C).

[39] Ariz. Rev. Stat. § 11-1105(E) and (F).

[40] *See Home Builders Ass'n of Cent. Ariz., Inc. v. City of Scottsdale*, 150 Ariz. Adv. Rep. at 51.

at the time of building permit or certificate of occupancy issuance or as may be provided for in a development agreement.[41] Furthermore, county development fees collected must be encumbered for public facilities within five years after the date of collection and must be refunded with interest if not so encumbered, unless a development agreement provides otherwise.[42]

Notice

Ariz. Rev. Stat. § 9-463.05(c) generally requires municipalities to provide "at least thirty days advance notice of intention to assess a new or increased development fee" and conduct a public hearing. Notice and hearing procedures applicable to needs assessments, proposed benefit area plans, and the adoption of a development fee ordinance are required

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[41] Ariz. Rev. Stat. § 11-1108(A) which provides as follows:

§ 11-1108. Development fee; assessments

A. All development fees imposed pursuant to this chapter shall be assessed at the time the building permit is issued and may be collected, at the option of the county, on issuance of the building permit or certificate of occupancy or as may be provided for in a development agreement. The county may provide for payment of a development fee on an installment basis. All development fee ordinances shall require that real estate closing documents involving a parcel of land or improvements for which a development fee has been assessed or paid within five years of the closing shall include a written notification of the fact that a development fee has been assessed or paid and the location of a public office where information in regard to the rights and obligations arising from the assessment or payment of the fee can be obtained.

[42] Ariz. Rev. Stat. § 11-1105(A)(3)(d) and (e) that provide as follows:

§ 11-1105. Development fee standards; recoupment; exemptions

A. A development fee shall meet the following standards:

. . . .

3. Development fees shall be used and expended for the benefit of the benefit area that pays the development fee. In order to satisfy this requirement, the implementing ordinance must specifically contain the following:

. . . .

(d) Development fees collected shall be encumbered for public facilities within five years after the date of collection unless a development agreement provides for a longer term.

(e) If the development fees are not encumbered within five years after the date of collection, a county shall refund the amount of the development fee along with accrued interest on the amount of the fee at the average annual rate of interest earned by the trust fund during the five year period to the owner of the property on which the fee was paid, unless a development agreement provides otherwise.

of counties by Ariz. Rev. Stat. § 11-1107.[43]

Conclusion

If the Arizona Court of Appeals' decision in *Home Builders of Cent. Ariz. v. City of Scottsdale*[44] stands, it is anticipated that Arizona municipalities confronted with increasing infrastructure demands caused by new development will continue and possibly increase their efforts to impose development fees. In addition, because this decision broadly interprets Ariz. Rev. Stat. § 9-463.05 and applies a deferential standard of review, it is possible that cities and towns will attempt to impose development fees for public facilities and needs not traditionally identified as subjects for such exactions. In comparison, as to counties, even though there as yet is no Arizona appellate decision interpreting the county development fee statutory scheme, it is probable that not much will change, because of the more restrictive requirements of Ariz. Rev. Stat. §§ 11-1101 through 11-1109.

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[43] Ariz. Rev. Stat. § 11-1107 provides as follows:

§ 11-1107. Development fee; hearing; notice; procedures

A. The needs assessment and a proposed benefit area plan shall be submitted to the board at a public hearing. Notice of the hearing shall be published in a display advertisement covering not less than one-eighth of a full page in a newspaper of general circulation in the county.

B. At or after the conclusion of the public hearing prescribed in subsection A, if the [county] board [of supervisors] decides to go forward with the proposed development fee ordinance, the board shall set a time and date for the final adoption of the ordinance. Notice of the time and place of the hearing including a general explanation of the matter to be considered and including a general description of the benefit area shall be given at least fifteen days before the hearing by publication at least once in a newspaper of general circulation published or circulated in the county and by mail to each owner of record in the benefit area. A new or increased development fee assessed pursuant to this chapter is not effective until ninety days after its adoption by the board.

[44] 1993 WL 440537, 150 Ariz. Adv. Rep. 47 (1993).

Chapter III

DEVELOPMENT IMPACT FEES IN COLORADO

Christopher J. Duerksen
Thomas J. Ragonetti
J. Thomas Macdonald[1]

Introduction

The use of impact fees to finance infrastructure necessitated by new developments is becoming increasingly common in Colorado as in many Rocky Mountain states. Often called service extension fees, utility connection fees, or development fees, these charges are typically assessed in Colorado communities to finance new roads, sewer and water lines, parks, and other public facilities that are built to serve new developments. However, for a variety of reasons, local governments are going beyond these typical improvements to impose fees to pay for trails, schools, and public safety facilities and equipment.

Part of the increased use of and interest in impact fees is due to problems associated with alternative methods of financing new infrastructure and community facilities. For example, some special districts[2]–widely used in the state to finance roads and utilities during the development booms of 1970 and early 1980–have failed and in the process attracted national notoriety when they defaulted on millions of dollars in district bonds. At the same time, a strong anti-tax mood among Colorado voters, which has resulted in adoption of state-wide tax limitation legislation, has signalled to local officials an unwillingness among voters to raise property and other traditional taxes to fund capital improvements associated with new developments.[3]

Interestingly, despite the widespread use of impact fees, the Colorado General Assembly has not passed any general enabling statute authorizing local governments to

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[1] The authors would like to thank Richard Paik and Erin Johnson of Clarion Associates and Brad W. Schacht of Otten, Johnson, Robinson, Neff & Ragonetti, P.C., for their assistance in preparing this paper.

[2] Title 32 of Colo. Rev. Statutes authorizes the creation of the type of special districts referenced here. In addition to "title 32 special districts," the Colorado statutes provide for the creation of approximately 45 other types of public improvement financing districts. For a general discussion of special districts, see Elliott, ed. *Colorado Land Planning and Development Law*, 4th ed., American Planning Association, Colorado Chapter, Chapter IX, "Special Districts and Public Building Authorities" (1992).

[3] See "Voters Reject Developer Subsidies," Denver Post, Section G, p. 1 (Nov. 28, 1993)

impose development impact fees.[4] Instead, local governments have invoked home rule authority, specific enabling legislation for particular improvements such as storm detention facilities, and general land-use enabling legislation to justify imposition of development impact fees.

Not surprisingly, with impact fee use on the rise among local governments, an increasing number of lawsuits are challenging their validity. Legal challenges to impact fees in Colorado have generally raised the following issues:

1. Whether the governmental unit has the authority to impose the charge;

2. Whether the charge is an impermissible tax;

3. Whether the charge bears a reasonable relationship or rational nexus to the need for improvements necessitated by the new development.

4. Whether the fees have been calculated properly and resulting revenues have been managed according to law.

Given this atmosphere, local governments in Colorado must be more careful than ever in crafting impact fee programs that meet all legal requirements.

Authorization to Impose Impact Fees

In enacting development impact fees, local governments in Colorado typically rely on one of three sources: home rule authority, explicit but narrowly drafted enabling legislation, or court decisions that have interpreted broad legislative mandates as to implicitly authorize imposition of exactions upon development. The following section discusses each of these sources of authority.

Home Rule Authority

Most large municipalities rely on home rule charter provisions to justify their imposition of a wide range of impact fees and development charges; in Colorado, home rule communities can rely upon their home rule powers as authorizations for a broad range of measures.[5]

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[4] However, the General Assembly has implicitly recognized that impact fees may be valid in certain circumstances by passing a statute entitle "Land Development Charges" that imposes accounting and procedural requirements on land development charges. Colo. Rev. Stat. Sec. 29-1-801-804.

[5] Colo. Const., Art. XX, Sec. 6, granting home rule authority to certain cities and towns in Colorado, provides in part:

> it is the intention of this article to grant and confirm to the people of all municipalities coming within

In general, where home rule communities enact local policies or regulations, the state legislature cannot impinge upon their authority. In regard to matters of purely local concern, home rule power preempts state power.[6] Such "purely local" matters include zoning and subdivision matters. For example, in *City of Colorado Springs v. Smartt*,[7] the court held that, where a dispute involves a home rule city, "its zoning policies and authority are governed by its own charter and ordinances."[8]

Home rule communities, thus empowered to enact ordinances to implement zoning and subdivision policies (and presumably, other types of local land use policies), are also empowered to take actions designed to implement such policies. In *Smartt*, the Colorado Supreme Court held that a charter city's ordinance intended to "lessen congestion in the streets," "facilitate the adequate provision of transportation," and "in general to promote health, safety and general welfare," authorized the city to condition a rezoning upon the city's approval of an appropriate access point to a development site. The court stated that, "if regulation of access to property is necessary to achieve such a purpose, and if the condition is reasonable and supported by the record . . . the imposition of the condition is a legitimate exercise of the City Council's authority."[9] Similarly, in *Zavala*, the court stated that, where a home rule city acted within the zoning authorization of its city charter,

> Implicit in this constitutional delegation of authority is the recognition that the City possesses broad legislative discretion to determine how best to achieve declared municipal objectives.[10]

Given this broad construction, the Colorado courts will most likely uphold the imposition of impact fees in home rule communities, so long as such fees are so related to the broadly stated purposes of a local zoning or other land use ordinance.

> its provisions the full right of self-government in both local and municipal matters and . . . any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Colo. Const. Art. XIV, Sec. 16 provides similar authorization for the establishment of home rule counties.

6 *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992), *R.E.N. v. City of Colorado Springs*, 823 P.2d 1359 (Colo. 1992). While clearly established in regard to municipalities, there is very little case law on this issue in regard to home rule counties.

7 620 P.2d 1060 (Colo. 1980).

8 *Id.* at 1062. *See also, Zavala v. City and County of Denver*, 759 P.2d 664 (Colo. 1988).

9 *Smartt*, 620 P.2d at 1063.

10 *Zavala*, 759 P.2d at 669 (Colo. 1988).

Despite the general authorization to conduct their own governmental affairs, home rule communities have not been granted carte blanche and must remain alert to the possibility that impact fees may conflict either directly or indirectly with state legislation in an area of statewide concern. For example, in recent challenges to school impact fees imposed by a Colorado county, the plaintiffs raised the issue of whether local government's ability to impose such fees has been preempted by a statewide system of school finance and whether such fees violate the free and uniform schools provision of the Colorado constitution. As discussed below, there is also some limited case authority in Colorado suggesting that an impact fee is an excise tax. If this position is accepted, the ability of home rule communities to impose impact fees would be subject to the recently enacted constitutional requirement of voter approval.

Specific Enabling Legislation: Explicit Authorization

As noted above, the Colorado General Assembly has not enacted broad, inclusive impact fee enabling legislation covering a spectrum of municipal improvements as has been done in New Mexico and Idaho. Consequently, local governments in Colorado have looked to specific enactments of the legislature for authority. While such authority exists in many areas, these areas are specifically defined, and grant narrow authorizations. For example, Colorado Revised Statutes Sec. 31-35-402(1)(f) provides statutory authority for municipalities to impose water and sewer development fees.[11] As another example, counties in Colorado have been granted explicit powers to require dedication of property or fees-in-lieu for parks, schools sites, and storm drainage detention facilities during the subdivision approval process.[12] No similar provisions exist, however, for statutory cities and towns.

Court Decisions: Implicit Authorization

Although no Colorado case specifically mentions the term "impact fee," Colorado courts have liberally construed zoning, planning, subdivision and other general land-use legislation to find authority for the imposition by local government of development fees and other exactions upon a landowner in connection with approval of specific developments.[13] These cases demonstrate a clear willingness on the part of the courts to allow local governments to condition approval of subdivisions, planned unit developments, rezoning or similar development matters upon payment by the developer of charges designed to cover governmental costs which will be caused by the development.

While local government representatives assert that the reasoning of these cases also supports jurisdiction-wide fees, opponents to impact fees question whether courts will read such statutes as providing implicit authority for imposing fees on a jurisdiction-wide basis,

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[11] *See Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986).

[12] Colo. Rev. Stat. Sec. 30-28-133(4) (1993).

[13] *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928 (Colo. 1985; *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981); *City of Arvada v. City and County of Denver*, 663 P.2d 611 (Colo. 1983) (storm drainage charges).

rather than in connection with approval of a specific development plan.

As noted above, the courts have found certain utility fees for water and sewer development and storm drainage control to be specifically authorized by statute.[14] Outside of such statutorily authorized fees, two cases have considered jurisdiction-wide ordinances imposing charges upon persons obtaining building permits for the purpose of paying for the expansion of municipal services necessitated by the new building. The first held that the charge, labelled a service expansion fee, was an improper ad valorem tax because it was calculated based upon the value of the new construction.[15] The second upheld the imposition of the charge, which was also labelled a service expansion fee, as an excise tax within the authority of a home rule city.[16]

The service expansion fee in *Cherry Hills Farms* had some of the characteristics of an impact fee as defined by commentators and courts in other jurisdictions. It was imposed on persons obtaining building permits, calculated based on the square footage and type of proposed improvement, and done for the stated purpose of paying for the expansion of city services necessitated by the new development. The court, however, stated that the fee, regardless of its label, was an excise tax.[17] As discussed in the following section, this characterization of such fees as taxes would severely limit the ability of local governments to impose them, but a later decision of the Colorado Supreme Court suggests that *Cherry Hills Farms* may no longer be dispositive on the issue.

The two leading cases frequently cited as supporting the ability of local governments to impose development impact fees are *Beaver Meadows v. Board of County Comm'rs*[18] and *Bethlehem Evangelical Lutheran Church v. City of Lakewood*.[19] In each case, the Colorado Supreme Court did interpret land use statutes as granting local governments broad authority in connection with approval of specific development requests. Because each case involved imposition of a fee or requirement as a condition to approval of a specific development plan, however, opponents of impact fees question whether the cases authorize non-home-rule governments to impose jurisdiction-wide impact fees.

In *Beaver Meadows*, the Colorado Supreme Court held that Larimer County had the power to condition approval of a PUD upon the improvement by the developer of an access

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[14] Colo. Rev. Stat. Sec. 31-35-402(1)(f).

[15] *Rancho Colorado, Inc. v. City of Broomfield*, 196 Colo. 444, 449-450, 586 P.2d 659, 663 (1978).

[16] *Cherry Hills Farms, Inc., v. City of Cherry Hills Village*, 670 P.2d 779, 782 (Colo. 1983).

[17] *Id.*

[18] 709 P.2d 928 (Colo. 1985).

[19] 626 P.2d 668 (Colo. 1981).

road and assurance of access to emergency medical services. The court found authority for the county's action in "the master plan, zoning, subdivision and PUD enabling statutes."[20] Impact fee opponents believe that certain difficulties arise when one attempts to read these statutes as providing authority for the imposition of jurisdiction-wide impact fees. For example, they assert that the subdivision and PUD statutes would provide no authority for imposition of fees on development within previously approved subdivisions or PUDs. Similarly, they question if the master plan and zoning statutes would provide authority for imposition of fees independent of change to the master plan or zoning districts. Supporters of impact fees believe, to the contrary, that the above-cite language provides ample authority for jurisdiction-wide fees

In the second case, *Bethlehem Evangelical*,[21] the City of Lakewood had required a church to dedicate certain land to be used to widen roads and to make certain street improvements as a condition to receiving a building permit to construct a gymnasium. The church challenged the requirement on the grounds that the ordinance pursuant to which it was imposed lacked sufficient standards to guide administrative action, that the dedication requirement was an unconstitutional taking and that the exactions violated the freedom of religion clauses of the United States and Colorado constitutions. The court upheld the requirements except to the extent that the dedication requirement would cause an existing building to encroach into the right of way. The court ruled that the city had broad statutory powers under C.R.S. 31-15-702 to widen, pave, and otherwise improve streets. It noted that there was statutory authority for requiring abutting property owners to pay for such improvements because their property was specially benefitted, and reasoned by analogy that a city could impose upon a property owner seeking to put his property to an expanded use which reasonably necessitates street improvements the cost of such improvements.[22]

Each of these cases evidences a willingness on the part of Colorado courts to broadly construe the statutory authority of local governments in connection with the regulation of specific development proposals. Again, some representatives of the development community have questioned just how far this authority will extend.

The Tax Issue

Recent challenges to impact fees have asserted that such charges are in fact taxes. Characterization of a charge as a tax would have several implications. First, if based on the value of property, impact fees would be subject to the uniform taxation provisions of the Colorado Constitution. Second, if such fees are identified as excise taxes, authority to impose excise taxes may be limited; while municipalities may levy excise taxes, absent

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[20] *Id.* at 935.

[21] 626 P.2d 668 (Colo. 1981).

[22] *Id.*

specific enabling legislation, counties in Colorado may not.[23] Finally, Colorado voters amended the state constitution in 1992 to require voter approval of any new tax or tax increase. Generally, however, Colorado courts have resisted characterizing development charges as taxes, except under special circumstances.

Such circumstances arose in *Rancho Colorado, Inc., v. City of Broomfield,*[24] where the Colorado Supreme Court held that a service expansion fee imposed as a condition of obtaining a new building permit that was calculated based on the value of the proposed building was an ad valorem tax. As such, it was invalid because it violated the uniformity requirements of Article X, Section 3 of the Colorado Constitution. Modern theory and practice requires impact fees be calculated not based on the value of property, but rather on the cost of facilities or services that are necessitated by a development. Such an impact fee would most likely fall within the definition of special fees as defined by the Colorado Supreme Court in *Bloom v. City of Fort Collins,* [25]:

> "... a charge imposed on persons or property and reasonably designed to meet the overall cost of the service for which the fee is imposed."

Moreover, in *Bloom* the Court identified a second distinction between fees and taxes. The Court stated that to qualify as a fee, rather than a tax, the monies raised must be used only to pay for the particular service for which the fee is imposed. In other words, it cannot be commingled with other funds or general revenues that might be spent for general public purposes.

Thus a properly designed charge imposed to pay for specific services most likely would be characterized as special fees, not an ad valorem property taxes or excise taxes. But what if impact fees are imposed to pay for a panoply of government services? Some opponents of impact fees argue that in such instance the purpose could be construed to be the raising of revenue for general municipal purposes, thus transmogrifying the fee into a tax. While no Colorado court has yet considered this inventive argument, local governments must address this concern until the courts issue a definitive response.

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[23] As noted above, one early Colorado development fee decision characterized such a fee as an excise tax. In *Cherry Hills Farms, Inc. v. City of Cherry Hills Village,* 670 P. 2d 779 (Colo. 1983), the Colorado Supreme Court found that a development fee was in fact an excise tax. This development fee had some characteristics of an impact fee: It was imposed on persons obtaining building permits, calculated based on the square footage and type of proposed improvement, and charged for the stated purpose of paying for the expansion of city services necessitated by the new development. The Colorado Supreme Court stated, however, that the fee, regardless of its label, was an excise tax. However, a later decision of the Colorado Supreme Court, *Bloom v. Fort Collins,* 784 P.2d 304 (Colo. 1989), suggested that the Court's characterization of the fee as an excise tax in *Cherry Hills Farms* might not be dispositive as to the nature of similar charges in later cases. Indeed, in no other instance has a Colorado court held a development charge to be an excise tax.

[24] 586 P.2d 659 (Colo. 1978).

[25] 784 P.2d 304 (Colo. 1989).

A final issue regarding the characterization of an impact fee as a tax relates to the recently enacted statewide constitutional amendment (the so-called Bruce Amendment or Amendment 1) that requires voter approval for imposition of all local taxes.[26] If an impact fee were held to be an excise tax, it would be subject to the voter approval requirement. Again, however, it is open to question whether Colorado courts would characterize as excise taxes fees that are charged against specific developments to pay for services and facilities necessitated thereby, especially if revenues generated by such fees are segregated and used to pay for those services or facilities.

Nexus/Rational Relationship Test

Once it is determined that a locality has enabling authority to impose impact fees, and that the assessed fee is not in fact a tax, the next important legal issue is whether such fee or exaction bears some direct relationship to an improvement or service necessitated by the development.

The leading case on point is a United States Supreme Court decision, *Nollan v. California Coastal Commission*.[27] Writing for a divided court, Justice Scalia held that to avoid running afoul of the takings clause of the U.S. Constitution, a government regulation must "substantially advance legitimate state interests." Applying that test to the case before it, the Court invalidated a land dedication requirement (not an impact fee) imposed by a state land-use regulatory agency. In this instance, the agency placed a condition on a one-home beachfront development requiring the owners to allow the public to cross their beach above the high-tide line. The rationale: the home created a "psychological" and "visual" barrier to beach access for citizens using the public road that ran in front of the house. The Court struck down this requirement because there was no "nexus between the condition and the original purpose of the building restriction."

The Colorado courts anticipated the *Nollan* decision in several cases by holding that development approval may be conditioned on requirements reasonably necessary to offset the impacts of the project. For example, in *Bethlehem Evangelical Lutheran Church v. City of Lakewood*,[28] the Colorado Supreme Court held that it was permissible to impose conditions on a building permit that required street and sidewalk improvements "reasonably necessitated" by the project. The United States Supreme Court in *Nollan* stated that the rule it was enunciating was consistent with that laid down in the *Bethlehem Evangelical* case.

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[26] Colorado Constitution, Article X, Section 20.

[27] 483 U.S. 825 (1987). For a more detailed discussion of *Nollan*, see Roddewig and Duerksen, Responding to the Takings Challenge, p. 6 (American Planning Assn. 1989).

[28] 626 P.2d 668 (Colo. 1981).

Similarly, in *Beaver Meadows v. Larimer County*,[29] the court ruled that the police power allowed the county, as a condition of a PUD approval, to require a developer to make reasonable road improvements necessitated by the development.

Some commentators have argued that the rational nexus standard set forth in *Nollan* is a more difficult test to meet than the test employed by the Colorado courts. While most state courts that have examined impact fees since *Nollan* have not concurred in this interpretation, the issue remains open to debate. It may be settled in 1994 as the U.S. Supreme Court has accepted for review an impact fee case. *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

Special Benefit Issue

Courts in some other jurisdictions outside Colorado allow exactions and impact fees only to the extent that they specially benefit the development in question. Colorado courts, however, appear to give local governments considerably more leeway and have been hesitant to impose any "special benefit" requirement.

For example, in *Beaver Meadows v. Larimer County*,[30] the court explicitly stated that the county could consider the impact of its development on the county's transportation network as a whole. Similarly, in *Cherry Hills Farms v. City of Cherry Hills*,[31] the court specifically ruled that the impact fee in question (called a service expansion fee) did not confer any special benefits upon the improvements subject to the fee. Nevertheless, it found the fee to be a permissible excise tax.

Proportionality/Fair-Share Issue

As noted above, like many other courts around the United States, Colorado courts only allow impact fees to be exacted to the extent necessitated by a development. In other words, a developer can be made to pay his fair share, but no more. While "fair share" does not necessarily have to be determined with mathematical precision, some rough proportionality is required.

The leading Colorado decision is *Wood Bros. Homes, Inc. v. City of Colorado Springs*,[32] In that case, the city conditioned approval of a subdivision plat on the developer's bearing the entire cost of construction of a major drainage channel that would serve an area far greater than the subdivision. The court ruled the city had exceeded its authority in refusing to grant a variance from "this disproportionate, unfair demand." Interestingly, the court also ruled that a recapture provision that would have paid the

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[29] 626 P.2d 668 (Colo. 1981).

[30] 709 P.2d 928 (Colo. 1985).

[31] 670 P.2d 779 (Colo. 1983).

[32] 568 P.2d 487 (Colo. 1977).

developer back over time based on contributions from other developers was not sufficient to remedy the defect.

Implementation/Administration

Despite showing considerable deference to localities in establishing impact fees and being fairly liberal with regard to the rational nexus test, the Colorado courts have been sticklers when it comes to implementation and administration of impact fee charges. These decisions, coupled with recently enacted state legislation, make clear that the fees must be based on intelligible standards, must be apportioned fairly and equitably, and that funds must be properly accounted for.

Impact Fee Formulas/Standards

When a locality makes a reasonable, good faith effort to establish a rational basis for assessing impact fees, courts have generally been supportive. Thus in *Zelinger v. City and County of Denver,*[33] the Colorado Supreme Court rejected a challenge to a storm drainage service charge scheme established by Denver. The plaintiffs urged that the amount of impervious land surface should be the sole determinant of the charge. The court responded: "...although alternative cost allocation schemes may be equally well-suited or arguably better suited to serving the governmental interest in providing storm drainage facilities than the scheme actually adopted, the equal protection clauses do not authorize the invalidation of the scheme chosen unless it is without rational foundation."[34]

On the other hand, the courts have made it abundantly clear that localities must make some effort to define those standards on a rational basis.[35] In *Cherry Hills*, the local government conditioned the project in question on the developer providing "improvements acceptable to the city" to assist in alleviating traffic congestion. Additionally, the developer was to "provide all funds required for additional fire equipment necessitated by the project." While upholding the power to condition the development, the court invalidated these two provisions on the ground that the exercise of such power "must be guided by land use

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[33] 724 P.2d 1356 (Colo. 1986).

[34] A similar result was reached in *Loup-Miller Construction Co. v. City and County of Denver,* 676 P.2d 1170 (Colo. 1984). There the plaintiff challenged the city's sewer facilities fee on the ground, among others, that the ordinance in question unconstitutionally delegated to the public works department city council's power to determine sewer charges. Plaintiffs claimed that the requirement that public works charge facilities development fees in amounts "proportionate" to other similar fees was vague. The court found that although other interpretations of the ordinances terms would have been reasonable, the standards adopted by the public works department provided adequate safeguards to protect against arbitrary action.

[35] Contrast the case of *Cherry Hills Resort Development Company v. City of Cherry Hills Village,* 790 P.2d 827 (Colo. 1990), with the *Zelinger* decision.

regulations which are sufficiently specific to guide the city council's discretion."[36]

One final caveat: Impact fees should not be calculated on the value of land within the development or based on the total cost of improvements to be made at the risk of having the fees characterized as property taxes. As discussed above, such a characterization has significant legal implications that may lead to the invalidation of the impact fee.[37]

Accounting Procedures

Colorado courts have also exhibited concern over how communities collect and spend money from impact fees. For example, in *Bloom v. City of Fort Collins*,[38] the court upheld a transportation utility fee, but struck down that part of the ordinance governing administration of revenues. The offending section authorized the city council to transfer any excess revenues not required to satisfy the purposes of the ordinance to any other fund of the city. Although that provision had never been used, the court said that the fact remained that such a transfer might occur. It concluded that "such a transfer cannot be squared with the principle that a service fee must be reasonably designed to defray the expenses for the particular service for which the fee is imposed."[39]

The Colorado legislature, responding to complaints similar to those raised in the *Bloom* case, adopted a statute requiring modest accounting procedures in handling local "land development charges." (See copy of legislation attached).[40] In brief, funds collected must be placed in an interest-bearing account that clearly identifies the purpose for which the money will be spent. Funds from several impact fees cannot be commingled. However, fees from several projects collected for the same purpose can be deposited in a single fund.

Summary–Some Guidelines for Legally Defensible Impact Fee Programs

The decisions discussed above and the recently enacted impact fee accounting law, taken together, begin to define the aspects of a sound impact fee program. These are some guidelines that might be considered in crafting workable, legally defensible impact fees.

A. Ascertain proper enabling authority for each type of impact fee.

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[36] *See also, Beaver Meadows v. Larimer County*, 709 P.2d 928 (Colo. 1985). There the court ruled that while Larimer County could impose road impact conditions, the regulations in question lacked specific standards as to the type or scope of improvements necessary to alleviate the perceived traffic and access problems associated with the development.

[37] See cases listed in Footnote 11.

[38] 784 P.2d 304 (Colo. 1989).

[39] *See also, Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986).

[40] Colo. Rev. Stat. § 29-1-180 et seq. (1991).

B. Establish a direct link between the impact fee or exaction being imposed and the development. This might be done by relying on national standards (in the case of parks, for example) or evidence of actual need for facilities or services based on past community experience.

C. Provide clearly articulated and, where possible, detailed standards for assessing the amount of the impact fee or exaction. Again, this might be done by relying on national standards or actual cost of improvements.

D. Establish the cost of the facility or improvement to be provided through the impact fee and an equitable method to apportion the cost among developments that necessitated the expenditure. Remember the key word: "Proportionality." Guard against over assessment.

E. Adopt and follow proper accounting procedures. Do not commingle funds from several different fees.

F. Make sure funds collected are actually spent for prescribed improvements.

Chapter IV.

IDAHO
DEVELOPMENT IMPACT FEES

Valerie E. Hart

As in other Rocky Mountain states, the Homebuilders Association pushed for, and succeeded in passing, impact fee enabling legislation in Idaho.[1] The Idaho statutes include extensive procedural requirements and encompass impact fee issues from enabling authority to the specific conditions with which a community must comply to take advantage of impact fees. To date, there are no reported cases challenging the Idaho impact fee statute.

The Idaho state legislature granted authority to impose impact fees to any governmental entity willing to comply with very detailed procedural requirements. Briefly, these requirements include: a capital improvements plan; proportionate share assessment; precise methodology when determining fees per developer; timely processing of development applications; earmarking of funds; refund and exemptions policies; a schedule of impact fees for various land uses; and an appeals process.

Predictability For Developers

The Idaho statute attempts to establish a quid pro quo for development impact fees by requiring fee schedules and prompt processing of development applications.[2] The schedules ensure predictability in the process and compensate developers for the additional costs of impact fees.

Citizen Participation

Each governmental entity which adopts an impact fee scheme must appoint an advisory committee of at least five members, two of which must be active in the business of development, building, or real estate.[3] The committee is charged with assisting the governmental entity with the adoption of land use assumptions[4], reviewing, monitoring, and evaluating the implementation of the capital improvements plan,[5] reporting any "perceived

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[1] The Idaho legislation is almost identical to the impact fee enabling legislation adopted by the New Mexico legislature in 1993. *See* Chapter VII *supra*.

[2] Idaho Code 67-8204(11); Idaho Code 67-8204(16).

[3] Idaho Code 67-8205(2).

[4] Idaho Code 67-8205(3)(a).

[5] Idaho Code Section 67-8205(3)(b) and (c).

inequities" in the capital improvements plan or the imposition of development impact fees,[6] and ongoing review of the impact fee scheme.[7] Further the local government must make all financial and accounting information regarding impact fees available to members of the advisory committee.[8]

Procedural Requirements

A detailed capital improvements plan must be prepared before a governmental entity may impose impact fees on developers. [9] The plan must be developed in coordination with the advisory committee[10] and prepared by "qualified professionals" in finance, engineering, planning and transportation.[11] For governments which have already developed a comprehensive plan, the capital improvements plan must be prepared in compliance with the Local Planning Act.[12]

The capital improvements plan will include a description of existing public facilities and their deficiencies along with reasonable estimates of the cost of curing the deficiencies to meet existing needs.[13] Also, "where practical", a commitment to use other sources of revenue to cure those deficiencies must accompany the plan.[14] The capital improvements plan must also include a description of "land use assumptions" and a table defining a "service unit" for each category of system improvements and for different categories of land use.[15] Finally, the capital improvements plan must describe system improvements, the resulting costs attributable to new development[16] and the projected demand over the next twenty years for new service units.[17] A capital improvements plan must be updated once

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6 Idaho Code 67-8205(3)(d).

7 Idaho Code 67-8205(3)(d) and (e).

8 Idaho Code 67-8205(4).

9 *See* Idaho Code 67-8206.

10 Idaho Code 67-8206(2).

11 Idaho Code 67-8208(1).

12 Idaho Code 67-6509.

13 Idaho Code 67-8208(1)(a).

14 Idaho Code 67-8208(1)(b).

15 Idaho Code 67-8208(1)(d) and (e).

16 Idaho Code 67-8208(1)(f) & (g).

17 Idaho Code 67-8208(2)(h)).

every five years[18] and a capital budget adopted annually.[19]

Opportunity for public comment on the capital improvements plan is provided through a public hearing held before the adoption, amendment, or repeal of a capital improvements plan[20] and at least one hearing held before the adoption of the ordinance authorizing development impact fees.[21]

Proportionate Share

The Idaho system complies with the Nollan rational nexus test[22] by restricting a developers fees to a proportionate share of the costs incurred to provide facilities or service to the new development.[23] The proportionate share may only be imposed after the governmental entity considers any credit attributable to a developer for prior system improvements, contributions, or dedications of land or money.[24] Project improvements are expressly excluded from credit.[25] The governmental entity must also consider reasonably anticipated user fees, debt service payments or taxes which will be used for the same system improvements[26] before determining a developer's proportionate share. Finally, the legislature developed a list of factors which must be considered prior to assessing the share a developer must pay. The list includes the cost of existing system improvements and how they were financed, the extent a developer has already contributed to the cost of system improvements, future contributions to the existing system improvements, extraordinary costs in serving a new development, compensation for inflation, and the availability of other sources of governmental funding.[27] An alternative method of funding the system improvements must be developed by the governmental entity.[28]

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[18] Idaho Code 67-8208(2).

[19] Idaho Code 67-8208(3).

[20] Idaho Code 67-8206(3) and (4).

[21] Idaho Code 67-8206(5)).

[22] A discussion of Nollan, 483 U.S. 825 (1987), and the rational nexus test appear *supra* in Chapter I.

[23] See Idaho Code 67-2807.

[24] Idaho Code 67-8207(1); Idaho Code 67-8209.

[25] Idaho Code 67-8209(1).

[26] Idaho Code 67-8207(1).

[27] Idaho Code 6708207(2).

[28] Idaho Code 67-8207(h).

Refunds for development impact fees paid must be provided if "service is available but never provided",[29] the building permit is denied, or the funds have not been expended for the system improvements.

Accounting for Impact Fees

A governmental entity which imposes development impact fees must maintain an accurate accounting system for each category of system improvements and service area for which they are collected.[30] Any fees paid must be kept in a separate interest-bearing account and the interest becomes part of the fund.[31] Communities must also take care to expend the funds for the purpose for which they were ostensibly imposed. That is, they may not be used for any other purpose than system improvements created to serve new growth.[32] Most funds must be expended within ten years from the date they were collected.[33]

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[29] Idaho Code 67-8211(1)(a).

[30] Idaho Code 67-8210(1).

[31] Idaho Code 67-8210(1).

[32] Idaho Code 67-8210(2).

[33] Idaho Code 67-8210(4)).

Chapter V.

KANSAS
DEVELOPMENT IMPACT FEES

Richard J. Lind

Introduction

Those familiar with Kansas are aware that the state has not been as active as other states in either the use of impact fees,[1] or in the adoption of comprehensive state impact fee enabling legislation.[2] This lack of activity has resulted, not coincidentally, in a distinct lack of reported appellate court decisions in the field. This paper shall therefore provide the reader with a brief overview of the authority for impact fees in Kansas, rather than attempting to address those aspects of impact fee systems which are unique to Kansas, since the scope and depth of such an endeavor would be limited.

Initial Adoption of Zoning and Subdivision Legislation

In 1923 the Kansas Legislature enacted Kan. Stat. Ann. 12-701 et seq., which provided cities with statutory authority to create planning commissions. This act was later amended[3] to include language that provided for the adoption of subdivision regulations that contained provisions for at least one type of exaction[4]. Section 12-705 stated in part that:

> Such regulations may also provide in residential subdivisions for the reservation or dedication of land for open space for either public recreational use or for the future use of the residents of the residential subdivisions in order to insure the proper balance of use, design or urban areas and avoid the overcrowding of land.[5]

Commencing in 1939, the Kansas Legislature also adopted three distinct and separate zoning enabling acts[6], among others[7], that provided counties with zoning authority.

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[1] Comment, *Supporting Municipal Impact Fee Ordinances: A Kansas Perspective*, 37 U. Kan. L. Rev. 621, 622 n.7 (1989).

[2] Leitner & Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 Urb. Law. 491 (1993).

[3] 1971 Kan. Sess. Laws, Chapter 45.

[4] Exaction is a term often applied to "[C]over various dedications and conditions, often in the form of fees in lieu of dedication, or fees for community impact or charges for off-site improvements, service capacity expansion, or facilities". Kushner, *Subdivision Laws and Growth Management*, § 6.03 (1991).

[5] 1971 Kan. Sess. Laws, Chapter 45, codified Kan. Stat. Ann. § 12-705 (repealed 1992).

[6] *See Spurgeon v. Board of Commissioners*, 181 Kan. 1008, 1012, 317 P.2d 798 (1957).

However, it was still generally concluded at that time that municipalities in Kansas lacked express statutory authority to impose impact fees upon new development[8]. The authority to impose impact fees was believed to reside in the municipal home rule power[9].

Kansas Home Rule Authority

Prior to 1961, the Dillon Rule of municipal law governed Kansas municipalities' exercise of local governmental powers[10]. Dillon's Rule essentially held that municipalities "[A]re creations of the legislature and can exercise only the power conferred by law, they take no power by implication, and the only power they acquire in addition to that expressly granted is that necessary to make effective the power expressly conferred."[11] Effective July 1, 1961,[12] a home rule amendment for cities was enacted by the people of Kansas by referendum.[13] Thereafter, the Kansas Legislature enacted statutory home rule for counties in 1974.[14] Prior to the adoption of constitutional and statutory home rule, Kansas municipalities were subject to the exclusive control of the legislature and could act only under their express authority. For example, in the case of Coronado Development Co. v. City of McPherson,[15] the Kansas Supreme Court, applying pre-home rule law, held that the city's fee-in-lieu of dedication requirement was invalid since the applicable state statute[16] did not expressly authorize this particular type of exaction. "Home rule, however, abolished Dillon's rule and provided municipalities with a direct source of legislative power."[17]

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[7] *See*, e.g., Kan. Stat. Ann. § 19-2956 et seq. (1988), which was enacted in 1984 by the Kansas Legislature for the benefit of Johnson County, Kansas.

[8] Comment, *supra* note 1, at 639.

[9] Comment, *supra* note 1, at 639.

[10] Comment, *supra* note 1, at 640.

[11] *State, ex rel., v. City of Topeka*, 175 Kan. 488, Syl. ¶ 2, 264 P.2d 901 (1953).

[12] KAN. CONST. art. 12, § 5(e).

[13] Comment, *supra* note 1, at 639 n 137. *See also* Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 U. Kan. L. Rev. 631 (1972).

[14] Kan. Stat. Ann. § 19-101a (Supp. 1992).

[15] 189 Kan. 174, 368 P.2d 51 (1962).

[16] G.S. 1949, § 12-705.

[17] Comment, *Municipal Corporations: Home Rule - The Power of Local Self-Government and the Effect of State Enabling Legislation [Blevins v. Hiebert, 247 Kan. 1, 795 P.2d 325 (1990)]*, 30 Washburn L.J. 554 n.2 (1991). See also Blevins v. Hiebert 247 Kan. 1, 5, 795 P.2d 325 (1990).

In the post-home rule era in Kansas, several Kansas commentators have agreed that Kansas municipalities have sufficient authority under their home rule powers to impose impact fees upon developers[18]. This line of reasoning should remain firm even though the recent case of *Blevins v. Hiebert*[19] has caused some concern[20] regarding the apparent establishment of new limitations upon the exercise of municipal home rule authority in Kansas. As will be discussed in greater detail hereafter, express language by the Kansas Supreme Court in the body of the *Blevins* decision should, among other reasons, enable Kansas municipalities to continue to utilize home rule authority to adopt impact fee ordinances and resolutions.

Recent Adoption of New Planning, Zoning and Subdivision Legislation

Effective January 1, 1992,[21] the Kansas Legislature enacted a comprehensive revision of the state planning, zoning and subdivision enabling acts.[22] "[R]epresents the culmination of a decade-long effort on the part of the Kansas Chapter of the American Planning Association (KAPA) to modernize the state's planning and zoning enabling laws."[23] The new enabling act virtually repealed all of the existing statutory planning, zoning, and subdivision acts, with the exception of special legislation enacted for Johnson County[24], and replaced them with one statutory enabling act that applies to both cities and counties[25].

Section 12-749 states in part that "Following adoption of a comprehensive plan, a city planning commission may adopt and amend regulations governing the subdivision of land... A county planning commission may establish subdivision regulations for all or for parts of the unincorporated areas of the county."[26] That Section also states that:

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[18] Comment, *supra* note 1, at 642; *See also* Butler, *Development Impact Fees Gain Popularity*, Kansas Government Journal, Sept. 1987, at 271; Shortlidge, *Making New Development Pay Its Way*, 2 Kan. Mun. L. Ann. 100, 103 (1985).

[19] 241 Kan. 1, 795 P.2d 325 (1990).

[20] *See generally* Comment, *supra* note 16; Kaup, *County Home Rule Decision May Adversely Affect City Home Rule*, Kansas Government Journal, July 1990, at 176.

[21] Kan. Stat. Ann. § 12-741(b) (1991).

[22] Kan. Stat. Ann. 12-741 *et seq.*

[23] Shortlidge, *The New Kansas Planning and Zoning Laws: Constraints and Opportunities*, Kansas Government Journal, Aug. 1991, at 210.

[24] Kan. Stat. Ann. § 19-2956 et seq. (1988).

[25] Shortlidge, *supra* note 20, at 210.

[26] Kan. Stat. Ann. § 12-749(a) (1991).

> Subdivision regulations may include, but not be limited to, provisions for the ... (3) reservation or dedication of land for open spaces; (4) off-site and on-site public improvements; (5) recreational facilities which may include, but are not limited to, the dedication of land area for park purposes... and (9) any other services facilities and improvements deemed appropriate... Such regulations may provide for the payment of a fee in lieu of dedication of land. (Emphasis added).[27]

Section 12-749(a)(4)[28] specifically addresses and authorizes both cities and counties to adopt subdivision regulations which require both on-site as well as off-site public improvements. This statutory language would appear to clearly set the stage for the future adoption by Kansas municipalities of impact fee subdivision regulations. Furthermore, Section 12-749(a)(9) contains a catch-all provision by which:

> [A] city or county may require "any other services, facilities and improvements deemed appropriate".[29]

"This expansive language gives cities and counties broad authority to impose requirements for subdivision exactions."[30] In addition, Section 12-749(b)[31] clearly appears to be an attempt on the part of the Kansas Legislature to legislatively repeal the decision of Coronado Development Co. v. City of McPherson,[32] by expressly authorizing municipalities to require the payment of fees in lieu of dedication.

Recent Kansas Case Law

As previously mentioned, the recent case of Blevins v. Hiebert,[33] has caused some concern regarding the apparent establishment of new limitations upon the exercise of municipal home rule authority in Kansas. However, language contained within the body of the *Blevins* decision, and within Section 12-741[34] of the new planning enabling act, should put to rest some of the fears that municipalities may have that impact fee requirements adopted pursuant to their home rule authority would be prohibited or invalidated in post-

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27 *Id.*

28 Kan. Stat. Ann. § 12-749(a)(4) (1991).

29 Kan. Stat. Ann. § 19-749(a)(9) (1991).

30 Shortlidge, *supra* note 20, at 215.

31 Kan. Stat. Ann. § 19-749(b) (1991).

32 *Supra* at note 15.

33 *Supra* at note 19.

34 Kan. Stat. Ann. § 12-741 (1991).

Blevins Kansas.

The Kansas Supreme Court stated in the *Blevins* decision that home rule is applicable for municipalities in several instances. "The first is in the area of regulations and prohibitions, where local government exercises its police power for the health, safety and general welfare of the public... No one questions a city's power to legislate by ordinary ordinance in the exercise of its police power so long as such ordinance does not conflict with state law, unless a state statute specifically preempts the field".[35]

To begin with, subdivision regulation is a land use control based on the police power of the municipality.[36] Therefore, any impact fees adopted as subdivision exactions by home rule authority should come under the umbrella of the city's or county's police power[37]. Next, Section 12-741(a) of the planning enabling act states:

> (a) This act is enabling legislation for the enactment of planning and zoning laws and regulations by cities and counties for the protection of the public health safety and welfare, and is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provision of this act[38]. (Emphasis added).

The above statutory language provides clear evidence of the intent of the Kansas Legislature to not preempt the field thereby precluding a municipality's ability to adopt home rule legislation. Furthermore, the broad language[39] used by the Kansas Legislature within the enabling act should assist municipalities in drafting home rule impact fee legislation which is not in conflict with the provisions of the act.

Conclusion

Kansas municipalities have sufficient authority under the new planning, zoning and subdivision enabling act to adopt impact fee requirements as a part of their subdivision regulations. Kansas municipalities also have authority under their home rule power to adopt impact fee ordinances and resolutions. Although the guidelines set forth in the *Blevins* case

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[35] *Blevins v. Hiebert*, 247 Kan. 1, 5, 6, 795 P.2d 325 (1990).

[36] D. Hagman, *Urban Planning and Land Development Control Law*, at 245 (1971).

[37] "In home rule states, the power to levy impact fees may stem indirectly through the police power of land use regulation that is one of the exercises of home rule authority, or directly, if addressed in state legislation". Griffith, *An Overview of Impact Fees to Finance Public Facilities*, Kansas Government Journal, Aug. 1989, at 187.

[38] Kan. Stat. Ann. § 12-741(a) (1991).

[39] *See generally* Kan. Stat. Ann. § 12-749 (1991).

should be closely followed, they should not be seen as a prohibition of a municipality's ability to adopt impact fee legislation through the police power of land use regulation. A copy of the impact fee ordinance of the City of Leawood, Kansas,[40] is provided as an appendix to illustrate one Kansas city's use of impact fees.

Finally, in addition to applicable Kansas requirements, a municipality must comply with state and federal constitution mandates in order to impose impact fees on development.[41] Generally this requires a "rational nexus" between the development and the proposed use for the fee. A municipality should also take care to ensure that fees are expended for the government's stated purpose.

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[40] Code of the City of Leawood, Kansas, ch. 13, art. 5,6 (1984).

[41] See Chapter 1 of this publication for discussion on constitutional guidelines for impact fees.

Chapter VI.

MONTANA
DEVELOPMENT IMPACT FEES

Richard M. Weddle

Montana has had only limited experience in the area of development exactions, and its courts have never had occasion to consider the propriety of imposing a development impact fees pursuant to a police power regulatory scheme.

The vast majority of Montana's 56 counties and 126 municipalities are "general power" local governments and, consequently, may exercise only those powers, including the power to impose development exactions, that are expressly provided by statute or that may be reasonably inferred from some express statutory grant of power. The Montana Code Annotated is almost completely devoid of such authorization.

In fact, the only express authority granted to Montana's local governments to assess what might be characterized as a development impact fee is contained in Mont. Code Ann. 76-3-606, of the Montana Subdivision and Platting Act (Mont. Code Ann. 76-3-101 *et seq.*). That statute requires subdividers to dedicate a portion of the subdivided land for use as parks and playgrounds. In the alternative it allows the governing body to require subdividers to make cash contributions equal to the value of the land that would otherwise have been dedicated. These "contributions" must be used to purchase and develop new parks.

In 1964 the Montana Supreme Court upheld the land dedication component of this provision and ruled that it did not constitute an impermissible "taking" of property without compensation under the guise of the police power.[1] In its opinion, the court observed that a governing body may impose reasonable conditions on the approval of a subdivision and if a subdivision will create a "specific need" for additional parks and playgrounds (a matter predetermined by the Legislature), it is not unreasonable to charge the subdivider with the burden of providing them. In support of this view the court quoted with approval the Illinois Supreme Court as follows:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the

[1] *Billings Properties v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964).

police power.[2]

The Montana Supreme has ruled that, in addition to their express authority with respect to park-land dedication, Montana's local governments may also impose development exactions in connection with the general subdivision approval process. In *Vogel v. Board of County Commissioners of Callatin Co.*,[3] the Court held that a municipality may condition the approval of a subdivision on the subdivider's willingness to dedicate land for a frontage road across his property. In view of the Court's discussion in *Billings Properties*, however, it seems clear that this authority is limited to exactions which are reasonably required to mitigate the impact that the development will have on the provisions of public services or on the public health, safety, and general welfare.

An alternate view was offered in an unreported district court decision that a governing body cannot, as a condition of approving a proposed subdivision, require the subdivider to dedicate a portion of his property to the public for the widening of an adjacent road when the need to widen the road does not arise "specifically and uniquely" from the proposed subdivision.[4] The "specifically and uniquely attributable" test is, of course, a more difficult standard to meet. Since it is an unreported decision, however, it has little effect as precedent in Montana.

Based on the precedents established by these few cases it seems likely that, if were called upon to rule as to the validity of a particular impact fee structure or other development exaction, the Montana Supreme Court would follow the rationale underlying the U. S. Supreme Court's decision in *Nollan v. California Coastal Commission*.[5] Accordingly, the Montana Court would likely uphold the imposition of a fee under a police power regulatory scheme only if a reasonable relationship, or "rational nexus," could be shown to exist between the collection and disposition of the fee and the legitimate governmental objective of the regulatory scheme. In applying this standard to the imposition of an impact fee in a particular situation, a governing body would be well advised to satisfy itself that:

1. The development in question will create a specific need for additional public facilities or improvements;

2. The regulatory scheme under which the fee would be imposed is intended, at least in part, to prevent or mitigate the types of impacts on public facilities or the public health and safety that the development is expected to have;

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[2] *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799, 801.

[3] 157 Mont. 70, 483 P.2d 270 (1971).

[4] *Munger v. City of Helena*, Lewis and Clark Co., No. 43004, 1979.

[5] 483 U.S. 825, 107 S.Ct. 3141 (1987).

3. The objective of the regulatory scheme is a legitimate governmental purpose;

4. The proposed fee is proportionate to the need for additional public facilities or mitigating measures reasonably attributable to the development; and

5. The fee will actually be expended to mitigate the particular impact on public facilities or the public health and safety attributable to the development.

The imposition of a development impact fee under circumstances that do not satisfy these criteria would likely not pass muster in Montana's courts.

Chapter VII.

NEVADA DEVELOPMENT IMPACT FEES

Charles K. Hauser

Introduction

The Nevada Legislature provided the authority for local governments to impose impact fees in 1989. This legislation was developed by an interim study committee of the legislature created in 1987. The legislation is codified under Nevada Revised Statutes (NRS) Chapter 278B and was passed with the support of the Southern Nevada Homebuilders Association.

Procedural Requirements

Nev. Rev. Stat. 278B.et.seq. sets out a definition of the applicable terms and provides for the procedural requirements which must be followed by a local government prior to the adoption of an impact fee for new development. Significantly, impact fees may only be applied to finance "capital improvements" which are defined as a drainage project, sanitary sewer project, storm sewer project, street project or water project[1]. In Nevada, therefore, a local government may not use an impact fee for any other purpose.

The statute requires that before imposing an impact fee, the governing body must establish a "capital improvements advisory committee" of at least five members[2]. The Planning Commission of the governing body may fulfill this role if the Planning Commission has one member, or a member is appointed who is "representative of the real estate, development or building industry" and is not employed by local government[3].

The capital improvement advisory committee is charged with reviewing conformance with the master plan of the local government and must review or create a capital improvement plan[4]. A capital improvement plan, broken up by service area, must include:

1. A description of the existing capital improvements and the costs to upgrade, improve, expand or replace those improvements to meet existing needs or more stringent safety, environmental or regulatory standards.

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1 Nev. Rev. Stat. §278B.020.

2 Nev. Rev. Stat. §278B.150.

3 Nev. Rev. Stat. §278B.150(2)(a)(b).

4 Nev. Rev. Stat. §278B.150(3).

2. An analysis of the total capacity, level of current usage and commitments for usage of capacity of the existing capital improvements.

3. A description of any part of the capital improvements or facility expansions and the costs necessitated by and attributable to the new development in the service area based on the approved land use assumptions.

4. A table which establishes the specific level or quantity of use, consumption, generation or discharge of a service unit for each category of capital improvements or facility expansions.

5. An equivalency or conversion table which establishes the ratio of a service unit to each type of land use, including but not limited to, residential, commercial and industrial uses.

6. The number of projected service units which are required by the new development within the service area based on the approved land use assumptions.

7. The projected demand for capital improvements or facility expansions required by new service units projected over a period not to exceed 10 years[5].

To develop the capital improvement plan and eventually impose impact fees, the governing body must embark upon a series of two noticed public hearings. The first public hearing follows four weeks of notice by publication in a newspaper of general circulation and posting in the principal office of the governing body, of a notice of the hearing, to consider land use assumptions which will be used to develop a capital improvement plan and a map of the proposed service area[6]. Following the public hearing, the governing body has thirty days to approve or disapprove the land use assumptions[7]. If approved, the governing body proceeds to develop a capital improvement plan and at least twenty days thereafter, must hold another public hearing to consider adoption of the plan and imposition of the impact fee[8]. Additional notice must be given by identical publication and posting, and the notice must include, among other items, a map of the service area and a proposed

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[5] Nev. Rev. Stat. §278B.170.

[6] Nev. Rev. Stat. §278B.180.

[7] Nev. Rev. Stat. §278B.190(1).

[8] Nev. Rev. Stat. §278B.190(2)(3).

impact fee for each service unit[9]. Following this public hearing, the governing body must "by resolution or ordinance, pass on the merits of each such compliant, protest or objection"[10]. The governing body must act to approve or disapprove both the capital improvement plan and imposition of impact fees within thirty days after the public hearing[11]. If approved, every three years thereafter, the local government must review the land use assumptions and capital improvements plan with nearly identical notice and public hearings[12].

The amount of the impact fee basically cannot exceed the cost of the capital improvement divied by the projected number of service units[13]. If a developer is required to construct or dedicate any portion of the facilities for which the impact fees are imposed, the construction or dedication must be credited against the fee[14]. The statute also requires the local government to enter into an agreement to reserve capacity for future development with the property owner or to agree to allow the property owner to construct or finance the capital improvements with the costs credited against the fees or reimbursed from others paying the fees[15]. An impact fee must be refunded to a property owner who so requests if construction of the capital facility is not started within five years, or if the fee or any portion thereof is not spent in ten years[16]. Impact fees can never be spent for repairs, operation or maintenance of capital improvements, upgrading for safety, environmental or regulatory standards, upgrading for better service or any administrative or operating costs of local government[17].

Use of Impact Fees in Nevada

To Clark County's knowledge, no governmental entity in the State of Nevada has ever imposed impact fees pursuant to N.R.S. §278B[18]. The Clark County government has been frustrated in the past by the procedural requirements and limitations outlined above. Impact fees for road construction were considered, but following a favorable vote in the County,

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9 Nev. Rev. Stat. §278B.190(4-7).

10 Nev. Rev. Stat. §278B.200.

11 Nev. Rev. Stat. §278B.210.

12 Nev. Rev. Stat. §278B.290.

13 Nev. Rev. Stat. §278B.230.

14 Nev. Rev. Stat. §278B.240.

15 Nev. Rev. Stat. §278B.250.

16 Nev. Rev. Stat. §278B.260.

17 Nev. Rev. Stat. §278B.280.

18 Richard Holmes, Director of Comprehensive Planning, Clark County, Nevada.

in 1991 the Legislature authorized the County to impose "a tax for the improvement of transportation on the privilege of new residential, commercial, industrial of other development"[19]. The legislation providing for this tax proclaims that any imposition of impact fees does "not limit or in any other way apply" to this tax[20].

In 1993, Clark County again approached the legislature requesting amendments to the impact fee legislation, proposing legislation patterned after a model impact fee ordinance prepared by James C. Nicholas, Arthur C. Nelson and Jullian Conrad Juergensmeyer[21]. That proposal as presented did not generate legislative support, however, the legislature did establish another interim committee to study laws relating to financing of infrastucture which accompany residential, commercial and industrial development[22]. That committee is directed to report its findings back to the 1995 Legislature.

As previously discussed, Clark County has never instituted impact fees. However, on January 4, 1994, the Board of County Commissioners of Clark County adopted a resolution establishing a Capital Improvements Advisory Committee for road projects. On February 1, 1994 the Board is scheduled to appoint seven individuals to this committee.

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[19] Nev. Rev. Stat. §278.710.

[20] Nev. Rev. Stat. §278.710(7).

[21] A Practitioner's Guide to Development Of Impact Fees, James C. Nicholas, Arthur C. Nelson and Jullian Conrad Juergensmeyer, Planners Press, Chapter 15, *Model Impact Fee Authorization Statute*, (1991).

[22] Assembly Concurrent Resolution Number 38 of the 67th Session of the Nevada Legislature.

Chapter VIII.

NEW MEXICO
DEVELOPMENT IMPACT FEES

Anita P. Miller

Introduction

The New Mexico Development Fees Act is modeled on the Texas Impact Fee Act. Research did not uncover any challenges to the Texas statute, and, in fact, the Texas statute was cited as providing a contrast to United States and Texas courts in its "clarification of the rules of the development game".[1] That law review article stated:

> By contrast [to the courts] through its enactment of the Impact Fee Act, the Texas Legislature has defined in great detail the terms for imposition of impact fees on new development in Texas. At least in this area of takings and the exercise of the police power, Texas property owners can make informed investment and land development decisions with some sense of certainty regarding the capacity of regulators to alter the often tenuous profit/loss equation involved in such development.

The New Mexico Development Fees Act was drafted by the New Mexico Association of Home Builders in order to achieve predictability and fairness in the assessment and collection of development fees imposed as a condition of development approval. The original bill drafted by the Home Builders was virtually identical to the Texas impact fees statute.[2] That bill was unacceptable to public sector representatives, who were invited by the Home Builders to review and comment on it, and to support it. Finally, extensive negotiations resulted in legislation acceptable to all parties.

The act allows cities and counties to utilize impact fees to finance water, wastewater, parks and recreation, fire and police and emergency capital improvements and facilities extensions. Joint Powers Agreements will be allowed to enable impact fees to be utilized for all facilities in an extraterritorial platting and subdivision jurisdiction or extraterritorial jurisdiction. Furthermore, the most burdensome procedural requirements for notice, hearing, accounting and reporting have been removed. Waivers of fees will be allowed to achieve adopted policy goals.

There are requirements in the bill for "land use assumptions" and "capital

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[1] Once More the Trilogy in Retrospect: An Essay on the Virtue of Development Agreements, 32 S. Tex. L. Rev. 1.

[2] Tex. Rev. Civ. Stat. art. 395.001 et seq.

improvement plans" which differ considerably from existing land use and capital planning procedures and will require additional steps to be taken by cities and counties to comply. There are other requirements in the statute with which existing fees, such as the Albuquerque Urban Expansion Charge and parks dedication fee and transportation exactions, may not be compatible.

The act emphasizes relating capital improvements to land use planning, as well as analyzing and planning for both existing deficiencies and new growth. Most New Mexico cities and counties have not done capital improvement planning. Those that have usually failed to tie this planning to "land use assumptions" or "Land Use Plans."

This summary will highlight relevant sections of the act for New Mexico communities most interested in utilizing the provisions of the Act – those cities and counties experiencing growth that is outstripping their ability to pay for infrastructure and services.

Definitions

"**Affordable Housing**" means any housing development to benefit those whose income is at or below eighty percent of the area median income; and who will pay no more than thirty percent of their gross monthly income toward such housing.

This definition will guide cities and counties in determination of waivers for affordable housing, discussed below in the context of Section 13 of the Act.

"**Capital Improvement**" means any of the following facilities that have a life expectancy of ten or more years and are owned and operated by or on behalf of a municipality or county:

(A) water supply, treatment and distribution facilities; wastewater collection and treatment facilities; and storm water, drainage and flood control facilities;

(B) roadway facilities located within the service area, including roads, bridges, bike and pedestrian trails,bus bays, rights of way, traffic signals, landscaping and any local components of state and federal highways;

(C) buildings for fire, police and rescue and essential equipment costing ten thousand dollars ($10,000) or more and having a life expectancy of ten years or more; and

(D) parks, recreational areas, open space trails and related areas and facilities.

"**Capital Improvements Plan** (CIP)" at Section 2.E., is a "plan required by the Development Fees Act that identifies capital improvements or facility expansion for which impact fees may be assessed." The steps necessary to develop the CIP, as set forth below, are over and above established Albuquerque and CIP procedures currently being used in

New Mexico municipalities and DFA.

"**Facility Expansion**" at Section 2.G., is important in that, along with the definition of "capital improvements", it sets forth the specific facilities for which impact fees may be assessed. Facility expansion refers to:

> the expansion of the capacity of an existing facility to serve new development. The term does not include the repair, maintenance, modernization or expansion of an existing facility to better serve existing development, including schools and related facilities. (emphasis added).

This section appears to preclude a city or county or both under a Joint Powers Agreement from using impact fees to provide new water or sewer service to an already developed area which has previously been served by septic tanks and wells or substandard community water systems. This definition should be read with the definition of "new development."

"**New Development**" means the subdivision of land; reconstruction, redevelopment, conversion, structural alteration, relocation or enlargement of any structure; or any use or extension of the use of land; any of which increases the number of service units; (emphasis added)

This and the above sections should be considered in conjunction with the definition of impact fees, in its reference to "necessitated by and attributable to new development."

"**Impact Fees**" are defined as a charge or assessment imposed by a municipality or county on new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to new development. The term includes amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, development fees and any other fee that functions as described by this definition. The term does not include hook-up fees, dedication of rights of way or assessments or construction or dedication of on-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks or curbs if the dedication or construction is required by a previously adopted valid ordinance or regulation and is necessitated by and attributable to the new development.

Under the current CIP processes, new capital improvements and facility expansions into growing areas compete with funding for rehabilitation projects in older areas of a City. The necessity of providing initial service is usually a priority over rehabilitation. If impact fees may now be used for capital improvements and facility expansions necessitated by growth, funds in the CIP may be "freed" to address rehabilitation needs in areas of the city that may have been neglected.

The definition section of the act states that impact fees do not include "dedication of

rights of way or assessments or construction or dedication of on-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks or curbs if the dedication or construction is required by a previously adopted valid ordinance or regulation and is necessitated by and attributable to the new development." This section should be read in the context of Section 15.CREDITS AGAINST FACILITIES FEES., which provides that:

> "any construction of, contributions to or dedications of on-site or off-site facilities, ...not required to serve the new development, in excess of minimum municipal and county standards, established by a previously adopted and valid ordinance or regulation and required by a municipality or county as a condition of development approval shall be credited against impact fees otherwise due from the development. The credit shall include the value of
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> A. dedication of land for parks, recreational areas, open space trails and related areas and facilities or payments in lieu of that dedication; and
>
> B. dedication of rights of way or easements or construction or dedication of on-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks or curbs.

It appears that previous dedications or cash-in-lieu of dedications necessitated by development, assessed under a previously valid statute for on and off-site facilities will not be disturbed by the statute. Similarly, hook-up fees and dedication of rights of way imposed to serve the development under a previously valid statute will not be disturbed. Credits will be given against impact fees otherwise due. However, if dedications, cash-in-lieu and construction fees were for the purpose of on-site or off-site facilities, were not attributable to a need generated by the new development, were in excess of minimum city standards established in a previously adopted valid ordinance and were required by the municipality/county as a condition of development approval, credits will be given against impact fees otherwise due.

In addition, a developer may build or finance a facility in excess of the need generated by its development. Funds which are advanced will be credited against impact fees otherwise due, or the developer will be reimbursed by fees paid by other users as new developments using the facility come on line. This provision allows development to take place if the developer is willing to construct or finance a necessary facility which by its nature will exceed the need created by the development, such as a road, pumping station, or fire station. A developer who fianances the entire facility in order to get his development approved in advance of other potential users coming on line, takes a risk that additional development may not occur. It appears that the city will not be responsible for the cost of the excess infrastructure built or financed by the developer if other users do <u>not</u> come on line.

A "**hook-up fee**", which is excluded from the definition of an "impact fee", as a "reasonable fee for connection of a service line to an existing gas, water, sewer or municipal or county utility." It should not be used as a "substitute" for an impact fee in an existing area in order to finance capital projects.

"**Land Use Assumptions**" are described at Section 2.J. as a description of the service area and projections of changes in land uses, densities, intensities and population in the service area over at least a five-year period."

"**Approved Land Use Assumptions**," as defined in Section 2.D., are "land use assumptions adopted originally or as amended under the Development Fees Act."

Cities and counties would have to assemble the data into "land use assumptions" to be used for each capital improvement or facility expansion, in order to provide the rational nexus for the capital improvement plan for that improvement or expansion.

Section 22 allows "system-wide land use assumptions" for water supply and treatment facilities in lieu of adopting land use assumptions for each service area for such facilities. After system-wide land use assumptions are adopted, there is no need to adopt additional land use assumptions for a service area for water supply, treatment and distribution facilities or collection and treatment facilities as a prerequisite to the adoption of a capital improvements plan and impact fee as long as the capital improvements plan and impact fee are consistent with the system-wide land use assumptions.

A "**qualified professional**," who must prepare the capital improvements plan described in the statute as well as the impact fees includes at Section 2.M. "...professional engineer, surveyor, financial analyst or planner providing services within the scope of his license, education or experience." Section 3 allows the cost of qualified professionals to prepare the Capital Improvements Plan out of the impact fees collected. A percentage of administration costs (3%) may also be paid by the impact fee.

"**Roadway facilities**" are defined at Section 2.N. as:

> ...arterial or collector streets or roads that have been designated on an officially adopted roadway plan of the municipality or county, including bridges, bike and pedestrian trails, bus bays, rights of way, traffic signals, landscaping and any local components of state or federal highways;

That facilities other than streets and roads may be funded by impact fees is significant in light of city transportation policies which include improving transit facilities and bicycle and pedestrian opportunities. Impact fees could be utilized for bus bays (which might also include similar facilities for other transit facilities such as trolleys and rapid rail), either as

part of road construction or other separate projects. Impact fees could be combined v other funding sources, such as the Intermodal Surface Transportation Act of 1991, wh make available funds for other components of the transportation systems. Bike pedestrian trails could be implemented in new areas by using impact fees, as long as nexus between the new development and the need for the trails is established.

A "**service area**" is defined in Section 2.0 as:

> ...the area within the corporate boundaries or extraterritorial jurisdiction of a municipality or the boundaries of a county to be served by the capital improvements or facility expansions specified in the capital improvements plan designated on the basis of sound planning and engineering standards.

A service area may thus include land outside the municipal boundaries as long as land is within the "extraterritorial" jurisdiction.

Section 3. AUTHORIZATION OF FEE, at Subsection C., states that a municipa and county:

> may enter into a joint powers agreement to provide capital improvements within an area subject to both county and municipal platting and subdivision jurisdiction or extraterritorial jurisdiction and may charge an impact fee under the agreement but if an impact fee is charged in that area, the municipality and county shall comply with the Development Fees Act.

Thus a city and county, by Joint Powers Agreement could create a service area streets in the extraterritorial platting and planning or zoning area and assess impact fees development outside the City which burdens city streets.

A city would have to have a Joint Powers Agreement with a County concern extraterritorial zoning, in the absence of the establishment of an actual extraterritorial zo pursuant to Section 3-21-3 NMSA 1978, if it is to have any zoning jurisdiction in the Cou over development which does not involve subdivision of land. Such an agreement appe to be a prerequisite to a second Joint Powers Agreement to provide capital improveme to a non-subdivision development in the extraterritorial area.

As stated above, citing sections 22 A. and C., land use assumptions do not have be created for each service area; system wide land use assumptions may be adopted, as lo as the CIP and impact fees for a service area are consistent with the system-wide land u assumptions.

A "**service unit**" is defined at Section 2.P. as a "standardized measure

consumption, use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions." The size of meters for water and sewer usage is the current basis of establishing per unit costs for the Urban Expansion Charge currently utilized to finance expansion of these facilities.

Items Payable by Fee

Section 4 provides that impact fees may be imposed only to pay specified costs of constructing capital improvements or facility expansions as defined in the statute. These specified costs include:

1. estimated capital improvements plan cost;

2. planning, surveying and engineering fees paid to an independent (outside) qualified professional for services provided for and directly related to the construction of capital improvements or facility expansions.

3. fees actually paid or contracted to an "outside" professional for preparation or updating of a capital improvements plan.

4. up to 3% of total impact fees collected may go the to administrative costs for city/county employees who are "qualified professionals."

Debt service charges may be included in determining the amount of impact fees only if the fees are to be used for the payment of principal and interest on bonds, notes and other obligations issued to finance construction of capital improvements or facility expansions identified in the capital plan upon which the impact fees are based.

Items Not Payable by Fee

Section 5 of the act specifically excludes certain items from financing by impact fees. Impact fees cannot be collected to finance:

> construction, acquisition or expansion of public facilities or assets that are not capital improvements or facility expansions, (as defined in the statute) identified in the capital improvements plan.

The capital improvements plan referred to must specifically meet the statutory criteria as a prerequisite to assessing impact fees. To qualify, the general CIP for all capital improvements planned by the city must be revised to meet the requirements at Section 6 of the statute.

Impact fees also may not be utilized to finance the:

> repair, operation or maintenance of existing or new capital improvements or facility expansions.

Current sources of funding for these purposes, such as general funding, general obligation bonds, hook-up fees and user fees, will thus continue to be used for:

> upgrading, updating, expanding or replacing existing capital improvements to serve existing development in order to meet stricter safety, efficiency, environmental or regulatory standards; (emphasis added)

Thus impact fees assessed on new development cannot be utilized as a "cash cow" to correct deficiencies in existing development. They also may not be used to pay a city's administrative expenses, or debt service, except as related to the specific facility for which the fees were assessed.

At Section 5.G. the following facilities are specifically excluded from financing by impact fees: libraries, community centers, schools, projects for economic development and employment growth, affordable housing or apparatus and equipment of any kind, except the "fire, police and essential rescue equipment costing ten thousand ($10,000) or more and having a life expectancy of ten years or more" defined in the definition of capital improvements at Section 2.D.(3).

It should be noted that there is no mention of solid waste facilities, either in the definition of "capital improvements" for which impact fees may be utilized, or in Section 5.G., excluding facilities. It thus falls into a "gray area". Whether the words "any of" in Section 2.D. were intended by the drafters of the act to specifically limit the section to the list of facilities that follows, or whether they indicate that the listed facilities are merely examples of what fees may be used for, if the facility in question is not specifically prohibited by Section 5.D. is not known.

During meetings between the New Mexico Association of Homebuilders and public sector representatives, no rationale was offered by the Homebuilders for excluding libraries and community centers from utilization of impact fees. New libraries are built to serve new development areas and are funded by impact fees in other jurisdictions. Adequate standards for measuring service units have been developed. Likewise, community centers, which are typically administered by a cultural and recreation department, should be constructed or expanded to serve new growth particularly if a development will include large numbers of retirees. Neither the Homebuilders nor public sector representatives wanted to include schools in the legislation. There was consensus that a separate statute should be passed for impact fees for schools since schools are administered by separate governmental units.

The Homebuilders representatives clearly did not want impact fees to be assessed to provide economic development, job opportunities and affordable housing. It is difficult to make a rational nexus that new market value housing creates a need for affordable housing,

although it may reduce the amount of land available to meet affordable housing needs. Likewise, the need for economic development and jobs is usually not directly attributable to new housing or other development. Usually, economic development creates the need for new housing.

The Homebuilders were willing to accept a provision in the act at Section 13 which will allow that a:

> ...developer and a municipality or county may agree to offset or reduce part or all of the impact fees assessed on that new development, provided that the public policy which supports the reduction is contained in the appropriate planning documents of the municipality...and provided that the development's new proportionate share of the system improvement is funded with revenues other than impact fees from other new development.

Section 13 will be discussed in greater detail below, in relationship to the existing policies that will enable it to be utilized. It should be noted that impact fees usually are not utilized to create affordable housing and jobs in any event. San Francisco requires that commercial and office developers in the downtown area provide either housing units or cash-in-lieu to build housing units to serve people who will work in the new development as a condition development approval. Monterey, California, provides density bonuses to developers who provide a percentage of low and moderate income housing units as part of an otherwise market rate development. Boston and San Francisco require that developers provide amenities such as day care, or cash-in-lieu to meet the child care burden caused by commercial development as a condition of development approval in certain redevelopment areas.

The "Capital Improvements Plan"

The capital improvements plan (CIP) is the linchpin of the new enabling statute as well as in the development of a legally defensible local impact fees ordinance. A city's CIP process, as well as CIP content, will have to meet the statutory requirements in order to implement impact fees.

The capital improvements plan described in this section should not be confused with existing CIP plans in Albuquerque and elsewhere in the state. Section 6 states:

> A municipality or county shall use qualified professionals to prepare the capital improvements plan and to calculate the impact fee. The capital improvements plan shall follow the infrastructure capital improvement planning guidelines established by the department of finance and administration and shall address the following:

(1) a description, as needed to reasonably support the proposed impact fee, which shall be prepared by a qualified professional, of the existing capital improvements within the service area and the costs to upgrade, update, improve, expand or replace the described capital improvements to adequately meet existing needs and usage and stricter safety, efficiency, environmental or regulatory standards;

(2) an analysis, which shall be prepared by a qualified professional, of the total capacity, the level of current usage and commitments for usage of capacity of the existing capital improvements;

(3) a description, which shall be prepared by a qualified professional, of all or the parts of the capital improvements or facility expansions and their costs necessitated by and attributable to new development in the service area based on the approved land use assumption;

(4) a definitive table establishing the specific level or quantity of use, consumption, generation or discharge of a service unit for each category of capital improvements or facility expansions and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial and industrial;

(5) the total number of projected service units necessitated by and attributable to new development within the service area based on the approved land use assumptions and calculated in accordance with generally accepted engineering or planning criteria;

(6) the projected demand for capital improvements or facility expansions required by new service units accepted over a reasonable period of time, not to exceed ten years; and

(7) anticipated sources of funding independent of impact fees.

The analysis required by Paragraph (2) of Subsection A of this section may be prepared on a system-wide basis within the service area for each major category of capital improvement or facility expansion for the designated service area.

The governing body of a municipality or county is responsible for supervising the implementation of the capital improvements plan in a timely manner.

Section 6.B. provides that the analysis of the total capacity, level or current usage and commitments for usage of capacity of the existing capital improvements may be prepared

on a system-wide basis within the service area for each major category of capital improvement or facility expansion for the designated service area.

Section 6.A.(7) requires the capital improvements plan to address "anticipated sources of funding independent of impact fees." This assumes that there may be situations in which impact fees will not pay the full cost of a capital improvement or facilities expansion, although for the purpose of this study the assumption is that all new growth will be so financed, except where waivers are utilized to meet adopted city policies.

There is nothing in the statute that specifically requires that other sources of funding be deducted from impact fees assessed, although Section 15, as discussed above, does give credit for construction, dedications and financing under certain circumstances.

Maximum Fee Per Service Unit

This section states, "[t]he fee shall not exceed the cost to pay for a proportionate share of the cost of system improvements, based upon service units, needed to serve new development." This assures the "rational nexus" requirement discussed above.

Time for Assessment and Collection of Fee

Section 8 provides that assessments of an impact fee be made at the earliest possible time, and collection at the latest possible time, with collection not occurring earlier than the issuance of a building permit. The city shall assess impact fees on land platted after the date of the act at the time of recording of the plat; the assessment shall be valid for four years from the date of recording; and after the expiration of the four year period, if the property has not been developed, the City can adjust the impact fee to the level of current impact fees. An impact fee may not be collected on any service unit in a new development platted in accordance with subdivision procedures in operation before the adoption of an impact fee.

This provision allows the developer to predict impact fees as part of his financing, pay them when he actually builds and creates the need, and recoup them when he sells or rents the unit. The city can borrow to build its facility using general obligation bonds and use the impact fees for debt service. The timing and refund provisions in Chapters 11 and 17 protect the developer. There is a risk, however, that a city may borrow based on approved development and assessed fees then build a facility and a downturn in the market may prevent the development from actually being built. A city could avoid that risk by utilizing Section 11.B., which requires the developer to agree to construct or pay to construct the entire facility in advance, as a condition of approval, with the developer being credited for the costs against impact fees due or reimbursed as other developments come on line.

Additional Fees Prohibited

Section 9 provides that additional impact fees may only be assessed after the initial assessment if the number of service units to be developed increases.

Agreement With Owner Regarding Payment

Section 10 authorizes a city to enter into an agreement with the owner of a tract of land for which a plat has been recorded providing for a method of payment of the impact fees over an extended period of time, "otherwise in compliance with the Development Fees Act." This provision is significant in that it permits agreements regarding the phasing of impact fee payments, but requires that the payments be calculated according to the Act. This provision, read in conjunction with Section 3.A. which states that "Unless specifically authorized by the Development Fees Act, no municipality or county may enact or impose an impact fee," leads to the conclusion that a city may no longer require impact fees in excess of the development's proportional share of the cost of improvements attributable to the development as a condition of annexation or as part of a development agreement. The only thing negotiable is the time of payment.

Development Agreements in effect prior to the effective date of the act, July 1, 1993, should not be affected by this provision since a statute cannot impair the obligation of contracts pursuant to Article II, Section 19, of the New Mexico Constitution.

Collection of Fees if Service Not Available

Impact fees may be assessed but not collected unless the city commits to complete construction within seven years and have the service available within a reasonable period of time after completion. In no event may that be longer than seven years.

As discussed above, the owner of a new development may agree to construct or finance construction of the improvement with the city either crediting the costs incurred or impact fees otherwise due, or reimbursing the owner from impact fees paid by other new developments using the improvement. The impact fees collected subsequently will be reimbursed to the owner of record at the time the plat of the subsequent development is recorded. Since a developer who advances costs in excess of his proportionate share will most likely pass these costs on to lot or home buyers, it is only fair that the owner of record, and not the developer, who has already been reimbursed when lots are sold, receive the benefit of other users coming on line.

Section 11.C. provides that the seven year time limitation for construction after collection of impact fees may be extended if the city provides security assuring the obligation to construct the improvement for a period not to exceed seven years from commencement of construction. Procedures must be established to assure that the developer does not lose credits.

Refunds

Section 17 provides for refunds of impact fees paid if existing facilities are not available or the city has failed to complete construction within the seven years or service is not available within a reasonable period of time after completion (no later than seven years from the date of payment). In addition, the city must recalculate the impact fee, using the actual costs of the improvement after completion of construction, and must refund the

excess paid if the difference between actual cost and impact fee paid exceeds 10%. Also, funds not spent within 7 years must be refunded. Refunds shall bear interest at the statutory rate from date of collection to date of refund. All refunds go to the statutory owner of record, except that impact fees paid by a government entity are made to that entity. Both the owner of property on which an impact fee has been paid and a governmental entity have standing to sue for a refund.

Entitlement to Services

Pursuant to Section 12, a new development which has paid impact fees is entitled to the use and benefit of the service for which the fee was exacted. It is also entitled to prompt service from any existing facility with actual capacity to serve the new service units before the new facility is built.

Accounting for Fees and Interest

The act, at Section 16, complies with the "rational nexus" test by mandating that ordinances imposing impact fees require impact fees be maintained in separate interest bearing accounts identifying the payor and category of capital improvement or facility expansion within the service area for which the fee was adopted Those funds may be spent only for the purposes for which the impact fee was imposed. The section also provides for interest earned on impact fees to be part of the account on which it is earned, that account records be open for public inspection and copying, and that the City, "as part of its annual audit process," prepare an annual report describing the amount of fees collected, encumbered and used during the preceding year by category of capital of capital improvement and service area identified as required.

Advisory Committee

The act provides for an appointed advisory committee of not less than 5 members, 40% of whom must be realtors, developers or representatives of the building industry. No municipal employees or officials may be members of the committee. An existing body may meet these requirements or could be reconstructed to meet them for the purposes set forth in the statute. The committee serves in an advisory capacity only, providing input into the land use assumptions, reviewing and commenting on the capital improvements plan, reporting on its implementation as well as on inequities in implementing the plan and impact fees, and advising on the need to update or revise the land use assumptions, capital improvements plan and impact fees. The existence of this committee, plus the requirement of separate notice and hearings on land use assumptions and the capital improvements plan and impact fees, will create the need for additional meetings for staff, the EPC and city councils.

Effective Date

The effective date of the Act was July 1, 1993. Impact fees in effect prior to the effective date must be replaced by July 1, 1995. If they are not replaced, a person who pays more than 10% in excess of the maximum fee as permitted by the act is entitled to a refund

of twice the difference between the maximum fee allowed and the actual fee imposed, plus attorneys fees and costs.

No Effect on Taxes and Other Charges

The Act has no effect on taxes, fees, charges or assessments authorized by state law. Thus it does not preclude continued use of Improvement Districts (SAD's) to finance capital improvements and facilities expansions.

Moratorium on Development Prohibited

A city cannot place a moratorium on new development for the sole purpose of awaiting the completion of the process necessary to develop, adopt or update impact fees. This provision does not preclude placing a moratorium on development during the establishment of an impact fees program if the moratorium can be justified by the health, safety and general welfare, such as a situation in which there is not sufficient water or wastewater collection facilities to serve a new development. The recent New Mexico Court of Appeals case, Brazos Land, Inc. v. Board of Commissioners of Rio Arriba County,[3] upheld the use of moratoria under police powers, and more specifically, under subdivision and zoning authority.

Waiver of Fees to Create Incentives to Implement Social and Economic Policies

This section discusses the strategy of waiving impact fees to encourage affordable housing and infill development, and presents the fiscal impact of this strategy. As stated above, impact fees may not be assessed for affordable housing and projects for economic development and employment.

In Albuquerque developers who wish to provide affordable housing have stated that city dedications and fees policies preclude the reduction of housing costs to meet the needs of moderate and low-income persons. The city's Affordable Housing Subcommittee likewise cited development fees as a deterrent to construction of affordable housing in its March, 1993 report. City urban expansion charges and park dedication fees are charged regardless of whether new growth occurs in an "infill area" or in a developing area. In addition, exactions for transportation facilities are utilized as a condition of development approval, often to correct a deficiency or meet an existing need, such as signalization or addition of a lane to an arterial which is not specifically attributable to the new development.

These fees, added to land costs in infill areas, make infill development uncompetitive when compared to lower land prices in "fringe areas", both within and outside the DFA municipal boundaries.

Section 13 was subsequently drafted to address these concerns.

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[3] Bar Bulletin, Vol 33, No. 13, April 1, 1993, p. 280.

Authority of Municipality or County to Spend Funds or Enter Into Agreements to Reduce Fees

Municipalities or counties may spend funds from any lawful source or pay for all or a part of the capital improvements or facility expansions to reduce the amount of impact fees. A developer and a municipality may agree to offset or reduce part or all of the impact fees assessed on that new development, provided that the public policy which supports the reduction is contained in the appropriate planning documents of the municipality or county and provided that the development's new proportionate share of the system improvement is funded with revenues other than impact fees from other new developments.

Thus impact fees may be utilized to pay all or part of capital improvements and facility expansions with the remainder of the cost of these facilities orginating from "any lawful source". Any "lawful source" is not defined.

There is authority for the city to offset or reduce part or all of the impact fees which it is authorized to assess on new growth for capital improvements and facility expansions as an incentive to the implementation of social and economic goals. The statute is clear that other new development cannot be tapped to make up for fees waived, but that other sources of revenues must suffice. It is presumed that traditional public funding sources would fill the waiver gap. CDGB Grants, tax increment financing and general obligation bonds could be utilized. Improvement districts (SAD's) could be utilized, but while allowing the initial cost of housing to be "affordable", would add to the carrying cost over time, with the same effect as if there had been no waiver of impact fees in the first place.

Some infill areas already have adequate public facilities while others require rehabilitation and upgrading of facilities to serve existing population. Others will require both correction of deficiencies and additional capital improvements or facilities expansion to serve new development.

Cities and counties could designate "tiers" of development, reflecting growth policies, land use assumptions and the CIP's for facilities involved, varying impact fees to encourage orderly expansion of population and facilities, with waived impact fees in areas already served or in targeted infill areas. They could have lower impact fees for "closer in" areas adjacent to existing facilities, supplementing impact fees with other lawful sources of funds. They could assess the entire cost of capital improvements and facilities expansion in areas which are not high priorities for urban expansion, utilizing Section 11.B. discussed above.

The shortfall of funds which would have been received from impact fees in infill areas could be offset by tax increment financing if these areas meet the criteria of the Metropolitan Redevelopment Act as "slum" or "blighted" areas.[4]

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[4] N.M. STAT. ANN. Section 3-60A-1 (Michie 1978).

Chapter IX.

UTAH
DEVELOPMENT IMPACT FEES

Ralph E. Becker, Jr.
Rulon M. Dutson

Introduction

In the last several years, many Utah communities have experienced substantial and continuous growth. Some of this growth has been in rural communities and can be attributed to scenic and recreational opportunities as well as quality-of-life and cost-of-living attributes. Urban development has been associated with an influx of people seeking lifestyle changes and job opportunities. More and more communities find they are ill-equipped to absorb the large capital costs associated with extensive development. As the cost of capital improvements continues to rise with increasing levels of development, this financial burden is becoming more difficult for communities to bear. Some local leaders, faced with the unpopular options of raising city-wide taxes or other fees in an effort to cover the costs of providing services to a small percentage of the population, are following the examples of other communities and are turning to development impact fees as a revenue-generating option.

The first impact fees in Utah were adopted during the sporadic growth periods of the late 1960s-early 1970s. Several cities began assessing charges for basic services such as water and sewer connections. During the growth spurt of the early 1980s, these communities expanded impact fees to include exactions and to address other impacts. Examples include the dedication of land for roads, schools or parks, or in-lieu fees for other public needs, such as improvements to existing streets, storm drains or fire protection.

In recent years, several Utah communities have also started to explore other applications for impact fees. Examples of more unique strategies include one county's $250.00 per-lot fee earmarked "for the purchase and preservation of threatened and endangered species habitat," and a water association's requirement to purchase a share of neighboring reservoir water with each culinary water connection.

Impact fee cases brought before Utah courts have been challenged on five primary issues:

- the municipality's authority to impose impact fees,
- the constitutionality of fee exactions,
- whether development mitigation requirements are taxes or fees,

- the reasonable amount of imposed fees, and
- what collected monies can be used for.

These issues and relevant judicial interpretations are reviewed in the following sections.

Authority of Utah Municipalities to Enact Impact Fee Ordinances

Considering the growing interest in impact fees throughout Utah, it may, at first glance, seem surprising that Utah has yet to adopt legislation specifically authorizing governmental entities' authority to impose them. However, what Utah may lack in explicit legislative direction has been made up in judicial interpretation. A series of court decisions beginning in 1979, including a U.S. Supreme Court case and several Utah Supreme Court cases, have established strong legal precedent supporting an entity's authority to impose development impact fees. The Utah courts have also established pragmatic standards for the development and implementation of impact fees.

The threshold question in determining the validity of an impact fee ordinance is whether the city or county possesses the authority to impose it. In *Call v. City of West Jordan,*[1] the Utah Supreme Court held that a municipal ordinance requiring a subdivider to dedicate seven percent of subdivided land to the city or pay the equivalent value in cash for flood control and/or parks fell within the city's delegated authority.[2] The court found that when the series of statutes through which the city derives its authority to enact such ordinances:

> ... are viewed together, and in accordance with their intent and purpose, as they should be, it seems plain enough that the ordinance in question is within the scope of authority and responsibility of the city government in the promotion of the "health, safety, morals, and general welfare" of the community.[3]

The court specifically stated that municipal powers included those expressly granted and "those necessarily implied to carry out such responsibilities."[4] The statutes cited by the

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[1] 606 P.2d 217 (Utah 1979) ("*Call I*"), *rev'd on other grounds*, 614 P.2d 1157 (Utah 1980), 727 P.2d 180 (Utah 1987).

[2] The Utah Supreme Court reversed *Call I* on other grounds, holding that the reasonableness of a dedication or cash requirement was a question of fact that must be addressed at trial. In speaking of this ordinance, the Court warned that it was close to being unconstitutionally vague because of "a paucity of stated purposes and standards of application." *Call v. City of West Jordan*, 614 P.2d 1257, at 1258 (Utah 1980). The Court noted similar provisions in other jurisdictions as examples of ordinances with clearly sufficient detail.

[3] *Call v. City of West Jordan*, 606 P.2d 217, 219 (Utah 1979).

[4] 606 P.2d at 217.

court included those which create the general zoning power, adoption of a comprehensive plan and regulations pursuant to it, creation of a planning commission which shall have such powers as may be necessary to enable it to perform its functions and promote municipal planning, and the power of a planning commission to prepare regulations governing the subdivision of land.[5]

The legal authority of counties to impose development impact fees does not significantly differ from the authority of municipalities.[6] It can reasonably be assumed that the Utah Supreme Court's treatment of county development impact fees would be given similar treatment upon review.

Constitutionality of Impact Fees

Once it is determined that the establishment of an impact fee is authorized, a number of constitutional issues must be addressed. One issue frequently argued is that municipal ordinances requiring dedication of land are attempts to exercise the power of eminent domain without landowner compensation. In Call I, supra, the court held that there was no taking issue because the developer had voluntarily sought to subdivide the land and was therefore subject to a reasonable regulation in exchange for the right to subdivide.[7]

This ruling is in accord with other jurisdictions. As one commentator noted:

> [C]ourts look to the "voluntary" aspect of a developers application of subdivision approval in concluding that fees or land dedication requirements represent proper community planning rather than a taking without compensation.[8]

This decision is also in accord with the U.S. Supreme court's analysis in Nollan v. California Coastal Commission discussed in Chapter 1.

Is the Development Mitigation Requirement a Tax or Fee?

Impact fees have also been challenged as illegal taxes that are used for general revenue needs of the community rather than for the purpose of the charge, thereby avoiding statutory limits on municipal taxation. The Utah Supreme Court has held in a number of cases that a reasonable charge for specific municipal services or capital expenditures is permissible, but a general fee constitutes an illegal revenue measure. For example, in

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5 606 P.2d at 218-219. *See generally*, Utah Code Ann. Sec's. 10-9-1 et seq. (1993).

6 See Utah Code Ann. Sec's 17-27-1 et seq. and Sec's 17-34-1 et seq. (1993).

7 *Id.* at 220.

8 Sheen, *Development Fees: Standards to Determine Their Reasonableness*, 1982 Utah L. Rev. 549.

Lafferty v. Payson City,[9] Payson City required impact fees of $1,000 prior to issuance of a building permit to meet additional revenue needs resulting from an "emergency" caused by development. The court rejected Payson City's impact fees approach, but affirmed the fees-for-services rule. Prior Utah cases were distinguished[10] which upheld specifically earmarked fees which were segregated from the general revenue fund. The court drew a parallel to *Weber Basin Home Builders Assoc. v. Roy City*,[11] where the funds illegally went into the city's general fund. The Utah Supreme Court held that Payson City's impact fee was deposited into the general fund and was therefore an illegal tax. The rulings of these cases are in accord with the majority of courts.[12]

In a more recent case, *Salt Lake County v. The Board of Education of the Granite School District*,[13] the court upheld a drainage fee imposed by county flood control ordinance. The primary issue in the case revolved around whether or not the "fee" was a "local assessment tax" that the school district, as a tax exempt entity, would be statutorily exempt from paying. The court ruled that the drainage fee was a legal special assessment, and not a "tax," thereby requiring the school district to pay the fee.

The Reasonable Amount of Fees and What Collected Fees Can be Used For: Rational Nexus Between Development Impacts and Fees

Recent court scrutiny has focussed on challenges to impact fee ordinances on the basis that fees are unreasonable and are thus constitutionally suspect. Although there are various criteria that courts have formulated to determine when an impact fee is or is not reasonable, many jurisdictions, including Utah, now adhere to the "rational nexus" test.[14]

The rational nexus test requires that "a new development pay only for its proportionate share of new facilities needed to serve the development."[15] Stroud identifies three issues that courts will address in applying the test.[16] The first issue is a determination

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[9] 642 P.2d 376 (Utah 1982).

[10] *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981), *Call I, supra*, and *Home Builders Association of Greater Salt Lake v. Provo City*, 503 P.2d 451 (Utah 1972).

[11] 487 P.2d 866 (Utah 1971).

[12] Sheen, *supra*, at 561.

[13] 808 P.2d 1056 (Utah 1991).

[14] Stroud, *Legal Considerations of Development Impact Fees*," Journal of the American Planning Assoc., Winter 1988, 29; Sheen, *supra*; *See also*, Mazuran, *The Evolution of Real Estate Development Exactions in Utah*, 3 Utah Bar Journal., August/September 1990, at 11.

[15] Stroud, *supra*, at 30.

[16] Stroud, *supra*, at 32.

of whether the new development will create a need for increased municipal services. The second issue is how to allocate the development's share for new facilities or services. The third issue is the extent to which the fee benefits the development that pays for it.

The Utah Supreme Court initially answered these questions by simply stating that "the dedication should have some reasonable relationship to the need created by the subdivision,"[17] and that "... the fees so collected be used in such a way as to benefit demonstrably the subdivision in question."[18] It was left to the court in *Banberry*, to delineate the constitutional standards of reasonableness so as to provide both practical guidance to local governments proposing such ordinances and to courts in reviewing them.

The Utah Supreme Court, in *Banberry Development Corp v. South Jordan City*, established the essential factors to be considered when developing impact fees. In *Banberry*, the City of South Jordan imposed water connection and park improvement fees prior to final approval of subdivision plats. The court held that "to comply with the standard of reasonableness, a municipal fee ... must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred."[19] A number of criteria were developed that the court said were "among the most important factors the municipality should consider."[20] The court listed seven factors:

(1) the cost of existing capital facilities;

(2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants);

(3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes);

(4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital in the future;

(5) the extent to which the newly developed properties are entitled to a credit

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[17] *Call I, supra*, at 220.

[18] *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980) (Call II), *rev'd on other grounds*, 727 P.2d 180 (Utah 1987).

[19] 631 P.2d at 903.

[20] Although the court in *Banberry* did not make consideration of these factors mandatory, the court subsequently mandated these factors in *Lafferty, supra*, where the court held that all seven factors must be considered.

because the municipality is requiring the developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality;

(6) extraordinary costs, if any, in servicing the newly developed properties; and

(7) the time-price differential inherent in fair comparisons of amounts paid at different times.[21]

In its analysis, the court drew a distinction between impacts that require expensive "central" facilities like water and sewer, and those that require "dispersed" resources such as parks and flood control. Although the standards of reasonableness, including the seven factors, are essentially the same for both, their application is different. The court explained:

> The measurement of "benefits conferred" may have a more significant impact on the reasonableness of park fees than on water connections. The central facilities that support water and sewer service would generally confer the same benefits in every part of the municipality, but the benefits conferred by recreational, flood control, or other dispersed resources may be measurably different on different parts of the municipality.[22]

Arguably, then, in the case of dispersed resources, the closer the resources to the new development, the better the case can be made that benefits are conferred on it. The court did not discuss those facilities or resources that might not be easily classified as "centralized" or "dispersed."

The court noted that, if legally challenged, municipalities needed to have flexibility "to deal with questions not susceptible to exact measurement."[23] It further held that the burden was on the municipality to first disclose the economic basis of its calculations to a challenger who would then have the burden of showing the failure to meet the standards of reasonableness.[24]

After determining that new facilities or services are warranted and that the fees are reasonable, the last prong of the rational nexus test is the extent to which the fee collected

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[21] *Banberry, supra* at 904.

[22] *Banberry, supra,* at 905.

[23] 631 P.2d at 904.

[24] *Id.*

benefits the development that pays for it. As noted in Stroud,[25] the courts "agree that capital facilities need not exclusively benefit the persons who pay for them." Or, as stated in *Call II*, "[T]his is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it."[26]

This Utah standard has been embraced by the U.S. Supreme Court. In *Nollan v. California Coastal Commission*,[27] the Court reviewed a state requirement to provide the public an easement across a beach as a condition to a permit to replace a small bungalow with a larger house. The Court ruled that the condition constituted an unconstitutional taking because it did not "substantially advance legitimate state interests."[28] The Court's reasoning focused on the closeness of the relationship between the nature of the required easement and the purpose for which it was required. The analysis is similar to the rational nexus test with its emphasis on the necessary clear relationship between development costs incurred and impact fees charged. The Court noted that its conclusion was consistent with the decisions of all state courts except California, and cited Utah's *Call II*.

Utah courts have also required that the funds received be placed in an account separate from the general revenue fund to ensure that they are spent for the purposes intended.[29] Finally, some courts may also require municipalities to refund the fees if they are not spent within a specified time.[30]

While a majority of Utah Supreme Court cases have involved municipalities, it can be reasonably assumed that this test would be applied similarly to counties. Utah counties (of the first and second class) have been granted authority in statute for provision of municipal services and functions in unincorporated areas, and to defray municipal-type costs by taxing property in such areas or by charging a service fee to any persons benefitting from the services and functions furnished.[31] These statutory provisions also require that all such funds, be they from taxes or fees, be placed in a special revenue fund of the county and used only for the rendering of the authorized types of services. A final requirement is that counties adopt and administer a budget for the municipal-type services "in the manner as the budget for general purposes ... either as a part of the general budget or separate from it."[32]

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[25] *Supra* at 32.

[26] 614 P.2d at 1259; *See also* 606 P.2d, at 220.

[27] 107 S. Ct. 1341 (1987).

[28] *Id.* at 3146, 3149.

[29] *See, Banberry, supra; Lafferty, supra; Call I, supra; Home Builder's Association of Greater Salt Lake, supra; and Weber Basin Home Builders Association, supra.*

[30] Stroud, *supra*.

[31] Utah Code Ann. Sec's 17-34-1 to 17-34-5 (1993).

[32] Utah Code Ann. Sec. 17-34-5(2)(a) (1993).

Summary

Court decisions have concluded that Utah municipalities and counties have judicial support for imposing impact fees on a wide range of development impacts provided that:

* the fee is reflective of the actual impact on services or facilities created by the proposed development;

* the amount of exaction is reasonable and fair; and

* the exaction is used to alleviate the need for which it was collected.

Chapter X.

WYOMING
DEVELOPMENT IMPACT FEES

Valerie E. Hart

Wyoming has historically experienced very low growth rates. As a result, Wyoming has correspondingly little case law and no statutory authority regarding impact fees. In fact, *Coulter v. City of Rawlins*,[1] is currently the only source of law regarding impact fees in Wyoming.

The *Coulter* court addressed whether a Wyoming municipality has authority under either existing statutes or home rule to charge connection fees to water and sewer lines. The court also addressed whether a municipality has the authority to require either the dedication of land or fees in lieu of dedication for parks. In both circumstances the court held that a municipality has implied authority to impose such exactions. It is important to note that a municipality's authority to impose connection fees is not derived from the state constitution's home rule provisions. In fact, the court expressly denied home rule as a basis of authority.[2] Instead, the court determined that authority for connection fees and dedication exists in a conglomeration of planning statutes.

Authority for Connection Fees

Authority to charge connection fees for water and sewer lines is derived from a compilation of statutory regulatory powers. These statutes delegate municipalities the authority to regulate land use matters,[3] construct, maintain, and provide sewer and water facilities,[4] create a fund in which revenues derived from the operation of a sewerage system are to be deposited,[5] charge rates for a sewerage system,[6] and pay for outstanding water bonds[7].

Tax vs. Fee

As in many other states, the Rawlins connection fees were challenged as being a

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1 662 P.2d 888 (Wy. 1983).

2 *Id.* at 895-96 (citing *Laramie Citizens for Good Government v. City of Laramie, Wyo.*, 617 P.2d 474 (1980).

3 Wyo. Stat. 15-1-601(d)(i), (1980 Repl. Vol.).

4 Wyo. Stat. 15-7-101, (1980 Repl. Vol.); Wyo. Stat. 15-7-502(a)(i), (1980 Repl. Vol.).

5 Wyo. Stat. 15-7-507(a), (1980 Repl. Vol.).

6 Wyo. Stat. 15-7-508 (1980 Repl. Vol.).

7 Wyo. Stat. 15-3-305(c), (1980 Repl. Vol.).

general tax which effectively circumvented limitations on the authority of municipalities to levy taxes.[8] The court looked to other jurisdictions to determine, "that such reasonable charges have been uniformly sustained as a service charge rather than a tax."[9]

Rational Nexus Test

Under *Coulter*, a municipality must apply the *Nollan* rational nexus test to the expenditure of exaction or impact fee funds. The court specifically approved the Rawlins ordinance which required funds from the connection fees to be earmarked and deposited in a separate account from which only expenses of the water and sewer development debts may be paid.[10]

Conclusion

Although *Coulter* adequately addressed the authority of a municipality to impose exactions and some impact fees, it left silent whether counties have similar authority to impose impact fees. As Wyoming encounters the same capital facilities budget crunch other states are now experiencing, the authority of counties to assess impact fees, as well as the extent to which municipalities may impose impact fees or exactions, will be tested.

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[8] *Id.* at 900.

[9] *Coulter*, 662 P.2d at 900.

[10] *Id.* at 894.

APPENDIX A

Impact Fee Ordinance for the
City of Leawood, Kansas

ARTICLE 5. K-150 CORRIDOR IMPACT FEE

13-501 SHORT TITLE. This Ordinance shall be known and cited as the "Leawood, Kansas Highway K-150 Corridor Impact Fee Ordinance". (Ord. 1027C; 1/4/88)

13-502 PURPOSE. A Highway K-150 corridor impact fee is imposed on new development in the K-150 corridor for the purpose of assuring that K-150 highway transportation improvements are available and provide adequate transportation system capacity to support new development while maintaining levels of transportation service on Highway K-150 deemed adequate by the City. The impact fee shall be imposed on all new development in the K-150 corridor and all fees collected shall be utilized solely and exclusively for transportation improvements in the K-150 corridor serving such new development. (Ord. 1027C; 1/4/88)

13-503 DEFINITIONS.

(a) Applicant: the property owner, or duly designated agent of the property owner, of land on which a building permit has been requested for non-residential development or on which final plat approval has been requested for residential development.

(b) Building: any enclosed structure designed or intended for the support, enclosure, shelter or protection of persons or property.

(c) Building Permit: the City permit required for new building construction and/or additions to buildings pursuant to Chapter 4 of the Code of the City of Leawood. The term "building permit" as used herein shall not be deemed to include permits required for remodelling, rehabilitation or other improvements to an existing structure, or to the rebuilding of a damaged structure, or to permits required for accessory uses.

(d) City: the City of Leawood, Kansas.

(e) City Council: The City Council of Leawood, Kansas.

(f) Development: the construction, erection, reconstruction or use of any principal building or structure for nonresidential use which requires issuance of a building permit; and the final platting of land for residential development.

(g) Director of Planning and Development: the enforcement official responsible for technical review of building and other construction plans, preliminary and final plats, issuance of building and land use permits, and enforcement of the various codes and ordinances relating to building and development in the City of Leawood.

(h) Dwelling: any building, or portion thereof, designed exclusively for residential occupancy and containing one or more dwelling units.

(i) Floor Area, Finished: the square foot area of all space within the outside line of exterior walls including the total area of all floor levels, but excluding porches, garages, or unfinished space in a basement or cellar.

(j) Governing Body: the legislative body of the City of Leawood, Kansas.

(k) Highway K-150 Corridor: all of that land within the north and south Highway K-150 reverse frontage roads, as set forth in the

Leawood Master Development Plan.

(l) Highway K-150 Corridor Impact Fee or Impact Fee: a pro rata regulatory fee imposed on all new development in the Highway K-150 corridor and required by the City as a condition of development approval and collected at final platting for residential development and at building permit issuance for nonresidential development to ensure that the necessary Highway K-150 corridor transportation improvements are or will be in place to accommodate the traffic generated by such new development.

(m) Highway K-150 Corridor Study: the Joint Land Use Study and Recommended Corridor Development Plan for Highway K-150 prepared by the Cities of Leawood, Olathe and Overland Park and Johnson County, Kansas.

(n) Impact Fee Rate: the amount of the applicable impact fee per trip generated by new development in the Highway K-150 corridor.

(o) Master Plan: the official, adopted comprehensive development plan for the City of Leawood, and amendments thereto, including the Major Street Plan.

(p) Nonresidential Development: all development other than residential development and public and quasi-public use, as herein defined.

(q) Property: a legally described parcel of land capable of development pursuant to applicable City ordinances and regulations.

(r) Property Owner: any person, group of persons, firm or firms, corporation or corporations, or any other entity having a proprietary interest in the land on which a building permit has been requested.

(s) Public and Quasi-Public Use: a development owned, operated or used by the City of Leawood, Kansas; any political subdivision of the State of Kansas, including but not limited to school districts; the State of Kansas, and any agencies or departments thereof; the Federal Government, and any agencies and departments thereof. For purposes of this Ordinance only, "places of worship" are hereby defined as quasi-public uses.

(t) Residential Development: the development of any property for a dwelling or dwellings as indicated by an application for final plat approval.

(u) Subdivision Regulations: Sections 17-101 through 17-506 inclusive, the Subdivision Regulations of the City of Leawood and including all duly adopted amendments thereof.

(v) Transportation Improvements: the development of Phase I roads and roadway improvements in the Highway K-150 corridor, which may include but which are not limited to, widening, paving, intersectional improvements, signalization, grading, acquisition of right-of-way, medians, turn lanes, curbs, gutters, signage, sidewalks, street lighting and ancillary facilities or any portion thereof pursuant to the City Master Plan and this Ordinance.

(w) Transportation Improvement Costs: the amounts spent, to be spent or authorized to be spent in connection with the provision of transportation improvements, which may include, but which are not limited to, funds spent on the planning, design, engineering, financing, acquisition of land or easements, construction, administration or

incidental expenses associated with the provision of transportation improvements.

(x) Zoning Ordinance: Section 15-101 through 15-3204 inclusive, the Zoning Ordinance of the City of Leawood and including all duly adopted amendments thereto. (Ord. 1027C; 1/4/88)

13-504 APPLICABILITY OF IMPACT FEE.

(a) This Ordinance shall be uniformly applicable to residential and nonresidential development, but not public and quasi-public uses, on property in the City of Leawood which is in the Highway K-150 corridor.

(b) This Ordinance shall be applicable to development occurring prior to, in conjunction with, or subsequent to the initiation of Phase I transportation improvements in the Highway K-150 corridor as set forth in the Master Plan and in Attachment "A" to this Ordinance; provided, however, that such transportation improvements are actually provided within a reasonable period of time following payment of the impact fee imposed by this Ordinance. (Ord. 1027C; 1/4/88)

13-505 IMPOSITION OF IMPACT FEE.

(a) No building permit for development to which this Ordinance is applicable shall be issued by the City nor shall any development subject to this Ordinance be finally approved by the City unless the applicant therefor or the owner of the subject property has paid the applicable impact fee in full in the amount and manner prescribed herein.

(b) The impact fee shall not be imposed on any residential development for which final plat approval had been granted by the City or on any nonresidential development for which a building permit has been issued by the City on or before the date of adoption of this Ordinance.

(c) Imposition of the impact fee does not alter, negate, supercede or otherwise affect any other requirements of City, County, State or federal legislation or regulations that may be applicable to a development, including City zoning and/or subdivision regulations that may impose transportation improvements requirements, right-of-way dedication requirements, and design and construction standards for local, collector or arterial streets.

(d) Upon receipt of an application for a preliminary plat, the Director of Planning and Development shall preliminarily calculate the amount of the impact fee due by multiplying the impact fee rate by the number of dwelling units or floor area (in square feet) for the proposed development for which subdivision approval is being sought. This calculation shall be an estimate only for the benefit of the applicant for subdivision approval and shall be subject to final determination at such time as the applicant requests final plat approval for residential development or a building permit for nonresidential development. (Ord. 1027C; 1/4/88)

13-506 AMOUNT OF IMPACT FEE.

(a) Impact Fee Rate: the impact fee rate shall be established by Resolution of the City Council initially upon the adoption of this

Ordinance, and thereafter as part of the annual review provided in Section 13-509 or at such other times as deemed necessary by the City. If no action is taken by the City Council to amend the impact fee rate, the rate then in effect shall remain in effect.

(b) Amount of Impact Fee: the amount of the impact fee per dwelling unit for residential development and the amount of the impact fee per square foot of floor area, finished for nonresidential development (by type) shall be established by Resolution of the City Council initially upon the adoption of this Ordinance, and thereafter as part of the annual review provided in Section 13-509 or at such other times as deemed necessary by the City. If no action is taken by the City Council to amend the impact fee amounts, the amounts then in effect shall remain in effect. (Ord. 1027C; 1/4/88)

13-507 COLLECTION OF IMPACT FEE.

(a) The Director of Planning and Development shall be responsible for the processing and collection of the applicable impact fee.

(b) Applicants for building permits for nonresidential development and applicants for final plat approval for residential development subject to this Ordinance must submit the following information:

(1) the number of dwelling units for residential development;

(2) the type and amount of finished floor area for nonresidential development (in square feet);

(3) both the number of dwelling units and the type and finished floor area of nonresidential development (in square feet) for a mixed-use project;

(4) relevant supporting documentation as may be required by the Director of Planning and Development.

(c) The Director of Planning and Development shall be responsible for determining that:

(1) the applicant has paid the applicable impact fee; or

(2) an appeal has been taken and a bond or other surety posted pursuant to Section 13-512.

(d) The Director of Planning and Development shall collect the applicable impact fee prior to issuance of a building permit for nonresidential development and prior to final plat approval for residential development. (Ord. 1027C; 1/4/88)

13-508 CALCULATION OF IMPACT FEE. Upon receipt of an application for a building permit or final plat approval for development subject to this Ordinance, the Director of Planning and Development shall calculate the amount of the applicable impact fee due in accordance with the following procedure:

(a) determination of the applicability of this ordinance to the subject property shall be made within three (3) working days of receipt of such application by the Director of Planning and Development;

(b) if this Ordinance is not applicable, the Director of Planning and Development shall indicate the inapplicability of this Ordinance on such application, shall notify the applicant of said inapplicability, and shall process the application in accordance with all

relevant City ordinances and regulations.

(c) if this Ordinance is determined to be applicable, the Director of Planning and Development shall:

(1) for residential development, multiply the applicable impact fee amount pursuant to Section 13-506(b) by the number of dwelling units for which final plat approval is being sought.

(2) for nonresidential development, multiply the applicable impact fee amount pursuant to Section 13-506(b) by the finished floor area (in square feet) of nonresidential development for which the building permit is being sought.

(3) for mixed use developments, the impact fee shall be separately calculated as set forth above for residential and nonresidential development (by type).

(4) the Director of Planning and Development shall calculate the amount of the impact fee due pursuant to the building permit application or application for final plat approval as submitted and the requirements of this Ordinance in effect at the time of submission.

(5) a building permit application or application for final plat approval must be resubmitted to the Director of Planning and Development and the amount of the impact fee recalculated if the applicant alters the proposed development by increasing the number of dwelling units, increasing the finished floor area of nonresidential development or changing the nonresidential use to a different use category.

(d) An applicant may file a petition for review with the City Administrator or his duly designated agent on forms provided by the City for the purpose of seeking administrative review of a decision by the Director of Planning and Development as to the applicability of the impact fee ordinance, the type of development, the number of dwelling units for residential development, the finished floor area (in square feet) of nonresidential development, or the amount of the impact fee due. Within one (1) month of the date of receipt of a petition for review, the City Administrator or his duly designated agent must provide the petitioner, in writing, with a decision on the request. The decision shall include the reasons for the decision. (Ord. 1027C; 1/4/88)

13-509 ANNUAL REVIEW.

(a) Prior to January 1, 1989 and every year thereafter, the City Administrator, or his duly authorized agent, shall prepare a report to the Governing Body on the Highway K-150 Corridor Transportation Impact Fees. In preparation of such report, the City Administrator or his duly designated agent shall review the following information:

(1) a statement from the City Treasurer summarizing impact fees collected and disbursed during the year;

(2) a statement from the City Engineer summarizing transportation improvements completed during the past year and planned for the next succeeding year.

(3) a statement from the Director of Planning and Development summarizing the type, location, timing and

amount of development for which building permits were issued or final plat approval granted in the year and summarizing the administration and enforcement of the impact fee.

(4) a statement and recommendation from the Planning Commission on any and all aspects of the Impact Fee and Highway K-150 corridor transportation improvements and land uses.

(b) The City Administrator's Report shall make recommendations, if appropriate, on amendments to the Ordinance; changes in the administration or enforcement of the Ordinance; changes in the impact fee rate; and changes in the Master Plan.

(c) The impact fee rate shall be reviewed annually. Based upon the City Administrator's Report and such other factors as the Governing Body deems relevant and applicable, the Governing Body may amend the impact fee rate by Resolution. If the Governing Body fails to take such action, the impact fee rate then in effect shall remain in effect. Nothing herein precludes the Governing Body or limits its discretion to amend the impact fee rate and/or the Impact Fee Ordinance at such other times as may be deemed necessary.

(d) In the annual review process, the Governing Body may take into consideration the following factors: inflation as measured by changes in an appropriate construction cost index used by the City; improvement and land acquisition cost increases as measured by actual experience during the year; changes in the design, engineering, location, or other elements of proposed transportation improvements; revisions to the Master Plan; changes in the anticipated land use mix and/or intensity of development in the Highway K-150 corridor; and such other factors as may be deemed relevant and appropriate. (Ord 1027C; 1/4/88)

13-510 RESTRICTIONS ON USE OF AND ACCOUNTING FOR IMPACT FEE FUNDS

(a) The funds collected by reason of the establishment of the Highway K-150 corridor transportation impact fee must be used solely for the purpose of funding transportation improvements as described herein and pursuant to the Master Plan or for reimbursement to the City for costs incurred in providing such transportation improvements

(b) Upon receipt of impact fees, the Director of Planning and Development shall transfer such funds to the City Treasurer who shall be responsible for the placement of such funds in a segregated, interest bearing account designated as the "Highway K-150 Corridor Transportation Impact Fee Account". All funds placed in said account and all interest earned therefrom shall be utilized solely and exclusively for the provision of transportation improvements as described herein in the K-150 corridor pursuant to the Master Plan and this Ordinance. At the discretion of the Governing Body, other revenues as may be legally utilized for such purposes may be deposited to such account. The City Treasurer shall establish adequate financial and accounting controls to ensure that impact fee funds disbursed from such accounts are utilized solely and exclusively for transportation improvements in the K-150 corridor as described herein or for reimbursement to the City of advances made from other revenue sources to fund such transportation improvements. Disbursement of funds from said accounts shall be authorized by the City at such times as are reasonably neces-

sary to carry out the purposes and intent of this Ordinance; provided, however, that funds shall be expended within a reasonable period of time, but not to exceed five (5) years from the date such funds are collected.

(c) The City Treasurer shall maintain and keep adequate financial records for said account which shall show the source and disbursement of all funds placed in or expended by such account.

(d) Interest earned by such account shall be credited to the account and shall be utilized solely for the purposes specified for funds of the account.

(e) Impact fee funds collected shall not be used to maintain or repair Highway K-150 nor to finance transportation improvements other than those described herein.

(f) The City may issue and utilize general obligation bonds, revenue bonds, revenue certificates or other certificates of indebtedness as are within the authority of the City in such manner and subject to such limitations as may be provided by law in furtherance of the financing and provision of the Highway K-150 transportation improvements as set forth in the Master Plan and this Ordinance. Funds pledged toward the retirement of such bonds or other certificates of indebtedness may include the impact fees and other City (and non-City) funds and revenues as may be allocated by the Governing Body. Impact fees paid pursuant to this Ordinance, however, shall be used solely and exclusively for transportation improvements as defined herein. (Ord. 1027C; 1/4/88)

13-511 REFUNDS.

(a) The current owner of property on which an impact fee has been paid may apply for a refund of such fee if:

(1) the City has failed to initiate transportation improvements within five (5) years of the date of payment of the impact fee; or

(2) the building permit for nonresidential development pursuant to which the impact fee has been paid has lapsed for noncommencement of construction; or

(3) the nonresidential development for which a building permit has been issued has been altered resulting in a decrease in the amount of impact fee due; or

(4) the final plat for a residential development pursuant to which an impact fee has been paid is vacated; or

(5) a replat for fewer residential lots or dwelling units is submitted on property pursuant to which an impact fee had been paid prior to final plat approval.

(b) Only the current owner of property may petition for a refund. A petition for refund must be filed within one year of the event giving rise to the right to claim a refund.

(c) The petition for refund must be submitted to the City Administrator or his duly designated agent on a form provided by the City for such purpose. The petition must contain: a statement that petitioner is the current owner of the property; a copy of the dated receipt for payment of the impact fee issued by the Director of Planning and Development; a certified copy of the latest recorded deed for the

subject property; and a statement of the reasons for which a refund is sought.

(d) Within one month of the date of receipt of a petition for refund, the City Administrator or his duly designated agent must provide the petitioner, in writing, with a decision on the refund request. The decision must include the reasons for the decision. If a refund is due petitioner, the City Administrator or his duly designated agent shall notify the City Treasurer and request that a refund payment be made to petitioner.

(e) Petitioner may appeal the determination of the City Administrator to the Governing Body. (Ord. 1027C; 1/4/88)

13-512 APPEALS. After a determination by the Director of Planning and Development of the applicability of the impact fee or the amount of the impact fee due, or after a determination by the City Administrator of the amount of refund due, if any, an applicant or a property owner may appeal to the Governing Body. The appellant must file a Notice of Appeal with the Governing Body within thirty (30) days following the determination by the Director of Planning and Development or City Administrator. If the Notice of Appeal is accompanied by a bond or other sufficient surety satisfactory to the City Attorney in an amount equal to the impact fee due as calculated by the Director of Planning and Development, the application shall be processed. The filing of an appeal shall not stay the collection of the impact fee due unless a bond or other sufficient surety has been filed. (Ord. 1027C; 1/4/88)

13-513 EFFECT OF IMPACT FEE ON ZONING AND SUBDIVISION REGULATIONS. This ordinance shall not affect, in any manner, the permissible use of property, density of development, design and improvement standards and requirements or any other aspect of the development of land or requirements for the provision of public improvements that may be imposed by the City pursuant to the zoning and subdivision regulations or other regulations of the City, which shall be operative and remain in full force and effect without limitation with respect to all such development. (Ord. 1027C; 1/4/88)

13-514 IMPACT FEE AS ADDITIONAL AND SUPPLEMENTAL REQUIREMENT. The Impact Fee is additional and supplemental to, and not in substitution of, any other requirements imposed by the City as a condition of the development of land or the issuance of building permits; provided, however, that the impact fee requirement and the payment of such fee by a developer for the transportation improvements described herein shall not be duplicative of other street improvement requirements imposed pursuant to City zoning, subdivision, planned unit development or other applicable ordinances or regulations and the payment of the Impact Fee shall not be used to meet such requirements. The Impact Fee requirement is intended to be consistent with and to further the objectives and policies of the Master Plan and to be coordinated with other City policies, ordinances and resolutions by which the City seeks to ensure the provision of adequate transportation capacity in conjunction with the development of land. In no event shall a property owner be obligated to pay an impact fee in an amount in excess of

the amount calculated pursuant to this Ordinance; but, provided that a property owner may be required, pursuant to City zoning and subdivision regulations to dedicate land and/or construct local, collector or arterial streets in addition to meeting the impact fee requirements set forth herein. (Ord. 1027C; 1/4/88)

13-515 VARIANCES AND EXCEPTIONS. Petitions for variances and exceptions to the application of this Ordinance shall be made to the City Administrator in accordance with procedures to be established by Resolution of the Governing Body. (Ord. 1027C; 1/4/88)

ARTICLE 6. SOUTH LEAWOOD TRANSPORTATION IMPACT FEE

13-601 SHORT TITLE. This Ordinance shall be known and cited as the "South Leawood Transportation Impact Fee Ordinance". (Ord. 1031C; 2/1/88)

13-602 PURPOSE. A Transportation Impact Fee is imposed on new development in South Leawood for the purpose of assuring that transportation improvements are available and provide adequate transportation system capacity to support new development while maintaining levels of transportation service deemed adequate by the City. The Impact Fee shall be imposed on all new development in South Leawood, except as may be otherwise provided herein, and all fees collected shall be utilized solely and exclusively for transportation improvements in South Leawood serving such new development. (Ord. 1031C; 2/1/88)

13-603 DEFINITIONS.

(a) Applicant: the property owner, or duly designated agent of the property owner, of land for which final plat approval has been requested for residential or nonresidential development or for which a building permit has been requested for nonresidential development for which no final plat is required.

(b) Building: any enclosed structure designed or intended for the support, enclosure, shelter or protection of persons or property.

(c) Building Permit: the City permit required for new building construction and/or additions to buildings pursuant to Chapter 4 of the Code of the City of Leawood. The term "building permit" as used herein shall not be deemed to include permits required for remodeling, rehabilitation or other improvements to an existing structure, or to the rebuilding of a damaged structure, or to permits required for accessory uses.

(d) City: the City of Leawood, Kansas.

(e) City Council: the City Council of Leawood, Kansas.

(f) Development: the final platting of land for residential and nonresidential development; and the construction, erection, reconstruction or use of any principal building or structure for nonresidential use which requires issuance of a building permit, but for which final plat approval is not required.

(g) Director of Planning and Development: the enforcement

official responsible for technical review of building and other construction plans, preliminary and final plats, issuance of building and land use permits, and enforcement of the various codes and ordinances relating to building and development in the City of Leawood.

(h) Dwelling: any building, or portion thereof, designed exclusively for residential occupancy and containing one or more dwelling units.

(i) Governing Body: the legislative body of the City of Leawood, Kansas.

(j) Impact Fee or South Leawood Transportation Impact Fee: a pro rata regulatory fee imposed on all new development in South Leawood and required by the City as a condition of development approval and collected at final platting for residential and nonresidential development for which a final plat is required or at building permit issuance for nonresidential development for which a final plat is not required to ensure that the necessary transportation improvements are or will be in place to accommodate the traffic generated by such new development.

(k) Impact Fee Coefficient: the distance, to the nearest 1/10 of a mile expressed as a decimal, from the principal access of the proposed development on a north-south arterial to the point at which the arterial intersects with Highway K-150; where the principal access of the proposed development is to an east-west arterial, the distance shall be measured from the intersection of the east-west arterial with the nearest north-south arterial to the intersection of the north-south arterial with Highway K-150.

(l) Impact Fee Rate: the amount of the applicable Impact Fee per gross acre of new development in South Leawood.

(m) Master Plan: the official, adopted comprehensive development plan for the City of Leawood, and amendments thereto, including the Major Street Plan.

(n) Nonresidential Development: all development other than residential development and public and quasi-public use, as herein defined.

(o) Property: a legally described parcel of land capable of development pursuant to applicable City ordinances and regulations.

(p) Property Owner: any person, group of persons, firm or firms, corporation or corporations, or any other entity having a proprietary interest in the land on which a building permit has been requested.

(q) Public and Quasi-Public Use: a development owned, operated or used by the City of Leawood, Kansas; any political subdivision of the State of Kansas, including but not limited to school districts; the State of Kansas, and any agencies or departments thereof; the Federal Government, and any agencies and departments thereof. For purposes of this Ordinance only, "places of worship" are hereby defined as quasi-public uses.

(r) Residential Development: the development of any property for a dwelling or dwellings as indicated by an application for final plat approval.

(s) South Leawood: all of that land within the City of Leawood lying south of the southern Highway K-150 reverse frontage road as set

forth in the Leawood Master Development Plan.

(t) Subdivision Regulations: Sections 17-101 through 17-506 inclusive, the Subdivision Regulations of the City of Leawood and including all duly adopted amendments thereof.

(u) Transportation Improvements: the development of off-site secondary arterial streets in South Leawood pursuant to the Major Street Plan, including but not limited to, widening, paving, intersectional improvements, signalization, grading, acquisition of right-of-way, medians, turn lanes, curbs, gutters, signage, sidewalks, street lighting, bridges and ancillary facilities or any portion thereof, except for the development of on-site or abutting arterial streets required pursuant to City subdivision, zoning, or planned development regulations and the collector portion of off-site arterial streets.

(v) Transportation Improvement Costs: the amounts spent, to be spent or authorized to be spent in connection with the provision of transportation improvements, which may include, but which are not limited to, funds spent on the planning, design, engineering, financing, acquisition of land or easements, construction, administration or incidental expenses associated with the provision of transportation improvements.

(w) Zoning Ordinance: Section 15-101 through 15-3204 inclusive, the Zoning Ordinance of the City of Leawood and including all duly adopted amendments thereto. (Ord. 1031C; 2/1/88)

13-604 APPLICABILITY OF IMPACT FEE.

(a) This Ordinance shall be uniformly applicable to residential and nonresidential development, but not public and quasi-public uses, on property in South Leawood which must be served by transportation improvements as a condition of development approval. For purposes of this Ordinance, property is "served by" transportation improvements when off-site secondary arterial street improvements are necessary in order to provide north-south and east-west access to and from the property via continuous, improved arterial streets. For purposes of this Ordinance, "improved arterial streets" means and refers to secondary arterial streets identified on the Major Street Plan and constructed to secondary arterial street standards pursuant to applicable City regulations.

(b) This Ordinance shall be applicable to development occurring prior to, in conjunction with, or subsequent to the initiation of transportation improvements in South Leawood as set forth in the Master Plan and Major Street Plan; provided, however, that such transportation improvements are actually provided within a reasonable period of time following payment of the Impact Fee imposed by this Ordinance. (Ord. 1031C; 2/1/88)

13-605 IMPOSITION OF IMPACT FEE.

(a) No building permit for development to which this Ordinance is applicable shall be issued by the City nor shall any development subject to this Ordinance be granted final plat approval by the City unless the applicant therefor or the owner of the subject property has paid the applicable impact fee in full in the amount and manner pre-

scribed herein, unless exempt or partially exempt pursuant to subsection (b) or Section 13-612 herein.

(b) The Impact Fee shall not be imposed on:

(1) residential or nonresidential development for which final plat approval had been granted by the City;

(2) nonresidential development for which a building permit has been issued by the City on or before the date of adoption of this ordinance; or

(3) residential development for which preliminary plat approval and rezoning has been granted by the City prior to November 2, 1987 and which approval and/or rezoning included stipulations imposed by the City which effectively prevented the applicant from submitting a final plat or plats for all or a portion of the proposed development prior to November 2, 1987.

(c) Imposition of the Impact Fee does not alter, negate, supercede or otherwise affect any other requirements of City, County, State or Federal legislation or regulations that may be applicable to a development, including City zoning and/or subdivision regulations that may impose on-site or abutting arterial street improvement requirements, local or collector street improvement requirements, right-of-way dedication requirements, and/or design and construction standards for local, collector or arterial streets. Provided, however, that an applicant for development approval shall be eligible for a credit for the provision of arterial street improvements pursuant to Section 13-613 herein.

(d) Upon receipt of an application for a preliminary plat, the Director of Planning and Development shall preliminarily calculate the amount of the Impact Fee due by multiplying the Impact Fee rate by the number of gross acres in the proposed development for which subdivision approval is being sought and multiplying the product by the applicable Impact Fee coefficient. This calculation shall be an estimate only for the benefit of the applicant for subdivision approval and shall be subject to final determination at such time as the applicant for development requests final plat approval or a building permit is requested for nonresidential development for which a final plat is not required. (Ord. 1031C; 2/1/88)

13-606 IMPACT FEE RATE. The Impact Fee Rate shall be established by Resolution of the City Council initially upon the adoption of this Ordinance, and thereafter as part of the annual review provided in Section 13-609 or at such other times as deemed necessary by the City. If no action is taken by the City Council to amend the Impact Fee Rate, the rate then in effect shall remain in effect. (Ord. 1031C; 2/1/88)

13-607 COLLECTION OF IMPACT FEE.

(a) The Director of Planning and Development shall be responsible for the processing and collection of the applicable Impact Fee.

(b) Applicants for development approval subject to this Ordi-

nance must submit the following information:

(1) the gross acreage of property for which approval is being sought;

(2) the principal access of the development to an arterial street;

(3) the distance from the principal access point to Highway 150;

(4) relevant supporting documentation as may be required by the Director of Planning and Development.

(c) The Director of Planning and Development shall be responsible for determining that:

(1) the applicant has paid the applicable Impact Fee; or

(2) the applicant is exempt pursuant to Section 13-612; or

(3) an appeal has been taken and a bond or other surety posted pursuant to Section 13-614.

(d) The Director of Planning and Development shall collect the applicable Impact Fee prior to final plat approval or prior to building permit issuance for nonresidential development for which final plat approval is not required. (Ord. 1031C; 2/1/88)

13-608 CALCULATION OF IMPACT FEE. Upon receipt of an application for a building permit or final plat approval for development subject to this Ordinance, the Director of Planning and Development shall calculate the amount of the applicable Impact Fee due in accordance with the following procedure:

(a) determination of the applicability of this ordinance to the subject property shall be made within three (3) working days of receipt of such application by the Director of Planning and Development;

(b) if this Ordinance is not applicable, the Director of Planning and Development shall indicate the inapplicability of this Ordinance on such application, shall notify the applicant of said inapplicability, and shall process the application in accordance with all relevant City ordinances and regulations.

(c) if this Ordinance is determined to be applicable, the Director of Planning and Development shall:

(1) Determine the gross acreage of the proposed development;

(2) determine the applicable Impact Fee coefficient;

(3) determine the applicability of credit, if any;

(4) calculate the amount of the Impact Fee due pursuant to the building permit application or application for final plat approval as submitted and the requirements of this Ordinance in effect at the time of submission.

(d) An applicant may file a petition for review with the City Administrator or his duly designated agent on forms provided by the City for the purpose of seeking administrative review of a decision by the Director of Planning and Development as to the applicability of the Impact Fee Ordinance, the gross acreage of the subject development, the applicable Impact Fee coefficient, or the amount of the Impact Fee due. Within one (1) month of the date of receipt of a petition for review, the City Administrator or his duly designated agent must provide the petitioner, in writing, with a decision on the

request. The decision shall include the reasons for the decision. (Ord. 1031C; 2/1/88)

13-609 ANNUAL REVIEW.

(a) Prior to January 1, 1989 and every year thereafter, the City Administrator, or his duly authorized agent, shall prepare a report to the Governing Body on the South Leawood Transportation Impact Fee. In preparation of such report, the City Administrator or his duly designated agent shall review the following information:

(1) a statement from the City Treasurer summarizing Impact Fees collected and disbursed during the year;

(2) a statement from the City Engineer summarizing transportation improvements completed during the past year and planned for the next succeeding year;

(3) a statement from the Director of Planning and Development summarizing the type, location, timing and amount of development for which building permits were issued or final plat approvals were granted in the year and summarizing the administration and enforcement of the Impact Fee;

(4) a statement and recommendation from the Planning Commission on any and all aspects of the South Leawood Transportation Impact Fee, and transportation improvements and planned land use in South Leawood.

(b) The City Administrator's Report shall make recommendations, if appropriate, on amendments to the Ordinance; changes in the administration or enforcement of the Ordinance; changes in the Impact Fee Rate; and changes in the Master Plan or Major Street Plan.

(c) The Impact Fee Rate shall be reviewed annually. Based upon the City Administrator's Report and such other factors as the Governing Body deems relevant and applicable, the Governing Body may amend the impact fee rate by Resolution. If the Governing Body fails to take such action, the Impact Fee Rate then in effect shall remain in effect. Nothing herein precludes the Governing Body or limits its discretion to amend the Impact Fee Rate and/or the Impact Fee Ordinance at such other times as may be deemed necessary.

(d) In the annual review process, the Governing Body may take into consideration the following factors: inflation as measured by changes in an appropriate construction cost index used by the City; construction cost increases as measured by actual experience during the year; changes in the design, engineering, location, or other elements of proposed transportation improvements; revisions to the Master Plan and Major Street Plan; changes in the anticipated land use mix and/or intensity of development in South Leawood; and such other factors as may be deemed relevant and appropriate. (Ord. 1031C; 2/1/88)

13-610 RESTRICTIONS ON USE OF AND ACCOUNTING FOR IMPACT FEE FUNDS.

(a) The funds collected by reason of the establishment of the South Leawood Transportation Impact Fee must be used solely for the purpose of funding transportation improvements as described herein and pursuant to the Master Plan and Major Street Plan or for reimbursement to the City for costs incurred in providing such transportation im-

provements.

(b) Upon receipt of Impact Fees, the Director of Planning and Development shall transfer such funds to the City Treasurer who shall be responsible for the placement of such funds in a segregated, interest bearing account designated as the "South Leawood Transportation Impact Fee Account". All funds placed in said account and all interest earned therefrom shall be utilized solely and exclusively for the provision of transportation improvements as described herein in South Leawood pursuant to the Master Plan and this Ordinance. At the discretion of the Governing Body, other revenues as may be legally utilized for such purposes may be deposited to such account. The City Treasurer shall establish adequate financial and accounting controls to ensure that Impact Fee funds disbursed from such accounts are utilized solely and exclusively for transportation improvements in South Leawood as described herein or for reimbursement to the City of advances made from other revenue sources to fund such transportation improvements. Disbursement of funds from said accounts shall be authorized by the City at such times as are reasonably necessary to carry out the purposes and intent of this Ordinance; provided, however, that funds shall be expended within a reasonable period of time, but not to exceed five (5) years from the date such funds are collected.

(c) The City Treasurer shall maintain and keep adequate financial records for said account which shall show the source and disbursement of all funds placed in or expended by such account.

(d) Interest earned by such account shall be credited to the account and shall be utilized solely for the purposes specified for funds of the account.

(e) Impact Fee funds collected shall not be used to maintain or repair transportation improvements nor to finance improvements other than those described herein.

(f) The City may issue and utilize general obligation bonds, revenue bonds, revenue certificates or other certificates of indebtedness as are within the authority of the City in such manner and subject to such limitations as may be provided by law in furtherance of the financing and provision of the South Leawood transportation improvements as set forth in the Master Plan and this Ordinance. Funds pledged toward the retirement of such bonds or other certificates of indebtedness may include the Impact Fees and other City (and non-City) funds and revenues as may be allocated by the Governing Body. Impact Fees paid pursuant to this Ordinance, however, shall be used solely and exclusively for transportation improvements as defined herein. (Ord. 1031C; 2/1/88)

13-611 REFUNDS.

(a) The current owner of property on which an Impact Fee has been paid may apply for a refund of such fee if:

(1) the City has failed to initiate transportation improvements within five (5) years of the date of payment of the impact fee; or

(2) the final plat of an approved development is vacated; or

(3) the building permit for an approved nonresidential de-

velopment for which the Impact Fee has been paid subsequently lapses for noncommencement of construction.

(b) Only the current owner of property may petition for a refund. A petition for refund must be filed within one year of the event giving rise to the right to claim a refund.

(c) The petition for refund must be submitted to the City Administrator or his duly designated agent on a form provided by the City for such purpose. The petition must contain: a statement that petitioner is the current owner of the property; a copy of the dated receipt for payment of the Impact Fee issued by the Director of Planning and Development; a certified copy of the latest recorded deed for the subject property; and a statement of the reasons for which a refund is sought.

(d) Within one month of the date of receipt of a petition for refund, the City Administrator or his duly designated agent must provide the petitioner, in writing, with a decision on the refund request. The decision must include the reasons for the decision. If a refund is due petitioner, the City Administrator or his duly designated agent shall notify the City Treasurer and request that a refund payment be made to petitioner.

(e) Petitioner may appeal the determination of the City Administrator to the Governing Body. (Ord. 1031C; 2/1/88)

13-612 EXEMPTIONS.

(a) A property owner shall be exempt from the Impact Fee otherwise due if:

(1) access to and from the applicable development can be obtained via a continuous, improved arterial street;

(2) the property owner has constructed, escrowed money for the construction of, or established a benefit district for the construction of "transportation improvements" necessary to ensure that access to and from the applicable development can be obtained via a continuous, improved arterial street concurrent with development; or

(3) the property owner has agreed, as a condition of preliminary or final plat approval or rezoning, to construct, escrow money for the construction of, or to establish a benefit district for the construction of "transportation improvements" necessary to ensure that access to and from the applicable development can be obtained via a continuous, improved arterial street concurrent with development.

(b) An exemption may only be given for final plat approval or for building permits for nonresidential development for which no final plat is required on the subject property for which access, as described in subsection (a) above, is assured.

(c) An applicant must apply for an exemption in conjunction with final plat approval or at the time of application for a building permit for nonresidential development for which no final plat is required. The applicant shall file a petition for exemption with the City Administrator or his duly designated agent on a form provided by the City for such purpose. The petition shall contain: a statement by the property owner or a duly designated agent of the property owner

certifying that petitioner is the current owner of the property; documentary evidence of the ownership of the property at the time of occurrence of the event giving rise to the claim for exemption; documentary evidence of appropriate access, as described in subsection (a) above with respect to the affected property; a certified copy of the latest recorded deed for the subject property; and a statement of the reasons for which the exemption is being sought. Within one month of the date of receipt of a petition for exemption, the City Administrator or his duly designated agent must provide the petitioner, in writing, with a decision on the exemption request; provided, however, that a decision on a petition for exemption filed in conjunction with a final plat shall be made by the City Administrator concurrently with Planning Commission action on the final plat. The decision must include the reasons for the decision. Upon making the decision, the City Administrator or his duly designated agent shall notify the petitioner in writing. Petitioner may appeal the determination of the City Administrator to the Governing Body.

(d) An applicant may apply for an advance determination of exemption at any time by filing a petition for same with the City Administrator or his duly designated agent on a form provided by the City for such purpose. The petition shall contain the information required and shall be processed in accordance with the procedure set forth in Section 13-612(c) above. If an advance determination has been granted, the applicant shall submit evidence of same at the time of application for final plat approval or, for nonresidential development for which no final plat is required, at the time of application for building permit, thereby permitting concurrent action by the City. (Ord. 1031C; 2/1/88)

13-613 CREDITS.

(a) Any property owner who constructs, escrows money with the City for the construction of, or agrees to participate in a benefit district for the construction of an abutting arterial street to secondary arterial street standards as established by the City shall be eligible for a credit against the amount of the Impact Fee otherwise due.

(b) The amount of the credit shall be equal to the difference between collector and secondary arterial front-foot street costs, as determined by the City, multiplied by the length (in front feet) of the abutting arterial street as improved by the property owner; provided, however, that the credit shall not exceed the amount of the otherwise applicable Impact Fee.

(c) The Director of Planning and Development shall determine the applicability and amount of a credit based upon information to be submitted by the applicant including, but not limited to: a statement by the property owner or a duly designated agent of the property owner certifying that the applicant is the current owner of the property; documentary evidence of the ownership of the property at the time of occurrence of the event giving rise to the claim for a credit; a certified copy of the latest recorded deed for the subject property; and a statement of the reasons for which the credit is being sought. (Ord. 1031C; 2/1/88)

13-614 APPEALS. After a determination by the Director of Planning and Development of the applicability of the Impact Fee or the amount of the Impact Fee due, including credits, or after a determination by the City Administrator of the amount of refund due, if any, or the applicability of an exemption, an applicant or a property owner may appeal to the Governing Body. The appellant must file a Notice of Appeal with the Governing Body within thirty (30) days following the determination by the Director of Planning and Development or City Administrator. If the Notice of Appeal is accompanied by a bond or other sufficient surety satisfactory to the City Attorney in an amount equal to the Impact Fee due as calculated by the Director of Planning and Development, the application shall be processed. The filing of an appeal shall not stay the collection of the Impact Fee due unless a bond or other sufficient surety has been filed. (Ord. 1031C; 2/1/88)

13-615 EFFECT OF IMPACT FEE ON ZONING AND SUBDIVISION REGULATIONS. This ordinance shall not affect, in any manner, the permissible use of property, density of development, design and improvement standards and requirements or any other aspect of the development of land or requirements for the provision of public improvements that may be imposed by the City pursuant to the zoning and subdivision regulations or other regulations of the City, which shall be operative and remain in full force and effect without limitation with respect to all such development. (Ord. 1031C; 2/1/88)

13-616 IMPACT FEE AS ADDITIONAL AND SUPPLEMENTAL REQUIREMENT. The Impact Fee is additional and supplemental to, and not in substitution of, any other requirements imposed by the City as a condition of the development of land or the issuance of building permits; provided, however, that the Impact Fee requirement and the payment of such fee by a developer for the transportation improvements described herein shall not be duplicative of other street improvement requirements imposed pursuant to City zoning, subdivision, planned unit development or other applicable ordinances or regulations and the payment of the Impact Fee shall not be used to meet such requirements. The Impact Fee requirement is intended to be consistent with and to further the objectives and policies of the Master Plan and Major Street Plan and to be coordinated with other City policies, ordinances and resolutions by which the City seeks to ensure the provision of an adequate street system in conjunction with the development of land. In no event shall a property owner be obligated to pay an Impact Fee in an amount in excess of the amount calculated pursuant to this Ordinance; but, provided that a property owner may be required, pursuant to City zoning and subdivision regulations to dedicate land and/or to construct or escrow money for the construction of local and collector streets and on-site and abutting arterial streets, to collector street standards, in addition to meeting the Impact Fee requirements set forth herein. (Ord. 1031C; 2/1/88)

13-617 VARIANCES AND EXCEPTIONS. Petitions for variances and exceptions to the application of this Ordinance shall be made to the City Administrator in accordance with procedures to be established by

Resolution of the Governing Body. (Ord. 1031C; 2/1/88)

APPENDIX B

A Survey of State Impact Fees, Martin L. Leitner & Susan P. Schoettle, Urban Lawyer.

TABLE 1: Analysis of State Impact Fee Legislation

State Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identifica of Deficien Requir
Arizona Cities ARIZ. REV. STAT. ANN. § 9-463.05 (Supp. 1993).	Necessary public services. § 9-463.05(A).	No	At time of building permit issuance for residential development. § 9-463.05(B)(3).	Separate funds by facility type. § 9-463.05(B)(2).	Not specified.	No	No	No
Arizona Counties ARIZ. REV. STAT. ANN. § 11-1101 *et seq.* (Supp. 1993)	Roads, sewer, water, neighborhood parks, flood control. § 11-1101(14).	No	Imposed at building permit issuance, collected at issuance of either building permit of certifate of occupancy. § 11-1108(A).	Separate funds by facility type. § 11-1105(A)(3).	Must encumber within 5 years of date of collection or refund due to property owner upon filing of claim to refund (1 year claim period). §11-1105(A).	Yes, must cover current fiscal year plus 4 years. §11-1101(8).	Yes. § 11-1105(A).	Yes, as pa of facilitie needs asse ment and §11-1106.
California CAL. GOV'T CODE § 66000 *et seq.* (West Supp. 1993).	Unrestricted.	No	Collected from residential development at final inspection or issuance of certificate of occupancy, whichever occurs first; collection may occur earlier if fees charged for facilities in CIP or fees are for reimbursement. (Conditions imposed pursuant to Subdivision Map Act must be imposed at earliest possible time. Cal. Gov't Code § 65961.) § 66007	Separate funds by facility type to avoid commingling of fees with other revenues and funds; and annual report required. § 66006.	Must encumber or expend within five years of date of deposit or refund current property owners unless local agency makes findings to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and purpose for which it was charged. § 66001(d) & (e).	No, however permitted and may allow collection of fees prior to issuance of certificate of occupancy. § 66002 & § 66007(a).	No.	No.

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identifi of Deficie Requ
Colorado COLO. REV. STAT. § 29-1-801 *et seq.* (supp. 1992).	Unrestricted.	No.	Not specified.	Separate fund or account by facility type or by aggregate or individual land development at discretion of local government. § 29-1-803.	Not specified.	No.	No.	No.
Georgia GA. CODE ANN. § 36-71-2(16) (Supp. 1992).	Roads, sewer, water, parks, stormwater, flood control, public safety, libraries. § 36-71-2(16).	Yes, advisory capacity only. § 36-71-5.	Collected no earlier than building permit issuance except for stormwater/ flood control facilities (grading permit). § 36-71-4(d).	Separate funds by facility type and service area. § 36-71-8(a).	Must refund upon application of property owner if not encumbered within 6 years and service not provided. § 36-71-9(1).	Yes, as part of adopted Comprehensive Plan. § 36-71-3(a).	Yes. § 36-71-4(b).	No.
Hawaii HAW. REV. STAT. § 46-141 *et seq.* (Supp. 1992).	Limited to facility types identified in a county comprehensive plan or a facility needs assessment study. § 46-142(b).	No.	Imposed prior to issuance of grading or building permit, collection prior to or at building permit issuance. § 46-146.	Separate trust funds by benefit area (portion of fees that recoupe cost may be transferred to any appropriate fund). § 46-144(1).	Must encumber or expend within 6 years of date of collection or refund upon application of developer or successor in interest. § 46-144(5).	Yes, unless fee is recouping previous government investment. § 46-144(3).	Yes, may be county-wide if reasonable. § 46-144(2).	Yes, as of facili needs as ment stu § 46-143

New Jersey N.J. STAT. ANN. § 40:55D-42 (West 1991)	Roads, sewer, water, drainage. § 40:55D-42.	No	Imposed as condition for approval of subdivision or site plan; collection time not specified. § 40:55D-42.	Not specified.	Not specified.	Yes, circulation and/or comprehensive utility service plan. § 40:55D-42.	Yes, facilities within a common and related area. § 40:55D-42.	No.
New Mexico 1993 New Mexico Laws Ch. 122.	Roads, sewer, water, stormwater, drainage, flood control, parks, fire, police, rescue. § 2(D).	Yes, advisory only. § 37.	Imposition at earliest possible time; collection at latest possible time but no earlier than issuance of building permit. § 8.	Separate accounts by facility type and service area. § 16.	Refund upon request of property owner required if facility construction not complete within 7 years after collection. § 17.	Yes, based on system-wide land use assumptions for period of at least five years. § 2.	Yes, may include extraterritorial jurisdiction of municipality. § 20.	Yes, as part of CIP. § 6.
Oregon OR. REV. STAT. § 223.297 *et seq.* (1991).	Roads, sewer, water, drainage, flood control, parks. §223.299(1)(a).	No.	Not specified.	Separate accounts by facility type. § 223.311.	Not specified.	Yes. § 223.309.	No.	No.
Pennsylvania PA. STAT. ANN. tit. 53, § 10501-A *et seq.* (Supp. 1992).	Roads. § 10501-A.	Yes, advisory only. § 10504-A(b).	Imposition at preliminary or tentative application for development, subdivision or PRD; collection at issuance of building permit. § 10505-A(c) & (e).	Separate accounts by service area. § 10505-A(d).	Refund required if construction of improvements not commenced within 3 years of date shown in CIP. § 10505-A(g).	Yes, must reflect land use assumptions projected over period of at least five years. § 10504-A(a).	Yes, not to exceed 7 square miles. § 10502-A.	Yes, as part of CIP. § 10504-A(d).

TABLE 1: Analysis of State Impact Fee Legislation (*Continued*)

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
Texas TEX. LOCAL GOV'T CODE ANN. § 395.001 *et seq.* (West Supp. 1993).	Roads, sewer, water, stormwater, drainage, flood control. § 395.001(1).	Yes, advisory only. § 395.058.	For fees adopted after legislation enacted, imposition before or at recordation of plat; collection at time of plat recordation, building permit or certificate of occupancy issuance, or at time of connection. § 395.016.	Separate accounts by facility type and service area. § 395.024.	Refund to property owner required if facilities available service is denied, or if facilities construction has not commenced within 2 years, or if service is not provided within 5 years, or if fees not expended within 10 years after date of collection. § 395.025.	Yes, based on land use assumptions projected over a period of at least 10 years. § 395.046.	Yes, for roads must not exceed distance equal to average trip length but in no case more than 3 miles. § 395.001(a).	Yes, as part of CIP. § 395.014(a).
Vermont VT. STAT. ANN. tit. 24, § 5200 *et seq.* (1992).	Unrestricted.	No.	Imposition as condition of issuance of zoning or subdivision permit; collection may be prior to issuance of zoning or subdivision permit, installment payments authorized. § 5204.	Annual accounting required. § 5203(e).	Expend within 6 years of collection or refund to property owner required. § 5203(e).	Yes. § 5203(a)(1).	No.	No.
Virginia VA. CODE ANN. § 15.1-498.1 *et seq.* (Michie 1989 & Supp. 1992).	Roads. § 15.1-498.2.	Yes. § 15.1-498.2.	Imposition before or at time of site plan or subdivision approval; collection at issuance of certificate of occupancy, installment payment plan authorized. § 15.1-498.6.	Separate accounts by service area. § 15.1-498.9.	Refund required if facility construction not completed within 15 years. § 15.1-498.10.	Yes, adopted as amendment to comprehensive plan or 6 year plan for County secondary roads. § 15.1-498.4.	Yes. § 15.1-498.3.	Yes, as part of CIP. §15.1-498.4(1).

Idaho IDAHO CODE § 67-8201 *et seq* (Supp. 1992).	Roads, sewer, water, parks, stormwater, flood control, public safety. § 67-8203(24).	Yes, advisory capacity only § 67-8205	Collection no earlier than commencement of construction, issuance of building permit, or issuance of manufactured home installation permit, or as agreed to by developer. § 67-8204(3).	Separate accounts, withing the capital projects fund, by facility type and service area. § 67-8210(1).	Must be expended within 10 years of date of collection (20 years for sewer and drainage fees), local government. § 67-8210(4) & § 67-8211.	Yes, must be based on projections of land uses and population over at least a 20-year period. § 67-8206	Yes. § 67-8203(26).	Yes, as part of the CIP § 67-8208.
Illinois 605 ILL. COMP. STAT. ANN. § 5-901 *et seq.* (Smith-Hurd 1993)	Roads directly affected by traffic demands generated by the new development charged ("specifically and uniquely attributable"). § 5-904.	Yes, advisory only. § 5-905(b) & § 5-907 to 909.	Imposed at final plat approval or building permit issuance if no plat approval necessary, collection at building permit issuance for one single-family unit construction, at certificate of occupancy issuance for all other development, 10-year installment payment plan authorized. § 5-912.	Separate accounts by service area. § 5-913.	Must be encumbered within 5 years of date of collection or refund to fee payer, or successor in interest, upon submittal of petition. § 5-916.	Yes, comprehensive road improvement plan based on land use assumptions projected over 10-year period. § 5-905(h) & § 5-910.	Yes, may be jurisdiction-wide if reasonable. § 5-903.	Yes, as part of comprehe sive road im provement plan. § 5-910(1).
Indiana IND. CODE ANN. § 36-7-4-1300 *et seq.* (Burns Supp. 1992).	Roads, sewer, water, parks, drainage, flood control. § 36-7-4-1308.	Yes, advisory only. §36-7-4-1312(b).	Imposed no later than 30 days after issuance of location permit or after submittal of development plan, whichever is earlier; collection upon issuance of building permit if fees total less than $5,000, ordinance must pro[illegible]e for installment payment plan. § 36-7-4-1322 & § 36-7-4-1324.	Separate accounts by facility type and impact zone. § 36-7-4-1329(d).	Refund upon application of fee payer required if facilities for which fee is imposed not completed within 2 years after date indicated in zone plan, if fee payer is unreasonably denied use of benefit of facilities, or if local government has failed to make reasonable progress on construction by the date specified in the zone plan or within 6 years of issuance of building permit, whichever is earlier. § 36-7-4-1332.	Yes, zone improvement plan based on projected development over 10-year period. § 36-7-4-1318(b).	Yes, "impact zones." § 36-7-4-1315	Yes, as part of zone improvement plan. Deficiencies mus be corrected within 10 years. § 36-7-4-131

TABLE 1: Analysis of State Impact Fee Legislation (*Continued*)

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	[illegible] of [illegible] Required
Maine ME. REV. STAT. ANN. tit. 30-A, § 4354 (West Supp. 1992).	Roads, sewer, water, parks, fire protection, solid waste. § 4354(1)(A).	No.	Not specified.	Must be segregated from general revenues. § 4354(2)(B).	Must expend funds according to reasonable schedule established in comprehensive plan or refund fees. § 4354(2)(D).	Yes, as part of comprehensive plan. § 4354(2)(C).	No.	No
Nevada NEV. REV. STAT. § 278B.010 *et seq.* (1991).	Roads, sewer, water, stormwater, drainage. § 278B.020.	Yes, advisory only. § 278B.150.	Not specified.	Not specified.	Refund upon request of property owner required if construction on facilities in CIP not initiated within 5 years or fees not expended within 10 years. § 278B.260.	Yes, including facilities needs for period of 10 years or less based on land use assumptions projected for at least 10 years. § 278B.170.	Yes. § 278B.100	Yes, as pa of CIP § 278B.1
New Hampshire N.H. REV. STAT. ANN. § 674:21 (Supp. 1992).	Roads, sewer, water, parks, stormwater, drainage, flood control, municipal office facilities, solid waste, public safety, libraries. § 674:21(V).	No.	Imposed prior to or as condition for issuance of building permit; collection as condition for issuance of certificate of occupancy. § 674:21(V)(d).	Must be segregated from general fund and accounted for by fee. § 674:21(V)(c).	Must expend within 6 years of collection or within reasonable time established by ordinance (not to esceed 6 years), or refunds. § 674:21(V)(e).	Yes. § 674:21(V)(b).	No.	No

Washington WASH. REV. CODE ANN. § 82.02.050 *et seq.* (West Supp. 1993).	Roads, parks, schools, fire protection. §82.02.090(7).	No.	Imposition as condition of development approval; collection not specified. § 82.02.090(3).	Separate accounts by facility type. § 82.02.070(1).	Encumber or expend within 6 years of date of collection or refund to property owner. § 82.02.070(3).	Yes, as part of comprehensive plan. § 82.02.050(4).	Yes. §82.02.060(6).	Yes. §82.02.050(4)(a).
West Virginia W. VA. CODE § 7-20-1 *et seq.* (1993).	Roads, sewer, water, parks, stormwater, drainage, flood control, police, fire protection, emergency medical rescue, schools. § 7-20-3(a).	No.	Levied as a condition of issuance of site plan or subdivision approval, issuance of building permit, approval of certificate of occupancy, or other development or construction approval. § 70-20-3(g).	Separate account by facility type; annual accounting required. § 7-20-8(d).	Expend within 6 years from date of collection or refund upon application of property owner. § 7-20-9(a).	Yes. § 7-20-6(a)(7).	Yes, restricted to areas wherein development projects are located. § 7-20-8(a).	Yes, as part of CIP. § 7-20-7(b).

APPENDIX C

Colorado Statute on Impact Fee Accounting
(Colo. Rev. Stat. 29-1-801 - 804)

LAND DEVELOPMENT CHARGES

§ 29-1-801. Legislative declaration

The general assembly hereby finds and determines that statewide standards governing accountability for land development charges imposed by local governments to finance capital facilities and services are necessary and desirable to ensure reasonable certainty, stability, and fairness in the use to which moneys generated by such charges are put and to promote public confidence in local government finance. The general assembly therefore declares that this part 8 is a matter of statewide concern.

Added by Laws 1990, H.B.90-1152, § 1, eff. Jan. 1, 1991.

§ 29-1-802. Definitions

As used in this part 8, unless the context otherwise requires:

(1) "Capital expenditure" means any expenditure for an improvement, facility, or piece of equipment necessitated by land development which is directly related to a local government service, has an estimated useful life of five years or longer, and is required by charter or general policy of a local government pursuant to resolution or ordinance.

(2) "Land development" means any of the following:

(a) The subdivision of land;

(b) Construction, reconstruction, redevelopment, or conversion of use of land or any structural alteration, relocation, or enlargement which results in an increase in the number of service units required; or

(c) An extension of use or a new use of land which results in an increase in the number of service units required.

(3) "Land development charge" means any fee, charge, or assessment relating to a capital expenditure which is imposed on land development as a condition of approval of such land development, as aa prerequisite to obtaining a permit or service. Nothing in this section shall be construed to include sales and use taxes, building or plan review fees, building permit fees, consulting or other professional review charges, or any other regulatory or administrative fee,

charge, or assessment.

(4) "Local government" means a county, city and county, municipality, service authority, school district, local improvement district, law enforcement district, water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district, any other kind of municipal, quasi-municipal, or public corporation, or any agency or instrumentality thereof organized pursuant to law.

(5) "Service unit" means a standard unit of measure of consumption, use, generation, or discharge of the services provided by a local government.

Added by laws 1990, H.B.90-1152, § 1, eff. Jan. 1, 1991.

§ 29-1-803. Deposit of land development charge

(1) Except as otherwise provided in this section, all moneys from land development charges collected, including and such moneys collected but not expended prior to January 1, 1991, shall be deposited, or, if collected for another local government, transmitted for deposit, in an interest-bearing account which clearly identifies the category, account, or fund of capital expenditure for which such charge was imposed. Each such category, account, or fund shall be accounted for separately. The determination as to whether the accounting requirement shall be by category, account, or fund and by aggregate or individual land development shall be within the discretion of the local government. Any interest or other income earned on moneys deposited in said interest-bearing account shall be credited to the account.

(2) Any county, city and county, or municipality shall be required to comply with the provisions of subsection (1) of this section requiring the deposit or transmittal of land development charges collected but not expended prior to January 1, 1991, only if such land development charges were collected on or after January 1, 1986.

Added by Laws 1990, H.B.90-1152, § 1, eff. Jan. 1, 1991.

§ 29-1-804. Exceptions--state-mandated charges

This part 8 shall not apply to rates, fees, charges, or other requirements which a local government is expressly required to collect by state statute and which are not imposed to fund programs, services, or facilities of the local government.

Added by Laws 1990, H.B.90-1152, § 1, eff. Jan. 1, 1991.