Uses of Fees or Alternatives to Fund Transit

DETAILS

35 pages | | PAPERBACK
ISBN 978-0-309-42957-3 | DOI 10.17226/23068

AUTHORS

December 2008

TRANSIT COOPERATIVE RESEARCH PROGRAM
Sponsored by the Federal Transit Administration

Subject Areas: IA Planning and Administration; IC Transportation Law; VI Public Transit

Responsible Senior Program Officer: Gwen Chisholm Smith

Legal Research Digest 28

USES OF FEES OR ALTERNATIVES TO FUND TRANSIT

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Jaye Pershing Johnson, Esq. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

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The Problem and Its Solution

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide this insight.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including environmental requirements; construction and procurement contract procedures and administration; civil rights and labor standards; and tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit equipment and operations guidelines, Federal Transit Administration (FTA) financing initiatives, and labor or environmental standards.

Applications

This report addresses the use of impact fees and other developer exactions for transit in the United States; the various circumstances that have contributed to the development, or lack thereof, of transit impact fees in this country; and the various strategies used by states, municipalities, and transit systems to develop impact fees or other development exactions to fund transit related to growth. The report is presented in two parts—the first, a discussion of the use of impact fees and other development exactions for transit and the various policies and structural and legal considerations; and the second, a series of case studies detailing impact fees and other exactions either enacted or considered in various jurisdictions.

The objectives of this report are to assess the use of impact fees for transit in the United States, discuss policy and legal considerations relating to the use of impact fees and developer exactions for transit, discuss various methodologies currently in use, and identify cases that exemplify strategies transit agencies may pursue when considering impact fees as an alternative funding source for transit.

The report will be of interest to state and local transportation officials, planners, and policy makers, and professionals who may consider this potentially valuable alternative funding source.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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USES OF FEES OR ALTERNATIVES TO FUND TRANSIT

By Jaye Pershing Johnson, Esq.

I. INTRODUCTION

Growth communities in the United States facing declining federal assistance for local public facilities, property tax revolts, and voter resistance to an increasing tax burden have turned to alternative techniques to finance growth-related capital facilities. Development impact fees are used to offset the consequences of growth.[1] No fewer than 29 states have adopted impact fee enabling acts (for other than water and wastewater fees).[2] These acts authorize localities to use development impact fees in connection with the process of land-use regulation and permitting to generate the financing needed for development of capital facilities that will be necessary to serve new development. Development impact fees are found primarily in the South and West and are relatively rare in the Northeast and Midwest.[3]

While courts are more likely to uphold a local impact fee ordinance if a state enabling act authorizes it, the absence of such enabling authority is not fatal to the validity of a local impact fee program. In several states, the use of development impact fees has been upheld absent state enabling legislation as within the inherent powers of the enacting governmental unit.

A. Impact Fees Defined

Impact fees are generally defined as a type of development exaction that is:

- In the form of a predetermined money payment;
- Assessed as a condition to the issuance of a building permit, an occupancy permit, or a plat approval;
- Pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
- Levied to fund large-scale, off-site, public facilities and services necessary to serve new development;
- In an amount that is proportionate to the need for the public facilities generated by new development.[4]

"Development impact fee" or "impact fee" is generally defined in state law along the lines of "a charge or assessment imposed by a municipality or a county on new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributed to the new development."[5]

Generally, when differentiating "fees" from "taxes," various courts have defined an impact fee as a type of exaction, which is a fee paid in exchange for a special service, benefit, or privilege not automatically conferred upon the general public.

> A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit or privilege. Payment of the fee is voluntary—an individual can avoid the charge by choosing not to take advantage of the service, benefit or privilege offered.[6]

Development impact fees are assessed and dedicated to generate financing primarily for the provision of water and sewer systems, transportation, schools, public safety, parks, and recreation facilities.[7] Impact fees for transportation are relatively common, but generally encompass financing for roads, streets, bridges, rights of way, traffic signals, and landscaping.[8] Several states

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*The author relied upon the experiences and information provided by the consultant community, particularly Clancy Mullen of Duncan/Associates in Austin, Tex. Much of this report is drawn from the experience of Randy Young, Principal, of Henderson, Young & Co., Redmond, Wash., Tom Noguchi of Mirai Associates, Kirkland, Wash., and Robert Spencer of MuniFinancial of Cal. Finally Jonathan Roberson, Senior Planner for Broward County Transit, provided information regarding the experience of Broward County, Fla., with its transit-oriented concurrency fee program.

[1] Larry L. Lawhon, *Development Impact Fee Use by Local Communities*, *in* THE MUNICIPAL YEARBOOK 27-31 (2003).

[2] Clancy Mullen, *National Impact Fee Survey: 2007,* Duncan Associates, Austin, Tex., Aug. 22, 2007; *see also* Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44, 51 (Miss. 2006).

[3] Mullen, *supra* note 2.

[4] Country Joe, Inc. v. City of Egan, 560 N.W.2d 681, 685 (Minn., 1997), citing to Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The 'Second Generation,' in* ZONING AND PLANNING HANDBOOK 255, 264 (Kenneth H. Young ed., 1991).

[5] N.M. STAT. § 5-8-2(i); PA. STAT. ANN. tit. 53, § 10502-A; TEX. LOC. GOV'T CODE ANN. § 395.001(4); VA. CODE ANN. § 15.2-2318; IND. CODE ANN. § 36-7-4-1305.

[6] McCarthy v. City of Leawood, 257 Kan. 566, 581, 894 P.2d 836, 845 (Kan. 1995); *see also* Russ Bldg. P'ship v. City and County of San Francisco, 199 Cal. App. 3d 1496, 1505, 246 Cal. Rptr. 21, 25 (transit fee not a "special tax"; transit fees required by the ordinance were limited to estimated costs to serve the increased ridership; none of the fees were earmarked for general revenue purposes; and fees exacted only if the developer voluntarily chooses to create new office space.)

[7] Mullen, *supra* note 2, at 29.

[8] *See* ALA. CODE 1975 § 45-2-243.80; R.I. GEN. LAWS § 45-22.4-3(5); MONT. CODE ANN. 7-6-1601(7); GA. CODE ANN. § 36-71-2(8); IDAHO CODE ANN. 67-8203(9); N.H. REV. STAT. ANN. 674:21,V; 53 Pa. Laws 10502-A; S.C. CODE ANN. § 6-1-920(8).

have enacted impact fee legislation that, by virtue of broad authorizing language, would permit the use of impact fees for transit purposes, but authorizing legislation that expressly includes transit or public transportation as a public facility or capital purpose eligible for impact fee expenditures is relatively rare. Arguably, municipalities in about 20 states have the necessary legislative authority or case law support for the enactment of impact fees for transit purposes.

Impact fees collected cannot generally be used for the operation, maintenance, repair, alteration, or replacement of capital facilities.[9] There are, however, certain exceptions, such as in California and Florida, where authorizing legislation does not limit the use of impact fees to capital purposes only, and transit impact fee programs have been established that use transit impact fees for operating costs.

Impact fees for transit, while enacted in California and Florida, are rarely used in the rest of the country. In fact, the San Francisco Transit Impact Development Fee Ordinance, enacted in 1981, was unique in the country for more than 20 years as the only developer fee devoted entirely to public transit capital and operations.[10] Practical and policy considerations, which will be discussed in greater detail herein, that may inhibit the imposition of impact fees for transit include:

- State law limitations on the use of impact fees for capital purposes only, while the largest costs in transit are on the operating side.
- The high level of federal subsidy (80 percent of capital costs) for capital investment in transit and the relatively low level of federal subsidy for transit operating costs.
- State law restrictions requiring the use of development impact fees solely for capital related to growth, making the unfunded local portion for capital even smaller.
- Impact fees are not a feasible alternative in areas that are experiencing declining growth or that have sufficient infrastructure to provide for growth.
- Potential for disconnect between mandatory placement of transit amenities in the districts where fees are collected and the operating needs of the transit system.

Structurally, the use of development impact fees for transit is complicated by the division typically found in municipalities between the entity responsible for the regulation of development and the entity responsible for transit services. Municipalities most commonly impose impact fees as a condition for receiving final planning and zoning approval to fund capital improvements typically thought of as municipal functions, such as road improvements, water and sewer, parks, public safety buildings, and libraries. Public transportation often functions under the auspices of a third-party state or local agency or authority that receives a certain level of appropriations at the local, state, and federal levels. In addition, transportation planning may not be a well-developed practice as part of the municipal planning process.

The validity of statutes and ordinances providing for transit impact fees may be subject to claims that they violate a constitutional bar to uncompensated takings, equal protection and due process claims, claims of impermissible taxation, and claims of unreasonableness. Other legal challenges may include whether a particular transit impact fee ordinance was valid in the absence of state enabling legislation or whether it failed to comply with the requirements of applicable legislation.

Finally, there may be a perception that impact fees increase the cost of, and thus discourage, development. There is literature to support the view that this is not necessarily the case. Nevertheless, as the case studies discussed herein demonstrate, development impact fees for transit may be successfully used as a financial tool for municipalities looking to address shortfalls in transit capital expenses.

B. Financing Alternatives

While this report will focus primarily on the use of development impact fees for transit, it is worth noting that in several jurisdictions where impact fees are not utilized, funding alternatives, including tax increment financing and tax allocation districts, have been implemented to fund transit infrastructure.

II. USE OF IMPACT FEES FOR TRANSIT

To determine the nature and extent of the current use of impact fees and other developer exactions for transit purposes, a questionnaire (a copy of which is attached hereto as Appendix A) was circulated among approximately 300 public transportation providers. Unfortunately, the survey elicited very little useful material. Of 28 responses received, none indicated the use of impact fees for transit. The Massachusetts Bay Transportation Authority responded that in 2006 the legislature authorized infrastructure assessments for Boston's Northpoint Development District, and the Metropolitan Atlanta Rapid Transit Authority (MARTA) responded that it was aware of at least two tax allocation districts (TADs) that allow revenues to be used for transit in Georgia, as well as multiple community improvement districts that utilize assessment revenue for various purposes, including transit. A summary of the survey responses is attached hereto as Appendix B.

The general consensus of professionals in this area is that impact fees for transit are relatively rare. The reasons cited include a number of practical and legal constraints that may make the use of impact fees for tran-

[9] Carmen Carrion & Lawrence W. Libby, *Development Impact Fees: A Primer,* Ohio State University (2004), *available at* http://www-agecon.ag.ohio-state.edu/programs/Swank/pdfs/dif.pdf.

[10] San Francisco Planning Department, prepared by Nelson/Nygaard Consulting Associates, *Transit Impact Development Fee Analysis: Final Report*, May 2001, at 1-1.

sit impractical or impossible. The reasons most often cited for the lack of the use of impact fees for transit are that 1) impact fee authorization is typically limited to capital expenditures and capital investment in transit is relatively well subsidized by the federal government; and 2) the municipal entity responsible for land-use regulation and the imposition of impact fees is often different from the entity responsible for the provision of transit services.

A. Impact of Federal Subsidy for Capital

The limitations of impact fees for capital projects in Teton County, Wyoming, have been described as follows:

> Impact fees are one-time system improvements, not operating costs, which is the major cost component for public transit. Also, transit impact fees are limited to the local government's share of infrastructure costs. As stated in the Jackson/Teton County Transit Development Plan, capital needs are eligible for federal funding through the Federal Transit Administration at a cost participation ratio of 80% federal, 20% local. Due to these limitations, transit impact fees tend to be relatively minor in comparison to other types of impact fees. Therefore, transit impact fees will not "solve" transit's funding problem in Teton County, but will provide a source of dedicated revenue to augment other funding.[11]

Capital investment in transit increased by nearly 70 percent across the country between 1996 and 2005, while inflation rose 21.4 percent. The role of the federal government accounted for, on average, approximately 39 percent of all capital invested in transit. Federal capital funds account for approximately 70 percent in small urbanized areas, while local capital funds make up 17.9 percent and state funds account for 11.5 percent. In medium urbanized areas, federal capital funds constitute 60.5 percent of the funding applied to capital projects, local capital funds account for 25 percent, and state funding for 16.7 percent. Large urbanized areas rely less heavily on federal funds (37 percent), directly levy taxes to pay for capital projects at the local level (48.4 percent), and receive approximately 14 percent of funding from the state.[12] In comparison, federal funds constituted 7.8 percent of operating funds nationally in 2005.[13] This funding imbalance may lead local governments to conclude that it may be easier and more cost effective to take advantage of traditional or other alternative funding mechanisms. Further, the availability of funding for additional capital may be irrelevant if sufficient funding is not foreseeable for the operating costs relating to expanded infrastructure.

[11] Tischler & Associates, Inc., *Transit Impact Fees: Teton County, WY*, July 5, 2002, *available at* http://www.tetonwyo.org/plan/docs/SpecialReports/TransitImpactFeeStudy.pdf.

[12] National Transit Database, *2005 National Transit Summaries and Trends* at 23–24, *available at* http://www.ntdprogram.com/ntdprogram/pubs/NTST/2005/HTML/2005_NTST.htm.

[13] *Id.* at 24.

Nevertheless, impact fees imposed for transit purposes have been used successfully to make up all or a portion of the local match in federally-funded projects. For example, while the transit portion makes up only approximately 6 percent of Washington County, Oregon's, $17 million per year Traffic Impact Fee program, approximately $5.6 million from the transit set-aside was used to fund the local match required for the Tri-County Metropolitan Transportation District of Oregon's (TriMet) Washington County/Wilsonville to Beaverton Commuter Rail line.[14] TriMet is also constructing new light rail transit under the Federal New Starts Program known as the South Corridor I-205/Portland Mall LRT. The total project cost under the full funding grant agreement is $575.70 million. The Section 5309 New Starts funding share is $345.40 million.[15] Of the City of Portland's $45.33 million commitment to the I-205/Portland Mall LRT Project, only $1.33 million is from the city's impact fee program known as System Development Charges.[16]

In addition, given the competition nationally and regionally for federal funds, there may not be enough federal money to fund all of an agency's proposed capital projects. When looking at growth areas nationally, and particularly the success San Francisco has had with its Transit Impact Development Fee, it seems logical to assume that the imposition of impact fees for transit could generate substantial revenue for capital over time.

B. Statutory Limits

The structure of a state's statutory scheme itself may discourage or facilitate the use of transit impact fees by municipal entities. As discussed below, several states implicitly prohibit the use of impact fees for transit capital purposes by exclusion of this purpose from applicable statutory authority. Nevertheless, alternative statutory authority, such as environmental mitigation, may be found to serve the same end. In the case of Seattle, Washington, state law does not authorize the use of impact fees for transit. However, a successful multimodal impact fee has been implemented in four development districts of the city using the state's Environ-

[14] Source: Washington County, Or., Planning Division. Washington County, Or., voters approved a Traffic Impact Fee Program in 1990 that provides for a certain amount of the fee to be reserved for extra capacity transit improvement projects that are either located in the jurisdiction in which the fee was collected or that directly benefit the jurisdiction. *See* Washington County Code § 3.17.010 *et seq*.

[15] FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., ANNUAL REPORT ON FUNDING RECOMMENDATIONS, PROPOSED ALLOCATIONS OF FUNDS FOR FISCAL YEAR 2009; REPORT OF THE SECRETARY OF TRANSPORTATION TO THE UNITED STATES CONGRESS PURSUANT TO 49 USC 5309(K)(1): NEW STARTS, ALTERNATIVE TRANSPORTATION IN PARKS AND PUBLIC LANDS, 2008, Appendix A–NS 2009, at A-47–48, *available at* http://www.fta.dot.gov/publications/reports/reports_to_congress/planning_environment_7754.html.

[16] Source: TriMet.

mental Policy Act. (See "Case Studies—Seattle, Washington: Multimodal Approaches to Impact Mitigation," Section VI.A. herein.)

Examples of statutes that limit the use of impact fees to offsetting the costs of capital include the Arkansas Development Impact Fees Act ("No development impact fee shall be assessed for or expended upon the operation or maintenance of any public facility or for the construction or improvement of public facilities that does not create additional capacity");[17] the laws of Hawaii ("Public facility capital improvement costs do not include expenditures for required affordable housing, routine and periodic maintenance, personnel, training or other operating costs");[18] the New Mexico Development Fees Act ("Impact fees shall not be imposed or used to pay for repair, operation or maintenance of existing or new capital improvements or facility expansions");[19] and Vermont ("The fee shall be equal to or less than the portion of the capital cost of a capital project which will benefit or is attributable to the development and shall not include costs attributable to the operation, administration or maintenance of a capital project").[20]

C. Nexus Between Impact Fees and System Improvements

A second factor related to the small local share of capital funding for transit is that impact fees may only be imposed for capital expenses necessitated by and directly attributable to the cost of system improvements needed to serve new growth and development. Three nexus tests of impact fees developed in the courts to meet constitutional challenges to impact fees include 1) the "reasonable relationship" test, which requires a reasonable connection between the fee charged the developer and the needs generated by that development; 2) the "specifically and uniquely attributable" test that the fee charged to the developer is directly and uniquely attributable to the developer; and 3) the "rational nexus" test, which requires proportionality between the amount charged to the developer and the type and amount of facilities demand generated by the development and that there be a reasonable connection between the use of fees and the benefits accruing to the development.[21]

The following are several statutory examples that include the standards established by case law:

Colorado: "A local government shall quantify the reasonable impacts of proposed development on existing capital facilities and establish the impact fee or development charge at a level no greater than necessary to defray such impacts directly related to the proposed development."[22]

Hawaii:

> Collection and expenditure of impact fees assessed, imposed, levied and collected for development shall be rationally related to the benefits accruing to the development….Collection and expenditure shall be localized to provide a reasonable benefit to the development….Impact fees shall be expended for public facilities of the type for which they are collected and of reasonable benefit to the development.[23]

Rhode Island:

> An impact fee must meet the following requirements: 1) The amount of the fee must be reasonably related to or reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the development; and 2) The impact fees imposed must not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity in accommodating the development.[24]

The issue for impact fee use is that the relatively small local portion of capital expenditures is made even smaller by the requirement that impact fees be imposed solely for the capital facilities directly related to growth. Similarly, impact fees typically may not be used to pay for existing system deficiencies. To the extent impact fees are being used to fund development-related deficiencies, the costs of existing deficiencies must be met with traditional resources. For example, Colorado's Local Government Land Use Control Enabling Act prohibits the imposition of development charges "to remedy any deficiency in capital facilities that exists without regard to the proposed development."[25] In Wisconsin, impact fees imposed by an ordinance in accordance with state law may not include amounts necessary to address existing deficiencies in public facilities.[26]

D. Coordination of Land Use and Development With Operating System Needs

The Broward County, Florida, experience with using impact fees for transit calls into question the operational feasibility of providing bus service in all areas of growth and development that are subject to the transit impact fees. Broward County essentially overlaid a transit impact fee program on a Florida road impact fee program structure. The fee is assessed in 10 transit concurrency districts and is based on the size of the development at the permit stage and the number of anticipated transit trips. Service must be spread throughout the 10 districts using the county's service standard of providing bus trips every half hour. Unfortunately, the scheme does not perfectly match the demographics of the entire transit concurrency area. The fee structure does not help very dense routes that need more than 30 minute service, especially at weekday peak hours, and mandates equivalent service in areas with little demand. The issue now for Broward

[17] ARK. CODE ANN. § 14-56-103(c).

[18] HAW. REV. STAT. § 46-141.

[19] N.M. STAT. § 5-8-5(B).

[20] 24 VT. STAT. ANN. § 5203(b).

[21] Carrion & Libby, *supra* note 9, at 6–7.

[22] COLO. REV. STAT. ANN. § 29-20-104.5(2).

[23] HAW. REV. STAT. § 46-142(2)(b).

[24] R.I. GEN. LAWS § 45-22.4-4(d).

[25] COLO. REV. STAT. ANN. § 29-20-104.5(2).

[26] WIS. STAT. § 66.0617(6)(f).

County is how to justify providing greater capital and operating funding through impact fees for heavily traveled corridors. Jonathan Roberson of Broward County cautions governmental entities seeking to use impact fees for transit to establish close connections among planners, development managers, and transit operators to avoid miscalculation of service demands and possibly underestimating other long-term costs.

E. Developer Response to Impact Fee Programs

Finally, a major concern of local governments when considering the adoption of an impact fee ordinance may be the fear of developer response. Growth areas may be reluctant to impose fees because developers will take their business elsewhere. Anecdotally, this has not been the experience of Broward County. Development impact fees may only be used to address growth. The extent to which the county continues to collect substantial fee revenues indicates that the fees have not discouraged growth in Broward County, an area that is facing build out. Developers prefer the fee because it indirectly reduces a developer's project development costs as well as alleviates development approval restrictions relating to the lack of public services.[27]

Neither is this fear supported in the literature.[28] Several observations include:

• Impact fees increase the cost of new housing and existing housing at the same rate through the capitalization of the benefits that impact fees provide through infrastructure improvements.

• New development contributes to the tax base, adding revenue at the same rate, while impact fee revenue is added to the revenues stream, with a net result of a lower tax rate for existing as well as new development.

• Impact fees make possible the improvement of economic efficiency in the provision of infrastructure; impact fees appear to reduce the uncertainty and risk of development through the funding and implementation of planned capital improvements and the ability of local governments to leverage impact fee revenues to expand public facilities.

• For areas experiencing growth and the demand for additional infrastructure, impact fees can enhance job growth by allowing for an increase in the buildable land supply (or in the case of transit, facilitating public transportation to employment centers).

• Impact fees may increase the demand for housing as home buyers realize the potential for a reduction in future property tax liabilities.

The value of public transportation is an amenity funded by impact fees. "This increase does not necessarily make the housing unaffordable if the amenity received is of value to the consumer. For example, if access to public transportation is an amenity of impact fees the additional housing cost may be offset by a decrease in a family's transportation costs."[29]

In the case of Portland, Oregon, state law permits a 90-day window for challenges to an impact fee methodology. The city committed itself to doing the groundwork to obtain stakeholder buy-in before the system development charge was acted on by the City Council. Property owners, bankers, and businesses were all asked to make suggestions. A citizen advisory committee began the project with a series of confidential interviews with key stakeholders for feedback regarding the transportation system, the economy, and stakeholder needs. Responses were synthesized into broad themes and shared with local officials. When the technical work for the project and the findings of the citizen advisory committee were presented to the City Council, not a single voice was raised in opposition. The ordinance was passed unanimously.[30]

F. Structural Considerations

The structural dichotomy between land-use regulation and the provision of transit services may constitute an obstacle for the implementation of transit impact fees. It is often the case that the municipal entity authorized to implement zoning and conduct land-use review is not authorized to provide the transportation services for the municipality or the region. Unlike Broward County, which regulates the growth of development of the county through impact fees and operates and maintains the county's transit services, municipalities such as New York City and Portland, Oregon, regulate land use but do not operate transportation systems. According to Tri-Met, a regional transportation provider, to benefit from transit impact fees, it must coordinate the adoption of ordinances for that purpose

[27] Interview with Jonathan Roberson, Senior Planner for Broward County Transit.

[28] See Henderson, Young & Company, *Effects of System Development Charges on the Amount of Development*, March 20, 2007, *available at* http://www.portlandonline.com/shared/cfm/image.cfm?id=180090. The study focused on four studies considered representative that had been conducted since 2002—Keith R. Ihlanfeldt & Timothy M. Shaughnessy, *An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets* (Lincoln Institute of Land Policy, Working Paper, 2002); Arthur C. Nelson & Mitch Moody, *Paying for Prosperity: Impact Fees and Job Growth* (The Brookings Institution Center on Urban and Metropolitan Policy, 2003); Vicki Been, *Impact Fees and Housing Affordability*, 2004, *available at* http://furmancenter.nyu.edu/publications/documents/impact_fees_cityscapes.pdf; and Gregory Burge & Keith Ihlanfeldt, *Impact Fees and Single Family Home Construction*, J. OF URBAN ECONOMICS, Elsevier, vol. 60(2), 284–306 (2006).

[29] *Id*. Survey notes the rarity of impact fees for transit and goes on to discuss the two impact fee studies in California that include transit, that of San Francisco's Transit Impact Development Fee and the San Jose Traffic Impact Fee with a public transportation component, both of which are discussed at greater length in this digest.

[30] Randy Young of Henderson, Young & Company advised of the importance of a strong community outreach effort.

among multiple cities and three counties to collect a single fee. In the State of New Jersey, municipalities regulate land use, but the state, through NJ Transit, operates the transit system. Nevertheless, municipal entities may be able to support transit services through the use of impact fees for rights-of-way, bus pullouts, and shelters.

G. The New Jersey Experience

In many ways, the State of New Jersey's experience with transit impact fees exemplifies many of the issues discussed above. In 1989, New Jersey adopted the Transportation Development District Act of 1989 (the "TDD Act").[31] The legislature recognized that "growth corridors" and "growth districts" were heavily dependent on the state's transportation system for current and future development, yet placed enormous burdens on the existing transportation infrastructure contiguous to new development and elsewhere. The legislature determined that it would be "appropriate for the State to make special provisions for the financing of needed transportation improvements in these areas, including the creation of special financing districts and the assessment of special fees on those developments which are responsible for the added burdens on the transportation system."[32] The legislature recognized certain limits on the statutory scheme of assessment, including the following:

> (1) The fees supplement, but do not replace the public investment needed in the transportation system;
>
> (2) The costs of remedying existing problems cannot be charged to new development;
>
> (3) The fee charged to any particular development must be reasonably related, within the context of a practicable scheme for assessing fees within a district, to the added burden attributable to that development; and
>
> (4) The maximum amount of fees charged to any development by the State or county or municipality for offsite transportation improvements pursuant to this act or any other law shall not exceed the property owner's fair share of such improvement costs.[33]

The TDD Act authorizes the governing body of any county to apply to the state transportation commissioner for the designation of a transportation development district (TDD). Following any such designation, a county must initiate a joint planning process for the TDD with opportunity for participation by the state, all affected counties and municipalities, and private representatives. The purpose of the joint planning process is to produce a draft district transportation improvement plan, which shall establish goals and priorities for all modes of transportation within the TDD and contain a program of transportation projects that addresses transportation needs arising from rapid growth conditions. The draft plan is required to provide for the assessment of development fees based upon the applicable formula established by the commissioner of transportation. The county may adopt the district transportation plan, which shall not be effective until approved by the commissioner.

After the effective date of the district transportation plan, a county may provide, by ordinance or resolution, for the assessment and collection of development fees within the TDD. The fee is to be assessed on a development at the time that the development receives preliminary approval from the municipal approval authority, or, where the municipality has not enacted an ordinance requiring approval of the development, at the time that a construction permit is issued. The fee may be paid in a lump sum or in a series of periodic payments over a period not to exceed 20 years. Payment of the fee shall be enforceable by the county as a lien. The ordinance shall also establish a TDD trust fund. Any fees not committed to a transportation project within 10 years shall be refunded to the developer.

Every transportation project funded in whole or in part from a TDD trust fund shall be subject to a project agreement to which the commissioner is a party. A "transportation project" is broadly defined to include "public highways and public transportation projects, any equipment, facility or property useful or related to the provision of any ground, waterborne or air transportation for the movement of people or goods."[34]

By July 2000, only four New Jersey counties had engaged in a TDD planning process under the TDD Act. They include Mercer County, which had a TDD plan approved in 1992 that is operational; Atlantic County, which had two former transportation improvement districts grandfathered under the TDD Act; and Hunterdon County and Union County, which had TDD applications approved in the 1990s, but had no approved TDD plan and the TDDs are not operational.[35]

The New Jersey legislature was concerned about the underutilization of the TDD Act and, in November 1998, created the Regional Intergovernmental Transportation Coordinating Study Commission (RITCSC) making recommendations for modifications to the TDD Act "which would encourage regional and intergovernmental transportation concerning transportation planning decisions."[36] The RITCSC made certain key findings and recommendations, which are applicable for purposes of this report as follows:

- Coordination and cooperation between municipalities, counties, the New Jersey Department of Transportation (DOT), NJ Transit, and the private sector during the statutorily required TDD joint planning process has been the most consistently valuable component of TDD

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[31] N.J. STAT. ANN. § 27:1C-1 *et seq*.

[32] N.J. STAT. ANN. § 27:1C-2(c).

[33] N.J. STAT. ANN. § 27:1C-2(d).

[34] N.J. STAT. ANN. § 27:1C-3(j).

[35] The Transportation Policy Institute, *Regional Intergovernmental Transportation Coordinating Study Commission (RITSC): Interim Report*, July 13, 2000, *available at* http://www.njleg.state.nj.us/legislativepub/reports/ritcsc.pdf.

[36] New Jersey, Pub. L. No. 1998, JR7 (AJR 21 1 R).

implementation efforts to date. The process has successfully brought different levels of government and the private sector together to examine existing and future transportation needs and collectively plan to meet those needs.

• The costs associated with the TDD planning process are high for counties and municipalities. There is no clearly defined source of funding to support TDD planning efforts and the TDD Act does not permit the use of TDD funds to recoup costs incurred during the TDD planning and implementation process. This has been a disincentive to TDD implementation.

• The TDD Act does not presently permit the assessment of fees on existing development/businesses within a TDD; however, it is likely that those developments/businesses will receive special benefits from enhanced mobility within a district when improvements to circulation are made.

• The TDD Act requires that TDD planning include projections of future transportation needs; however, the zoning build out capacity of land within a municipality or municipalities is often overly optimistic and/or unrealistic. This could result in a program of transportation improvements that is ultimately unacceptable to the participants and/or unattainable.

• The TDD Act does not presently permit the expenditure of TDD funds on transit operating expenses. This has limited the range of mobility solutions and transportation improvements contemplated as part of the TDD planning process.

• Transportation decisionmaking with regard to new development proposals is fragmented at various levels of government.

• Transportation planning is not a well-developed practice as part of the municipal planning process. In practice, circulation planning is often limited to an inventory and functional classification of existing and proposed roadways. Very few master plans and zoning codes have been adequately tested for their impact on transportation infrastructure.

• State laws relating to county land use and transportation planning are very weak. The role of counties in the transportation planning process limits the opportunities for counties to facilitate the intergovernmental cooperation needed to balance competing local, regional, and state interests with regard to transportation.[37]

The RITCSC recommended amendment of the TDD Act to eliminate barriers to implementation, including, among other things, 1) authorization to use TDD funds to pay for previously incurred planning costs as well as prospective administrative costs associated with implementing a TDD over time; and 2) amending the TDD Act to permit the use of TDD funds for operating expenses. The RITCSC also recommended broadening the scope of the TDD construct to accommodate the use of the TDD concept in a wider variety of land-use settings, including growth corridors, existing developed areas, and redevelopment areas. RITCSC recommended flexibility to add transportation enhancement districts to the existing TDD mechanism to permit both an assessment of fees on new development and an assessment of fees on existing development/businesses in the TDD that will be specially benefited by enhanced mobility within the district.

Ultimately, the TDD Act was not amended, as New Jersey shifted its emphasis in 1999 to its Transit Village Initiative. The state's Transit Village Initiative gives access to grants from the New Jersey DOT's Transit Village funding and makes priority funding and technical assistance available from some state agencies to local communities that qualify as a "transit village." NJ Transit and NJ DOT lead coordination efforts among state agencies. Since 1999, 19 municipalities have been designated as transit villages.[38]

III. METHODOLOGIES

The first key finding needed to adopt an impact fee program is the determination of an objective "nexus" or critical connection between the need for transit services caused by development, the use of fee revenues to address those needs, and the amount of the fee to be paid by a development project. The parameters of a fee's methodology are sometimes codified in statute. For example, in Hawaii, the method of impact fee calculation is clearly spelled out:

• The governing body of a municipality must approve a needs assessment study, prepared by an engineer, architect, or other qualified professional, that identifies service standard levels, projects public facility capital improvement needs, and differentiates between existing and future needs;

• The data sources and methodology must be set out in the needs assessment study;

• The prorated amount of each impact fee shall be based on the development and actual capital cost of public facility expansion, or a reasonable estimate thereof;

• The impact fee shall not exceed a proportionate share of the costs incurred or to be incurred in accommodating the development using seven factors in determining such proportionate share.[39]

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[37] *Id.*

[38] The 19 designated Transit Villages include Pleasantville (1999), Morristown (1999), Rutherford (1999), South Amboy (1999), South Orange (1999), Riverside (2001), Rahway (2002), Metuchen (2003), Belmar (2003), Bloomfield (2003), Bound Brook (2003), Collingswood (2003), Cranford (2003) Matawan (2003), New Brunswick (2005), Journal Square/Jersey City (2005), Netcong (2005), Elizabeth/Midtown (2007), and Burlington City (2007). N.J. Dep't of Transp., *available at* http://www.state.nj.us/transportation/community/village/faq.shtm.

[39] HAW. REV. STAT. § 46-143.

The two methodologies most often used to establish this connection are the "consumption driven" and "improvement driven" methodologies.

A. Consumption Driven

The general approach to impact fees across the country is the so-called consumption-based or consumption-driven approach. A peer review of an impact fee study relating to the Sarasota County, Florida, impact fee ordinance describes the consumption-based methodology as follows:

> This method, widely used in traditional transportation impact fee analysis calculates impact fees based on the value of public infrastructure consumed per unit of land use, such as a dwelling unit. The value of the public infrastructure is developed by calculating a unit cost of public capital infrastructure, such as cost per lane mile of road or acre of park. Levels of service are used to translate these unit costs into cost per unit of development.[40]

The Sarasota County Road Impact Fee Ordinance,[41] which authorizes the use of impact fees primarily for road facility projects, also permits such fees to be used for sidewalks, bicycle paths, transportation capacity planning, and mass transit projects to the extent such projects "are demonstrated to add capacity to or reduce capacity demand on the road system based on an accepted methodology of transportation planning or engineering."[42] The general formula for the road impact fee is relatively straightforward: the quantity of travel attributable to a unit of development, measured in vehicular miles of travel per day, is multiplied by the net cost of roadway construction per vehicular mile of travel. The Sarasota Ordinance requires the calculation of the impact fee due by:

- Verifying the number of square feet of commercial and industrial use, by type, and/or the number and type of dwelling units that are proposed to be constructed as shown on the Certificate of Occupancy application for the principal use;
- Determining the trip generation unit[43] to be applied to the principal use;
- Determining the fee per trip generation unit that shall be applied to the principal use; and
- Multiplying the number of trip generation units by the applicable fee per trip generation unit.[44]

Revenues from the Sarasota County Road Impact Fees are directed to road facility projects identified in the county's 5-year schedule of capital improvements, which is adopted by the county annually as part of the county budget process and the county's Comprehensive Plan. The fees collected are placed in trust accounts established for each road facility service district for road facility projects within the road facility service district from which they were collected.[45]

In Broward County, which has adopted a consumption-driven model, concurrency assessments are calculated by a formula that shows how many transit trips would be required to mitigate the effects of development. To calculate the Transit Oriented Concurrency Fee, a proposed use is multiplied by the peak-hour trips generation rate using the TRIPS (TRansport Improvement Planning System) model.[46] Once the number of trips is calculated, the number is multiplied by a designated trip length factor and multiplied by the assigned cost per trip by district. For example, to calculate the Transit Concurrency Fee for a 50 single-family unit project:

- 50 single-family units multiplied by trip generation rate for single family (1.01 T/PH) = 50.5 trips/peak hour;
- 50.5 trips/peak hour multiplied by 0.88 (trip length factor) = 44.44 trips/peak hour;
- 44.44 trips/peak hour multiplied by the cost per trip per district (North East District) of $902 = $40,085.[47]

Revenues from the Broward County Transit Concurrency Assessments are directed to transit enhancements identified in the 5-year County Transit Program that corresponds to the Transit Oriented Concurrency District where the proposed development occurred.[48]

The consumption-driven methodology is the most commonly used method of establishing impact fees in Florida, especially by counties, and has received judicial acceptance.[49] The road impact fee reviewed in *Home*

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[40] James C. Nicholas, *Sarasota County Impact Fees: A Peer Review of the Public Review Draft*, Aug. 2006, *available at* http://scgov.net/PlanningandDevelopment/PlanningServices/documents/Peer_2.pdf.

[41] Ord. No. 89-097, § 9-21-1989; Ord. No. 98-056, § 2(1), 6-30-1998.

[42] *Id.* § 70-95.

[43] "Trip generation unit" is defined as the unit of measurement to which impact fees for different land use types are assigned for purposes of calculating the applicable impact fee. Sarasota County Road Impact Fee Ordinance, § 70-95.

[44] *Id.* § 70-99.

[45] *Id.* § 70-100.

[46] TRIPS (TRansport Improvement Planning System) is a transportation planning package that enables strategic as well as detailed analyses of multimodal transportation networks. TRIPS provides a framework for implementing a wide range of travel demand forecasting models. (From http://www.citilabs.com/index.html). The TRIPS formula is applied to each Broward County project seeking a building permit, using the formulas tied to the type of land use and therefore transit trip generation expected to occur.

[47] Jonathan Roberson, Senior Planner, Broward County Transit.

[48] *Id.*

[49] Nicholas, *supra* note 40, at 6; *see also* § 150 of the Pinellas County Land Development Code, which authorizes the use of transportation impact fees for "transit facilities such as shelters and pullout bays," and ch. 56 of the Code of the City of Orlando, which authorizes the use of transportation impact

Builders and Contractors Association v. Palm Beach County [50] employed the consumption-driven methodology: "The ordinance has a formula which takes into consideration the costs of road construction and the number of motor vehicle trips generated by different types of land use."[51] After reviewing the fees, the court observed that the Palm Beach County ordinance was mindful of the lessons of the case *Contractors & Builders Assn. of Pinellas County v. City of Dunedin*[52] in that it recognized that the rate of development would require a substantial increase in the capacity of the road system; the evidence demonstrated that the cost of roads improvements would far exceed the fair share of fees imposed by the ordinance; the formula for calculating the fee is flexible in that it allows a developer to submit an independent traffic study and economic data to demonstrate the appropriate proportionate share; and the expenditure of funds is localized.[53] The court held that the Palm Beach County ordinance had met the tests laid down in *Contractors & Builders Assn.* and imposed a regulatory fee and not a prohibited tax.[54]

A similar consumption-driven approach has been used in California. The Transit Impact Development Fee (TIDF) analysis conducted in connection with the update of San Francisco's TIDF ordinance established a process for fee calculation as follows:

- Identify a single trip generation rate for each broad land use category that approximates the average trip generation rate across all detailed land uses included in the category.
- Identify a service standard, or ratio of revenue service hours to total trips generated by non-residential land uses. Data should be the most recent available and trip rates should include vehicle and transit trips and exclude walk and bicycle trips.
- Determine the net costs to accommodate development based on the cost of additional revenue hours of service per trip generated by development over the estimated useful life of the building.
- Convert the fee for each land use category (the net revenue cost per trip multiplied by the trip generation rate applicable to that category) to a square footage standard.[55]

The San Francisco TIDF ordinance[56] defines the "Base Standard Fee Rate" as the transit impact development fee that would allow the city to recover the estimated costs incurred by the Municipal Railway (Muni) to meet the demand for public transit resulting from new development in the economic activity categories for which the fee is charged, after deducting government grants, fare revenue, and costs for nonvehicle maintenance and general administration.[57] The findings of the San Francisco Board of Supervisors detail calculation of the base standard fee rate by the TIDF study for each of six economic activity categories (cultural/institution/education; management, information, and professional services; medical and health services; production/distribution/repair; retail/entertainment; and visitor services) as follows:

- Calculate the Muni's total annual costs by combining the fiscal year 2000 operating costs with an average annual capital budget and averaging the 5 prior years of Muni's capital expenditures.
- Calculate net annual costs for fiscal year 2000 by subtracting fare box revenue and federal and state grants from Muni's total costs.
- Determine Muni's net annual cost per revenue service hour by dividing Muni's net annual costs by Muni's average daily revenue service hours, as reported to the National Transit Database.
- Estimate the number of daily auto and transit trips within the city by using trip generation rates and 2000 employment data. By dividing Muni's average daily revenue service hours by the estimated daily auto and transit trips within the city, the TIDF study determined that Muni provided approximately 0.9336 service hours for every 1,000 transit and auto trips. The TIDF study multiplied the net annual cost per revenue service hour by 0.9336 to determine a net annual cost per trip.
- The TIDF study multiplied the net annual cost per trip by an adjusted daily trip rate per economic activity category to calculate a net annual cost per gross square foot of new development for each economic activity category and adjusted the daily trip rate to exclude bicycle and pedestrian trips.
- Finally, the TIDF study multiplied the net annual cost per gross square foot of development for each economic activity category by a net present value factor of 20.69 (based on a U.S. transportation industry index inflation rate of 2.05 percent, earning an invested funds rate of 6.14 percent, and a building life span of 45 years) to establish the Base Service Standard Rates for each economic activity category that would be necessary to pay for increased transit services for the 45-year useful life of a new development.[58]

The TIDF study calculated a net annual cost per trip of $45.37 for purposes of setting the base service standard rates. Muni made several conservative adjustments to the formula and came up with a net annual cost per trip of $36.32. In addition, in setting the base

fees for transit bus pullouts, both of which codify a consumption-driven methodology.

[50] 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983).

[51] *Id*. at 142.

[52] 329 So. 2d 314 (Fla. 1976).

[53] Home Builders, 446 So. 2d 140 at 145.

[54] *Id*.

[55] Nelson/Nygaard Consulting Associates, The Duffey Co. and MuniFinancial, *Transit Impact Development Fee Analysis: Technical Memorandum #5 – Nexus Analysis*, Feb. 2001.

[56] Ordinance No. 199-04.

[57] *Id*.

[58] *Id*. § 38.2(M).

service standard rates, the city took into consideration the input of a variety of stakeholders, including business groups, developers, and civic organizations. The city found that, "Based on projected new development over the next 20 years, the TIDF will provide revenue to Muni that is significantly below the costs that Muni will incur to mitigate the transit impacts resulting from new development."[59]

Pursuant to the 2004 San Francisco TIDF Ordinance, TIDF funds may be used:

> [T]o increase revenue service hours reasonably necessary to mitigate the impacts of new non-residential development on public transit and maintain the applicable base service standard, including, but not limited to: capital costs associated with establishing new transit routes, expanding transit routes, and increasing service on existing transit routes, including, but not limited to, procurement of related items such as rolling stock, and design and construction of bus shelters, stations, tracks, and overhead wires; operation and maintenance of rolling stock associated with new or expanded transit routes; capital or operating costs required to add revenue service hours to existing routes; and related overhead costs. Proceeds from the TIDF may also be used for all costs required to administer, enforce or defend this ordinance.[60]

The methodology of the original San Francisco TIDF ordinance adopted in 1981 was challenged on two grounds: first, that the calculation based on the 45-year useful life of a building violated the developers' substantive due process rights and, second, that the methodology used and the assumptions relied upon by the city's consultants were unsupported by the evidence.[61] The court rejected both arguments. First, in light of the evidence presented that an office building has a useful life of 45 years, it found that the imposition of a lump sum fee representing increased transit costs over a 45-year period was not arbitrary or unreasonable and did not constitute an unconstitutional taking. Second, the court found that substantial evidence supported the trial court's findings that the approach taken by the city's consultants was economically justifiable and financially and scientifically sound.[62]

B. Improvement Driven

A second impact fee methodology is the "improvements driven" or "facilities driven" methodology. This calculation methodology, used in Seattle, Washington, and Portland, Oregon, uses as its basis the list of improvements needed to reduce or eliminate the impacts of growth. An improvements-driven methodology is required under Oregon law as follows:

Improvement fees must:

> (a) Be established or modified by ordinance or resolution setting forth a methodology that is available for public inspection and demonstrates consideration of: (A) The projected cost of the capital improvements identified in the plan and list adopted pursuant to ORS 223.309 that are needed to increase the capacity of the systems to which the fee is related and; (B) The need for increased capacity in the system to which the fee is related that will be required to serve the demands placed on the system by future users.
>
> (b) Be calculated to obtain the cost of capital improvements for the projected need for available system capacity for all future users.[63]

For purposes of the improvements-driven methodology, the list of projects must first be developed as part of a comprehensive, multiyear planning process and then screened for noneligible costs such as those attributable to existing deficiencies, maintenance, and safety. To calculate the payment, the portion of improvements that serve new growth is divided by the number of trips generated by the new development. If impact fees are to be collected in a limited development area, the number of trips (car trips/person trips) must be screened to identify those trips related to the new project. For purposes of a nexus analysis, it is important to identify those trips that (i) begin and end inside the development area; (ii) begin inside the development area and end outside the development area; (iii) begin outside the development area and end inside the development area; and (iv) begin outside the development area and pass through the development area. Trips that begin outside the development area and pass through the development area are excluded from the nexus analysis.[64] Seattle, Washington, uses a travel demand model and selected link assignment runs are applied to determine the extent of through trips that would use planned improvements. With respect to Seattle's Northgate revitalization area, it was estimated that 43 percent of the trips using the improvements would be through trips, which required 43 percent of the improvement costs to be paid by sources other than development mitigation payments. [65]

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[59] *Id.* § 38.2(P).

[60] *Id.* § 38.8.

[61] Russ Bld. P'ship v. City and County of San Francisco, 199 Cal. App. 3d 1496, 1508–1509, 1511–1516; differences between the 1981 TIDF Ordinance and the 2004 Ordinance are detailed in *Case Studies—San Francisco Transit Impact Development Fee (1981) and San Francisco Transit Impact Development Fee (2004)*, Sections VI.B and C herein.

[62] *Id.*

[63] OR. REV. STAT. § 223.304(2).

[64] Both Noguchi and Young stressed the need for good, recent, reliable data to establish the number of growth trip ends. Noguchi advised, with respect to the Seattle, Washington, mitigation fee program, that approximately one-quarter of the cost was directly attributable to growth in a specific development area.

[65] Tom Noguchi, *Multi-Modal Approaches to Development Impact Mitigation: Managing Congestion Can We Do Better,* Institute of Transportation Engineers 2007 Technical Conference and Exhibit (2007).

The following table shows an example of the calculation of cost per person per trip end using Seattle, Washington's, Northgate revitalization area:

Travel Mode	Mitigation Cost of Local Trips	Other Funding Available	Unfunded Cost of Local Trips	Growth Trip Ends	
Bicycle	$ 854,850	$0	$ 854,850	1,054	
Pedestrian	4,318,367	0	4,318,367	2,894	
Transit	78,300	0	78,300	1,660	
Roadway	4,919,446	0	4,919,446	9,302	
Totals	$10,170,963	$0	$10,170,963	14,910	
Cost per growth trip end			$10,170,963	÷ 14,910	= $682.16

The cost per growth trip end must then be translated into each development type by cost per square foot or residential unit.

The two methodologies discussed above have also been referred to as "inductive" (consumption driven) and "deductive" (improvement driven).[66] One of the advantages of the inductive methodology is that major changes to general plan growth will not affect the calculations, thus adding flexibility to the planning process. It matters little how much residential, commercial, or industrial properties are constructed. The new development, either residential or commercial, pays its pro-rata share of the need based upon the model. "Such a system is, in effect, a no-fault impact fee determination."[67]

Major disadvantages of the inductive fee calculation include:

- The standardization of the models used to determine the fee, generally conservative in nature, may not take special needs of the community into account; the fees collected may not match the costs of a specific facility and there may be either too much money collected or too little;
- The focus on the final product, which ignores overhead or support facilities; and
- The need to determine how much of the financing for a particular facility is to be paid from accumulated impact fees; the remaining fees should come from other resources.[68]

With respect to the deductive, or improvements-driven, methodology, the greatest advantage is deemed to be the ability of a municipality to accommodate impact fees to the uniqueness of each facility to be funded. The disadvantages include the considerable amount of effort required to generate the information necessary for the impact fee calculations. Inadvertent omission of projects may result in inadequate collections for the facilities. Further, for large jurisdictions that may not be able to determine the extent or location of growth, this method may not be an option.[69]

IV. LEGAL ISSUES

For an impact fee or other exaction to be legal, there must be a valid statute that expressly or impliedly, through general police powers, authorizes a municipal entity to impose a development exaction. An impact fee or other exaction must also pass three constitutional tests. First, the impact fee must meet a substantive due process test, where the local government has the authority to assess, collect, and spend impact fees for public facilities. The second is the equal protection test where the fees must be applied to all parties on the same basis. All new development creating an impact must be assessed the same kind of fees, although the fees may vary by land-use category, and the fees must be rationally related to the public purpose.[70] The third test is whether the impact fee constitutes an unconstitutional "taking" of property. The courts have developed three tests to determine if a connection or "nexus" exists between the exaction and the development that creates the need for the infrastructure improvements and the benefits to the development of the infrastructure improvements.[71] There must be a rational relationship between the need for new facilities to accommodate growth and the fees new development pays to finance those facilities.[72] Early case law makes clear that, to be valid, such fees must be collected (and exactions and dedications required) solely for the public infrastructure

[66] Dennis H. Ross & Scott Ian Thorpe, *Impact Fees: Practical Guide for Calculation and Implementation*, 118 JOURNAL OF URBAN PLANNING AND DEVELOPMENT, 106–118 (1992).

[67] *Id.*

[68] *Id.*

[69] *Id.* Ross and Thorpe conclude that both methodologies will relate the needs and service levels of the community necessary to retain inherent validity. Nevertheless, the deductive (improvements driven) methodology will result in an impact fee capable of providing facilities specific to the community needs.

[70] Carrion & Libby, *supra* note 9, at 6.

[71] *Id.*

[72] *Id.*

for which land development causes a need. Courts will uniformly strike down, usually as an unauthorized tax, land conditions that are not so connected.[73]

A. State Impact Fee Enabling Acts

1. Explicit or Implied Authority to Impose Impact Fees for Transit

One of the most important criteria in determining whether or not impact fees are permissible is whether there is legislative authority to impose them. Subject to the limitations of a particular jurisdiction on the imposition of development impact fees generally, and impact fees for transit specifically, impact fees may generally be imposed to fund the public capital facilities that can be reasonably construed to fall within a state's enabling legislation and home rule powers. At least 20 states have enacted impact fee legislation that expressly or implicitly authorizes the use of impact fees for transit capital purposes. Local jurisdictions in at least three of those states (Florida, California, and Oregon) have adopted ordinances for the imposition of impact fees for transit purposes.

The Florida Impact Fee Act, possibly the briefest and broadest of all authorizing legislation, is based on a finding of the legislature that "impact fees are an outgrowth of the home rule power of a local government to provide certain services within its jurisdiction."[74] In Florida, impact fees must be adopted by ordinance of a county or a municipality or by resolution of a special district, and such ordinance or resolution at a minimum must require calculation of the fee based on the most recent and localized data, provide for accounting and reporting of impact fee expenditures, limit administrative charges for the collection of impact fees to actual costs, and provide a minimum 90 days of notice before the effective date of the ordinance.[75] The enactment of an impact fee ordinance for transit capital purposes in Florida is thus limited only by the home rule powers of a county, municipality, or special district.

California relies on broad language when defining the public facilities for which impact fees may be expended as "public improvements, public services and community amenities."[76]

In Colorado, the "Local Government Land Use Control Enabling Act of 1974"[77] authorizes local governments, including a county, home rule or statutory city, town, territorial charter city, or city and county, to impose an impact fee or other similar development charge to fund expenditures on "capital facilities" needed to serve new development. The term "capital facility" means any improvement or facility that 1) is directly related to any service that a local government is authorized to provide; 2) has an estimated useful life of 5 years or longer; and 3) is required by the charter or general policy of a local government pursuant to a resolution or ordinance.[78]

Similarly, in Hawaii, the city and county of Honolulu, the county of Hawaii, the county of Kauai, and the county of Maui are authorized to levy and collect impact fees from a developer to fund all or a portion of the "public facility capital improvement costs" required by the development from which it is collected, or recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development. "Public facility capital improvement costs" are defined as "costs of land acquisition, construction, planning and engineering, administration, and legal and financial consulting fees associated with construction, expansion, or improvement of a public facility. Public facility capital improvement costs do not include expenditures for required affordable housing, routine and periodic maintenance, personnel, training, or other operating costs."[79]

The New Jersey Transportation Development District Act of 1989[80] authorizes the assessment of development fees on developments within special financing districts for transportation projects including, in connection with public transportation service or regional ridesharing programs:

> Passenger stations, shelters and terminals, automobile parking facilities, ramps, track connections, signal systems, power systems, information and communication systems, roadbeds, transit lanes or rights-of-way, equipment storage and servicing facilities, bridges, grade crossings, rail cars, locomotives, motorbus and other motor vehicles, maintenance and garage facilities, revenue handling equipment and any other equipment, facility or property useful for or related to the provision of public transportation service or regional ridesharing programs.[81]

In Oregon,[82] Wisconsin,[83] and Arkansas,[84] the impact fee statutes authorize impact fees for "transportation," "other transportation facilities," and "public transportation," respectively, without regard to transportation mode. The New Mexico Development Fees Act[85] is more restrictive but still authorizes the use of impact fees for bike and pedestrian trails and bus bays in addition to roadway facilities.[86]

In North Carolina, the courts have upheld the authority of cities to impose utility system impact fees under the North Carolina public enterprise statute

[73] David L. Callies, *Exactions, Impact Fees and Other Land Development Conditions,* AMERICAN INSTITUTE OF CITY PLANNING, PROCEEDINGS OF 1998 NATIONAL PLANNING CONFERENCE (1998).

[74] FLA. STAT. ANN. § 163.31801(2).

[75] FLA. STAT. ANN § 163.31801(3).

[76] CAL. GOV'T CODE § 66000(d).

[77] COLO. REV. STAT. ANN. § 29-20-101 *et seq*.

[78] COLO. REV. STAT. ANN. § 29-20-104.5.

[79] HAW. REV. STAT. ANN. § 46-141.

[80] N.J. STAT. ANN. § 27:1C-1 *et seq*.

[81] N.J. STAT. ANN. § 27:1C-3.

[82] OR. CODE ANN. §§ 223.297–223.314.

[83] WIS. STAT. ANN. § 66.0617.

[84] ARK. CODE ANN. § 14-56-103.

[85] N.M. STAT. ANN. § 5-8-1 *et seq.*

[86] N.M. STAT. ANN. § 5-8-2(D)(2).

without the necessity of specific enabling legislation.[87] The public enterprise statute provides that "a city shall have full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor…."[88] "Public enterprise" is defined to expressly include public transportation systems.[89]

Other states with general authorizing language that arguably would support the enactment of impact fees or other exactions for transit capital purposes include the following:

- Maine[90] ("infrastructure facilities include, *but are not limited to*" an enumerated list of public infrastructure facilities).
- Maryland[91]

> (any county, or municipal corporation, including Baltimore City, that exercises authority granted by this article may enact and is encouraged to enact ordinances or other laws providing for or requiring: (1) the planning, staging or provision of adequate public facilities and affordable housing; [and] (2) off-site improvements or dedication of land for public facilities essential for a development).

- Rhode Island[92] ("public facilities" include those public facilities consistent with a community's capital improvement program).
- Tennessee[93] (71 cities incorporated under the Mayor-Aldermanic Charter and Modified City-Manager Charter authorized to impose impact fees for public facilities).
- Vermont[94] ("capital project" means any physical betterment or improvement including furnishings, machinery, apparatus, or equipment for such physical betterment or improvement).
- West Virginia[95] (impact fees may be used to fund "county services" defined to include "all other direct and indirect county services authorized by this code.").

2. Other Authority

Impact fees were originally adopted by local governments absent explicit state authorizing legislation and defended as an exercise of the local government's police power. In certain states, the courts have held that transportation impact fees could be collected despite the absence of a specific legislative enactment enabling such collection.[96] In Florida, where impact fees were widely used prior to the adoption of the state's Impact Fee Act in 2006, the courts affirmed the validity of a county ordinance imposing an impact fee on a new development for the purpose of constructing roads made necessary by the increased traffic generation.[97] The record indicated that the county's comprehensive plan recognized that extensive road improvements would be necessary in view of the extraordinary growth rate being experienced in the county and the consequent need to maintain a consistent level of road service and quality of life.[98]

In *McCarthy v. City of Leawood,*[99] the Kansas Supreme Court held that, absent specific legislative authority to impose impact fees, reasonable impact fees may be enacted under that state's constitutionally granted Home Rule authority.[100] In that case, landowners sought declaratory relief invalidating a city's use of an ordinance that conditioned building permits and plat approval within a certain highway corridor on the payment of highway impact fees. The court also rejected the landowners' arguments that the fee was unreasonable, that the fee was a "taking of property" for Fifth Amendment purposes, that the fee constituted an impermissible tax, and that other constitutional and statutory provisions precluded enactment of the impact fees.[101]

The Ohio Supreme Court has upheld the authority of Ohio cities and villages to charge impact fees under that state's Home Rule amendment to the state Constitution. In the case of *Home Builders Assoc. of Dayton v. Beavercreek,*[102] the court applied a "dual rational nexus test" to determine whether the impact fee was a taking under the federal and state constitutions. The court found that a traffic impact fee ordinance enacted by the city of Beavercreek is an exaction, not a tax, and that an exaction fee adopted by ordinance that partially funds new highway projects is constitutional under both

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[87] South Shell Inv. v. Town of Wrightsville Beach, N.C., 703 F. Supp. 1192 (1988).

[88] N.C. GEN. STAT. ANN. § 160A-313.

[89] N.C. GEN. STAT. ANN. § 160A-311(5).

[90] ME. CODE ANN. 30-A-§ 4354.

[91] MD. ANN. CODE art. 66B § 10.01.

[92] "Rhode Island Development Fee Act," R.I. CODE ANN. §§ 45-22.4-1 *et seq.*

[93] TENN. CODE ANN. § 6-2-201(15).

[94] 24 VT. STAT. ANN. §§ 5200 *et seq.*

[95] W. VA. CODE ANN. §§ 7-20-1 *et seq.*

[96] Many of the cases discussed herein relate to road or transportation impact fees and relate most often to fees imposed for road improvements; however, the reasoning would be applicable in the case of transit improvements. The only litigated impact fee relating to transit is the case of Russ Bldg. P'ship v. City and County of San Francisco, 199 Cal. App. 3d 1496 (1987), discussed at greater length herein.

[97] Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 4th Dist. 1983); Frank J. Wozniak, *Validity, Construction and Application of Road or Transportation Impact Fee Statutes or Ordinances,* 97 A.L.R. 5th 123 (2002).

[98] *Id.*

[99] 257 Kan. 566, 894 P.2d 836 (1995).

[100] Art. 12, § 5 of the Kansas Constitution, the Cities' Powers of Home Rule, states, in relevant part:

> (b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class.

[101] McCarthy, 894 P.2d 836, 844–48.

[102] 89 Ohio St. 3d. 121, 729 N.E.2d 349 (2000).

the Ohio and United States Constitutions if 1) there is a reasonable connection between the city's need for constructing new roadways and the increase in traffic generated by new developments; and 2) if a reasonable connection exists, whether there is a reasonable connection between the expenditure of the impact fee imposed on the developer and the benefits accruing to the developer from the construction of the roadways.[103]

In Wyoming, the Supreme Court upheld development impact fees enacted by ordinance by the City of Rawlins as consistent with the city's constitutional power to levy and collect special assessments, but also the separate power of municipalities to enact and enforce zoning regulations.[104] Most recently, the Nebraska Supreme Court ruled that a city operating under a limitation of powers home rule charter was empowered, in the absence of an express delegation by the legislature of the power to tax, to enact an ordinance conditioning the issuance of a building permit for new residential development on the payment of impact fees intended to offset the expenses associated with providing municipal services to the new development.[105]

3. Implicit Prohibition on the Use of Impact Fees for Transit

Approximately 14 states implicitly prohibit the use of impact fees for transit capital purposes by omission. For example, the Georgia Development Impact Fee Act[106] authorizes municipalities and counties that have adopted a comprehensive plan containing a capital improvements element to impose, by ordinance, development impact fees as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve growth and development. "System improvement costs" is defined to mean costs incurred to provide additional "public facilities" capacity; "public facilities" means:

(A) Water supply production, treatment, and distribution facilities;

(B) Waste-water collection, treatment, and disposal facilities;

(C) Roads, streets, and bridges, including rights of way, traffic signals, landscaping, and any local components of state or federal highways;

(D) Storm-water collection, retention, detention, treatment, and disposal facilities, flood control facilities, and bank and shore protection, and enhancement improvements;

(E) Parks, open space, and recreation areas and related facilities;

(F) Public safety facilities, including police, fire, emergency medical, and rescue facilities; and

(G) Libraries and related facilities.[107]

The Georgia Development Fee Act implicitly prohibits the use of development impact fees for transit capital purposes by omission from the definition of "public facilities."

Similarly, the Indiana Impact Fee Act[108] authorizes the legislative body of a local unit of government to adopt an ordinance imposing impact fees on new development in the geographic area over which the unit exercises planning and zoning jurisdiction. "The ordinance must aggregate the portions of the impact fee attributable to the 'infrastructure types' covered by the ordinance so that a single and unified impact fee is imposed on each new development."[109] "Infrastructure type" is defined to mean any of the following types of infrastructure covered by an impact fee ordinance:

(1) Sewer, which includes sanitary sewerage and wastewater treatment facilities.

(2) Recreation, which includes parks and other recreational facilities.

(3) Road, which includes public ways and bridges.

(4) Drainage, which includes drains and flood control facilities.

(5) Water, which includes water treatment, water storage, and water distribution facilities.[110]

One further example is the New Hampshire statute, which authorizes innovative land-use controls.[111] Innovative land-use controls may include impact fees, defined as follows:

> [A] fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality, including and limited to water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; public road systems and rights-of-way; municipal office facilities; public school facilities; the municipality's proportional share of capital facilities of a cooperative or regional school district of which the municipality is a member; public safety facilities; solid waste collection, transfer, recycling, processing and disposal facilities; public library facilities; and public recreational facilities not including public open space.[112]

Like Georgia and Indiana, the New Hampshire law includes a fairly detailed recitation of capital purposes

[103] *Id*. at 354.

[104] Coulter v. City of Rawlins, 662 P.2d 888 (1983); WYO. CONST.,art. 13, § 1(b); WYO. STAT. ANN. § 15-1-601(d)(1) (1977) (1980 Replacement).

[105] Home Builders Ass'n of Lincoln v. City of Lincoln, 271 Neb. 353, 711 N.W.2d 871 (2006); Frank J. Wozniak, *Validity, Construction and Application of Road or Transportation Impact Fee Statutes or Ordinances,* 97 A.L.R. 5th 123 (2002).

[106] GA. CODE ANN. § 36-71-1 *et seq*.

[107] GA. CODE ANN. § 36-71-2 (17).

[108] IND. CODE ANN. § 36-7-4-1300 *et seq.*

[109] IND. CODE ANN. § 36-7-4-1309.

[110] IND. CODE ANN. § 36-7-4-1309.

[111] N.H. REV. STAT. § 674:21.

[112] N.H. REV. STAT. § 672:21,V.

for which impact fees may be imposed but omits transit capital purposes.

Statutory authority in Illinois and Pennsylvania authorizes the adoption of impact fees by ordinance for roads only.[113] Other states that arguably prohibit the use of impact fees for transit purposes by exclusion include Alabama (applicable only in Baldwin County),[114] Idaho,[115] Montana,[116] Nevada,[117] South Carolina,[118] Texas,[119] Utah,[120] Virginia,[121] and Washington.[122]

4. Other Prohibitions

In at least seven states where there is no authorizing legislation for impact fees, court decisions have been unfavorable, striking down impact fees enacted as regulatory fees in accordance with local zoning and land-use powers.[123] It is generally accepted in Massachusetts that, other than in the City of Boston and as authorized by the Cape Cod Commission Act of 1990 (as applied to Cape Cod's 15 towns), the state's Zoning Act[124] and Subdivision Control Law[125] do not authorize cities and towns to impose impact fees. In *Northeast Builders Assn of Massachusetts v. Town of Dracut*,[126] the court declared the town's imposition of a $2,000 impact fee per residential unit to be a tax and therefor invalid. Similarly, in *Dacey v. Town of Barnstable,* [127] the Barnstable Superior Court ruled invalid an inclusionary zoning ordinance designed to collect fees per residual lots created. The court held that the fee was in fact an unconstitutional tax.

Like the Massachusetts courts, the Mississippi Supreme Court has held that the state lacked a specific constitutional provision or statute regarding implementation of development impact fees, municipal planning statutes did not grant cities the authority to adopt impact fees, and impact fees did not qualify as regulatory in nature but rather constituted an unauthorized tax.[128] This is also true in Louisiana, where the Attorney General has opined that the power to tax is reserved to the state legislature and neither a city nor a parish may levy an impact fee for the purpose of raising revenues.[129] The Iowa Supreme Court has also held that a city's mandatory park dedication fees, which were made a condition of obtaining subdivision plat approval or a building permit, were taxes rather than regulatory fees.[130]

It has also been observed that impact fees in Connecticut may not be imposed without an enabling act.[131] Connecticut law does not explicitly authorize impact fees, and the Connecticut Supreme Court has struck down a development fee to recoup the cost of a town's supervision of infrastructure work in new subdivisions, stating that the statutes did not authorize fees for this purpose as they did for processing subdivision applications and inspecting site work.[132]

One other basis relied upon by the courts in determining the invalidity of an impact fee absent express statutory authority is preemption by state law. The New York Court of Appeals struck down a local transportation impact fee ordinance because the local fee was preempted by the state's comprehensive and detailed regulatory scheme in the field of highway funding.[133] In that case, the court held that the legislature had implicitly limited the amount a town could raise by taxation for highway purposes.

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[113] The Illinois Road Improvement Law, 605 ILL. COMP. STAT. 5/5-901 *et seq*.; and 53 PA. CONS. STAT. § 10502-A *et seq*.

[114] ALA. CODE ANN. 1975 § 45-2-243.80.

[115] IDAHO CODE ANN. § 67-8201 *et seq*.

[116] MONT. CODE. ANN. § 7-6-1601 *et seq*.

[117] NEV. REV. STAT. 278B.010 *et seq*.

[118] S.C. CODE ANN. § 6-1-910 *et seq*.

[119] TEX. CODE ANN. § 395.001.

[120] UTAH CODE ANN. § 11-36-101 *et seq*.

[121] VA. CODE ANN. § 15.2-2317 *et seq*.

[122] WASH. REV. CODE 82.02.050 *et seq*. However, as noted elsewhere, Washington's State Environmental Policy Act provides a basis to mitigate the impacts of development on transit as part of the built environment.

[123] The Minnesota court has sidestepped the issue and reserved to the future the questions of whether impact fees are authorized by Minnesota's Municipal Planning Act or can be authorized under home rule charters or the statutes applicable to statutory cities. County Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (1997). It has been suggested that this uncertainty poses significant risks for any city imposing impact fees. Floyd B. Olson, Daniel J. Greensweig & Scott J. Riggs, *The Future of Impact Fees in Minnesota*, 24 WM. MITCHELL L. REV. 635 (1988).

[124] MASS. GEN. LAWS ch. 40A, § 1 *et seq*.

[125] MASS. GEN. LAWS ch. 41, § 81K.

[126] Middlesex Super. Ct., C.A. No. 87-6222 (1988).

[127] Barnstable Super. Ct., C.A. No. 00-53 (2000).

[128] Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44 (2006).

[129] LA. CONST. art. 7, § 2; Op. Att'y Gen. No. 05-0282 (Aug. 15, 2005); Op. Att'y Gen. No. 98-447 (Nov. 30, 1998).

[130] Home Builders Ass'n of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339 (2002). Nevertheless, the facts of these cases should be scrutinized for applicability to the structure of the particular fee. In the Des Moines case, the court analyzed the difference between a tax and a fee, holding that a tax is a charge to pay the cost of government without regard to special benefits conferred (*Id*. at 346), while a fee may be charged when based on a special benefit conferred on the person paying the fee (*Id*. at 347). The court left open the possibility that the fee may have been valid if it had been premised on the special benefits bestowed on the developers and builders and limited to the value of those special benefits. *Id*. at 349.

[131] John G. Rappa, *Case Law Regarding Development Impact Fees*, Connecticut General Assembly Office of Legislative Research Report, No. 2002-R-0902 (Nov. 26, 2002), *available at* http://www.cga.ct.gov/2002/olrdata/pd/rpt/2002-R-0902.htm.

[132] *Id*.; Avonside Inc. v. Zoning and Planning Comm'n of Avon, 153 Conn. 232, 215 A.2d 409 (1965).

[133] Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 (1989); Frank J. Wozniak, *Statutes or Ordinances*, 97 A.L.R. 5th 123 (2002).

B. Nexus and Proportionality

The U.S. Supreme Court decisions in *Nollan v. California Coastal Commission*[134] and *Dolan v. City of Tigard,*[135] "imposed a national uniformity on the police power common law with respect to development conditions, particularity concerning the necessary connection between the exaction or condition and the land development project that is subject to such an exaction or condition."[136]

1. Nollan and Nexus

At least 20 states arguably have either expressly authorized or judicially implied the authority to enact development impact fees for infrastructure development and improvement, including transit purposes. Another 14 states prohibit the use of such fees for transit purposes by exclusion. Express legislation obviously resolves many authority issues; however, constitutionality issues may still arise. Various judicial standards and tests have been developed to determine the constitutional validity of imposing exactions. Among the most significant cases with respect to this issue is the now famous *Nollan* case, decided by the United States Supreme Court in 1987. In *Nollan*, the Coastal Commission granted a permit to the Nollans to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass along the back of their lot adjacent to the high tide line in order to facilitate access to the ocean and a public park.

The Court noted its historic recognition that land-use regulation does not affect a taking if it "substantially advances legitimate state interests" and does not "deny an owner the economically viable use of his land."[137] It further noted that its cases made clear that a broad range of governmental purposes and regulations satisfies those requirements.[138] However, the Court required that there be an "essential nexus" between the public purpose of the land-use action and the conditions attached to the approval of the development.[139]

The public purpose sought to be advanced by the Commission was to ameliorate the blockage of the view of the ocean caused by the new development. The Court conceded that if the Commission had, in the exercise of its police powers, imposed as a condition some protection of the public's ability to see the beach notwithstanding the construction of the new house, the imposition of the condition would have been constitutional. But an easement along the beach itself did nothing to advance the purpose of allowing a better view of the beach. The Court stated, "the evident constitutional propriety disappears [if] the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[140] The elimination of this "essential nexus" thus amounted to "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[141] To avoid payment of compensation under the Fifth Amendment's property clause, regulation through the police power must substantially advance a legitimate state interest, and the connection between the state interest and the regulation becomes the focus of the inquiry.

2. Dolan and Proportionality

In 1994, a question left unanswered in *Nollan* was resolved by the United States Supreme Court's decision in *Dolan v. City of Tigard*.[142] The issue addressed in *Dolan* was "the degree of connection between the exactions [imposed by the city] and the projected impact of the proposed development."[143] The case reached the Supreme Court after the Oregon Supreme Court held that the City of Tigard could, as a condition of a building permit, require that part of the Dolan's land be dedicated for flood control and traffic improvements, specifically the dedication of a bike path and greenway/floodplain easements to the city. The Court first determined that an essential nexus did exist between the permit conditions and the legitimate public interests in dealing with storm water run-off and reducing traffic congestion.[144] However, the Court struck down the permit conditions as unconstitutional because the city's findings concerning the projected stormwater runoff and generation of additional vehicular traffic were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."[145]

The Court adopted a "rough proportionality" test, holding that, "The city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[146] Applying this test to Dolan's property, the Court concluded that the city's permit conditions exceeded the requirements of this nexus/rough proportionality test. The Court found that, while there was no doubt that a larger retail sales facility would generate additional traffic:

> The city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the

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[134] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[135] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[136] David L. Callies, *Exactions, Impact Fees and Other Land Development Conditions*, AMERICAN INSTITUTE OF CITY PLANNING, PROCEEDINGS OF 1998 NATIONAL PLANNING CONFERENCE (1998).

[137] *Id*. at 834.

[138] *Id*.

[139] *Id*. at 834, 837.

[140] *Id*. at 837.

[141] *Id*.

[142] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[143] *Id*. at 386.

[144] *Id*. at 387–88.

[145] *Id*. at 389.

[146] *Id*. at 391.

> city's requirement for a dedication of a pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand…and lessen the increase in traffic congestion…." No precise mathematical calculation is required, but the city must make some effort to quantify its findings…beyond the conclusory statement that it could offset some of the traffic demand generated.[147]

Likewise, the Court found the city's demand for a public easement for its greenway system had not clearly established proportionality and thus amounted to eminent domain.[148] The constitutional problem in both instances was "the loss of [Dolan's] ability to exclude others," identified by the Court as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[149]

The Court in *Dolan* summarized "representative" state cases that address the necessary connection between the required dedication and the proposed development. The U.S. Supreme Court categorized the various state standards as 1) generalized statements, deemed by the Court to be "too lax to adequately protect the petitioner's right to just compensation if her property is taken for a public purpose";[150] 2) the "specific and uniquely attributable" test under which a local government must demonstrate that its exaction is directly proportional to the specifically created need;[151] and 3) the intermediate position, requiring a municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development.[152]

The constitutional standards developed by the courts are often incorporated into state impact fee enabling acts. Development fees assessed by a municipality in the State of Arizona are subject to the following requirements:

- "Development fees shall result in a beneficial use to the development";
- Monies received from development fees assessed must be placed in a segregated fund;
- The schedule of fees shall be predetermined by the municipality;
- "The amount of any development fees assessed [m]ust 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 or by taxes, fees, or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee";
- Fees are to be assessed in a nondiscriminatory manner; and
- "In determining and assessing a development fee, 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."[153]

Another example is the Rhode Island Development Impact Fee Act, which requires a governmental entity considering the adoption of impact fees to conduct a needs assessment for the type of public facility for which impact fees are to be levied. The needs assessment shall identify levels of service standards, project public facilities capital improvement needs, and distinguish existing needs and deficiencies from future needs. The data sources and methodology upon which the impact fees are based must be made available to the public, and the amount of each impact fee shall be based on actual or reasonable estimates of the cost of public facility expansion or improvements.[154]

An impact fee in Rhode Island must meet the following requirements:

- The amount of the fee must be reasonably related to or reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the development; and
- The impact fees incurred must not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity in accommodating the development.[155]

Impact fees in Colorado must be made in accordance with a schedule that is legislatively adopted, generally applies to a broad class of property, and is intended to defray the projected impacts on capital facilities caused by proposed development. Further, the fee is required to be proportional to the impacts caused by the new development and may not address existing deficiencies:

> A local government shall quantify the reasonable impacts of proposed development on existing capital facilities and establish the impact fee or development charge at a level no greater than necessary to defray such impacts directly related to the proposed development. No impact fee or other similar development charge shall be imposed to remedy any deficiency in capital facilities that exists without regard to the proposed development.[156]

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[147] *Id*. at 395–96.

[148] *Id*. at 393.

[149] *Id*.

[150] *Id*. at 389–90.

[151] *Id.* The *Dolan* Court rejected the exacting scrutiny of the "specifically and uniquely attributable" test as excessive, "given the nature of the interests involved."

[152] *Dolan*, 512 U.S. at 391–92 ("we think the 'reasonable relationship' test adopted by the majority of the state courts is closer to the federal constitutional norm than either of those previously discussed.").

[153] ARIZ. REV. STAT. ANN. § 9-463.05.

[154] R.I. GEN. LAWS § 54-22.4-4(a)-(c).

[155] R.I. GEN. LAWS § 54-22.4-4(d).

[156] *Id*.

This language of reasonable relationship and proportionality directly addresses the concerns relating to eminent domain issues.

3. Russ Building Partnership

While there is a relatively large body of case law relating to "transportation" impact fees, this is not so with respect to impact fees for transit.[157] Nevertheless, given the lack of case law arising out of transit impact fees, other courts may look to this body of case law for guidance. The leading case surrounding the use of development impact fees for transit is *Russ Building_Partnership v. City and County of San Francisco* ("*Russ I*").[158] In this case, developers of new office space in downtown San Francisco sued for declaratory judgment that the TIDF imposed by the city 1) violated state constitutional limitations on collection of a "special tax," and state and federal constitutional protections of equal protection and substantive due process and 2) constituted double taxation. Further, the plaintiffs challenged the amount of the fee.

In May 1981, the City and County of San Francisco enacted Ordinance No. 224-81 "in order to be able to provide public transit services for new development in the downtown area…." The ordinance conditioned the issuance of a building permit or certificate of completion on any office building development in the downtown area upon payment of a transit fee. The fee was designed to provide revenue for the San Francisco Muni system to offset the anticipated increased costs to accommodate new riders during peak commute hours generated by such office building development. The fee was fixed at $5 per square foot of new office space.

Under the ordinance, the fee was payable by each developer either in a lump sum at the end of development or amortized and paid in installments over several years. The fee was calculated to take into account increased transit costs that would accrue over the 45-year useful life of each office building.[159]

In May 1981, the Russ Building plaintiff filed a class action suit against the city to have the ordinance declared invalid on its face and in application. The trial court held that the fee was not an impermissible tax but a "debatably rational" development fee.[160]

a. Unconstitutional "Special Tax."—The plaintiffs argued that the TIDF was not a legitimate development fee because the $5 per square foot fee exceeded the reasonable cost of the increased services to be provided and thus constituted a "special tax" requiring voter approval under Article XIII, Section 4, of the California Constitution. The court made reference to its own definition of "special tax" as a tax "levied for a specific purpose rather than a levy placed in the general fund to be utilized for general governmental purpose."[161] While the Russ I court noted that the ordinance did exact a fee for a specific purpose, it determined that the TIDF is not a tax at all. First, the TIDF is not intended to replace lost revenues but rather is triggered by the voluntary decision of a developer to construct office buildings and is "directly tied" to the increase in ridership generated by such construction.[162] Second, the TIDF is limited to the estimated costs involved to serve the increased ridership and is not earmarked for general fund purposes.

The court remarked upon the connection between the role of impact fees and tax relief in California when it added, "Such a construction will not interfere with giving voters effective property tax relief, the central purpose behind article XIII A of the California Constitution."[163] The court also considered the similarity between a development fee and a special assessment in California law and concluded that the difference was irrelevant:

> Whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development, and it is not a "special tax" for purposes of section 4.[164]

b. Equal Protection.—Plaintiffs claimed that the ordinance discriminated against office buildings constructed after 1979 and arbitrarily singled out commercial buildings. The TIDF, as an economic regulation, was presumed to be constitutional; the only determination to be made by the court was whether the TIDF bore a rational relationship to a legitimate state purpose. The court made reference to the language of the ordinance that found, in reliance on the *Downtown Plan Environment Impact Report*, that "future increases in demand for public transit service [will be] attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods."[165] As a result of the evidence presented, the court found the city's determination—that office space is the primary generator of transit trips—to be rational and thus rejected the equal protection claim because the ordinance was shown to be "directly and additionally related to legitimate governmental goals."[166]

c. Due Process.—The plaintiffs charged that the TIDF ordinance violated substantive due process because it is unreasonable to require developers to underwrite public transit costs over a 45-year period, claiming it was not possible to estimate increased transit costs that far into the future. The city relied on expert testimony to demonstrate that long-term cost projects are accepted in a

[157] See Frank J. Wozniak, *Validity, Construction and Application of Road or Transportation Impact Fee Statutes or Ordinances*, 97 A.L.R. 5th 123 (2002).

[158] 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987).

[159] *Id*. at 1503.

[160] *Id*.

[161] *Id*. at 1504, citing to City and County of San Francisco v. Farrell, 32 Cal. 3d. 47, 57, 184 Cal. Rptr., 684 P.2d 935 (1982).

[162] *Id*. at 1505.

[163] *Id*. at 1506.

[164] *Id*.

[165] *Id*. at 1508, citing to Ord. No. 224-81, § 38.2.

[166] *Id*.

number of contexts, regardless of whether inflation and other unknown factors affect the accuracy of such projections. The city presented data to support the conclusion that "the imposition of a lump sum fee representing increased transit costs over a 45-year period was not arbitrary or unreasonable and was not an unconstitutional taking of plaintiff's property."[167]

d. Double Taxation.—The court found that the TIDF was a development fee and not a tax because the fee "is charged at one time, at the completion of construction of new office space, and does not recur as does a property tax. Furthermore, transit fee is designed specifically to fund Muni maintenance and development, whereas a property tax provides general revenue to cover a wide range of municipal services."[168] The fee is not developed by virtue of property ownership, but rather for the privilege of developing real property. The court held, as a matter of law, that the imposition of the TIDF did not result in double taxation.

e. Level of Impact Fee.—The plaintiffs in *Russ I* contended that the city's impact fee methodology and the assumptions relied upon by the city's consultants in support of the impact fee amount were not supported by the evidence. The plaintiffs relied upon several arguments:

- Plaintiffs first attacked the use of the 45-year projection, but the court found that the use of this projection was reasonable and supported by substantial evidence.
- Plaintiffs challenged the discount rate used in calculating the present value of the fee, using an economic forecast that estimated the discount rate over the 45-year projected term rather than for a "snapshot year." The court disagreed and found there was a rational basis for using this method.
- Plaintiffs argued that the failure to include an adjustment mechanism was unconstitutional; however, the court held that an adjustment mechanism was not constitutionally mandated in this case.
- Plaintiffs challenged the data used in the "snapshot year" of 1980, first with respect to the availability of federal or state grants for capital improvements over the 45-year period and second with respect to the city's decision not to include off-peak revenues in calculating the TIDF. The court found that the city's approach to both issues was rational.
- The plaintiffs found support from the court with respect to two facets of the methodology: that of the revenue generated by "fast pass" during peak hours ("In order to estimate the revenue likely to be generated by fast pass use, the calculation should be based on the cost per ride paid for at the time the ride is taken.")[169] and the "transfer rate" applied as part of the city's increased costs ("there is no evidence of increased cost to Muni to operate [feeder] lines. This is the only relevant consideration, since the fee imposed by the city must not be more than needed to provide the improvements and services required by the development").[170] Nevertheless, the court found these errors to be harmless because, even with the necessary adjustments, the $5 fee was still well below the estimated per-square-foot reductions.

The California Supreme Court accepted two issues on appeal from *Russ I*: whether extrinsic evidence is relevant for interpreting the building permit and whether the permit gave adequate notice to appellants of the developer fee imposed after the permits were issued.[171] In *Russ II,*[172] plaintiffs argued that the TIDF was retroactively applied, in violation of the vested rights doctrine, to office building projects that had begun before the ordinance's enactment. At issue was the language in the building permits issued prior to adoption of the TIDF ordinance that conditioned issuance of the permits upon the developers' participation "in a downtown assessment district or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the city."[173]

The Court of Appeals in *Russ I* had held that the evidence presented did not support the conclusion that plaintiffs had adequate notice that they might have to contribute for future transit service.[174] The court in *Russ II* differed, noting that the evidence supported the argument that the transit mitigation condition language was intended to encompass whatever financing mechanism would be developed as a result of the city's continued study of the transit funding problem. The court also found that at the time their permits were issued, the plaintiffs understood they would be required to pay some amount to fund increased transit demands as a condition to developing their properties. With respect to this issue, the California Supreme Court reversed the Court of Appeal. [175]

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[167] *Id*. at 1509.

[168] *Id*.

[169] *Id*. at 1515.

[170] *Id*. at 1516, citing to Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317 (1981).

[171] Russ Bldg. P'ship v. City and County of San Francisco, 236 Cal. Rptr. 403, 735 P.2d 444 (1987).

[172] Russ Bldg. P'ship v. City and County of San Francisco, 44 Cal. 3d 839, 244 Cal. Rptr. 682, 750 P.2d 324 (1988).

[173] *Id*. at 326.

[174] Russ Bldg. P'ship v. City and County of San Francisco, 188 Cal. App 3d 977, 234 Cal Rptr. 1, at 9 (1987).

[175] Russ Bldg. P'ship v. City and County of San Francisco, 44 Cal. 3d 839, 244 Cal. Rptr. 682, 750 P.2d 324 (1988). *See also* Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992), where plaintiff developers unsuccessfully challenged the imposition of the TIDF, on the basis that their project was located away from the traditional downtown area. The California Appeals Court upheld the fee based on minimum "rational relationship" test rather than more stringent "heightened scrutiny" Nolan test, stating that the Nolan analysis is applicable only to possessory takings rather than regulatory takings.

In light of *Russ I*, the San Francisco Planning Department has made the following recommendation:

> Any impact fee ordinance [should] be airtight: perform plenty of studies before adopting legislation, involve the public in hearings, and write the language of the ordinance to stand up against class action suits. San Francisco spent six years in court before it began to collect the funds. It is paramount that localities consider possible court challenges when designing an impact fee ordinance.[176]

V. ALTERNATIVES

Local governments may take advantage of other alternative mechanisms for funding the local share of transit projects in addition to or in lieu of impact fees. The use of tax increment financing (TIF) districts and special taxing districts is discussed in this section.[177] To take advantage of TIF districts and special taxing districts, a local governmental authority must enact enabling legislation that authorizes the creation of taxing districts and either the imposition of special taxes and assessments or the use of a portion of the general taxes. Furthermore, a resolution or ordinance must be adopted approving the creation of the specific district and, potentially, the issuance of municipal bonds on behalf of such district. Both TIF districts and special taxing districts can be used as an alternative to the general revenues of a local jurisdiction to encourage development activities by the private sector.[178]

A. Tax Increment Financing

Currently, 49 states and the District of Columbia have adopted authorizing legislation for the creation of local TIF districts. A table that summarizes the state authorizing legislation is attached hereto as Appendix C. Direct local funding of transit improvements can be found in local redevelopment districts through the use of TIF. The underlying purpose of TIF is to revitalize commercial, industrial, or residential areas. A redevelopment agency tool that serves to reduce the costs of development that the private sector would otherwise bear, TIF uses future gains in taxes to finance the current improvements that will create those gains through increased site value and investment that creates more taxable properties and thus tax revenue. The incremental increased revenue from the general tax base over and above the existing tax base, may, depending upon the authorizing statute, utilize real property taxes, sales taxes, personal property taxes, or other general taxes. Since the local jurisdiction is surrendering, at least temporarily, the additional tax revenue generated by new development, TIF districts are generally utilized only where the properties are subject to economic depression, or blight, such that new development would not ordinarily occur.

The local enabling legislation that authorizes the creation of TIF districts generally authorizes a public entity, or some local authority with designated power, such as a redevelopment authority, to adopt a resolution designating a defined area as a TIF district and authorizing the capturing of a portion of the general tax revenues, whether they be real property, sales, or other general taxes, to be applied towards a redevelopment or other public purpose. The enabling legislation generally provides that the base value for the real estate located within the designated TIF area for the tax year preceding the date of adoption of a resolution or ordinance creating a special tax incentive district will serve as the floor, with all future taxes assessed against such properties above the base rate designated as the tax increment to be utilized to fund the public improvements through the district.[179]

Two TIF methodologies have been described as the "up front" method and the "pay as you go" or "rebate" method.[180] In the case of up front TIF, a developer may receive grants from a municipality to pay for a portion of or specified development costs. The municipality issues debt and arranges for a loan or a bond to the developer, up front, either before the project begins or by the time it is substantially completed. The bond will amortize over the life of the tax increment financing district. The developer agrees to pay a minimum tax assessment per year on the overall project, whether the project is developed or not. Because this method exposes the municipality to development risks, the up-front method is best used when a developer's other financing is known to be in place and collateral is available to guarantee repayment.

The developer is responsible for providing all up-front financing when a municipality chooses the "pay as you go" or "rebate" method. Aid comes to the developer in the form of an annual rebate of tax paid only on the new increment on parcels that are actually developed. This method is best used when the municipality wants to take a lesser role in the project, when the municipality needs to lessen the impact on its constitutional debt limit, or when collateral is not available.[181]

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[176] *Transit Impact Development Fee: San Francisco Municipal Railway, San Francisco, California*, *in* FUNDING STRATEGIES FOR PUBLIC TRANSPORTATION (Part B), at 64 (TCRP Report No. 31, 1998), *available at* http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_31-2-b.pdf.

[177] To the extent alternatives were not strictly a subject addressed in the national survey that was sent to approximately 300 transit agencies, this section on funding alternatives is not intended to be comprehensive, but simply illustrative.

[178] *See* JOHN J. DELANEY, STANLEY D. ABRAMS & FRANK SCHNIDMAN, HANDLING THE LAND USE CASE: LAND USE LAW, PRACTICE & FORMS, pt. III, app. N1 (3d ed. 2005, Jan. 2008 supplement). *Overview: Special Taxing Districts and Tax Increment Financing Districts* (Westlaw 2007 and updates).

[179] *Id*.

[180] *See* City of Maquoketa, Iowa, Economic Development, discussion of Tax Increment Financing or TIF at http://www.maquoketaia.com/econdev/econdev_tif.htm.

[181] *Id*. Of the responses to the survey that were received, the Transit Authority of River City, Louisville, Kentucky, reported that a TIF district was considered as a funding mechanism for

In jurisdictions such as Illinois and Pennsylvania, which authorize impact fees for road improvements only, and Oregon and Georgia, which do not authorize impact fees for transit, municipalities have utilized tax increment financing to add local funding for transit improvements.

B. Special Taxing Districts

Special taxing districts (also referred to as community development authority districts, community facilities districts, or community management districts) may finance the construction of public infrastructure or services by imposing special taxes on those taxpayers owning the property who directly benefit through the provision of the new infrastructure or service. To implement a special taxing district, the governing body must designate, by resolution or ordinance, an area that defines the special taxing district. The ordinance must authorize the creation of a special fund into which the special tax revenues are to be deposited and authorize the imposition of special taxes through a defined methodology. To address issues of due process, equal protection, and taking without just compensation, a methodology will generally assess ad valorem property taxes on a uniform basis against all property within the district. Where a special benefit is conferred, the tax rate on properties receiving such benefit must likewise bear a uniform rate, but general classifications among property types may be recognized.[182]

1. Chicago, Illinois

TIF has been used to fund transit improvements in Chicago, Illinois, in accordance with the County Economic Development Project Area Tax Increment Allocation Act of 1991.[183] In accordance with the Act, a county may by ordinance establish an economic development project area that "is suitable for siting by a commercial, manufacturing, industrial, research or transportation enterprise or facilities."[184] "Economic development project costs" are defined broadly to include, among other things, the "costs of installation or construction within an economic development project of any buildings, structures, works, streets, improvements, utilities or fixtures, whether publicly or privately owned or operated."[185]

TIF has been used in Chicago to fund transit in the downtown. Although the Chicago Transit Authority has the primary responsibility for train and bus service in the city, between 1990 and 2004, the city allocated $773 million for improvements to the public transportation infrastructure. The City of Chicago funded three public transportation projects with TIF revenue, all of which are located in the Loop as follows:

Project Name	*Estimated Cost*
Randolph/Washington Station	$13,500,000
Dearborn Subway—Lake Wells	$1,200,000
Miscellaneous Transit Projects—Central Loop	$24,000,000

In 2005, the City of Chicago agreed to provide $42.4 million in TIF funds specifically for expenses related to the track and tunnel connections for the development of a transit center under Block 37, also known as 108 North State Street.[186]

2. Pennsylvania Transit Revitalization Investment Districts

In Pennsylvania, the legislature passed the Transit Revitalization Investment District Act[187] in 2005, which provides municipalities, transit agencies, and developers flexibility and options for planning and implementing transit-oriented developments (TODs). The Act allows a transit agency to work with a municipality to create and designate a Transit Revitalization Investment District (TRID) and permits tax increment financing to support TODs with the option of utilizing these tax revenues to support new transit capital investments within the TRID. The Borough of Marcus Hook, located southwest of Philadelphia, was one of the first municipalities to receive TRID grant funds. The new funding was designed to build upon an initial TOD study completed in 2003 and support a range of activities to formally establish the TRID, such as determining the distribution of anticipated tax revenues, formulating a financial plan, preparing an agreement with Southeastern Pennsylvania Transportation Authority, and forming a TRID management authority.[188]

Another TRID planning study has been initiated in Rochester Borough, northwest of Pittsburgh. It will assess the opportunity for a TOD around the central bus terminal serving Beaver County residents with routes into neighboring Allegheny County and Pittsburgh.[189]

a 15-mi light rail transit line (LRT), but the LRT study was suspended. The city contemplated the establishment of a TIF district in Louisville for the project, with anticipated revenues of $30 million.

[182] JOHN J. DELANEY, STANLEY D. ABRAMS & FRANK SCHNIDMAN, HANDLING THE LAND USE CASE: LAND USE LAW, PRACTICE & FORMS (3d ed. 2005, Jan. 2008 supplement).

[183] 55 ILL. COMP. STAT. § 90/1 *et seq*.

[184] 55 ILL. COMP. STAT. § 90/10(c).

[185] 55 ILL. COMP. STAT. § 90/10(d)(5).

[186] Chicago Transit Authority (CTA) Press Releases, "CTA Reaches Agreement for Development of Block 37," Apr. 13, 2005, *available at* http://www.transitchicago.com/news/archpress.wu?action=displayarticledetail&articleid=129385 (Last visited Apr. 1, 2008).

[187] 73 PA. STAT. ANN. § 850.101.

[188] TRANSIT FRIENDLY DEVELOPMENT: NEWSLETTER OF TRANSIT-ORIENTED DEVELOPMENT AND LAND USE IN NEW JERSEY (NJ Transit, New Jersey), Nov. 2006, Vol. 2, No. 2, *available at* http://policy.rutgers.edu/vtc/tod/newsletter/vol2-num2/article_formbaseddesign.html (Last visited Apr. 1, 2008).

[189] *Id*.

3. Portland, Oregon

In Portland, Oregon, tax increment financing has been used for at least two transit improvement projects:

- Approximately $7.5 million in tax increment funds were used to support that portion of the alignment of the Central City Streetcar that passes through the South Park Blocks tax increment district.
- The Interstate Avenue Light Rail was supported by the City of Portland's issuance of $30 million in general fund notes, which the Portland Development Commission must repay when the Interstate tax increment district has the financial capacity to issue long-term bonds.

4. Georgia's Tax Allocation Districts (TADs)

As of March 2007, there were 27 existing TADs in Georgia, encompassing more than 18,700 acres, 20,600 tax parcels, and nearly $1.9 billion in existing base tax digest value. Ten of the existing TADs are in Atlanta and the majority of the remaining districts are scattered throughout suburban metro Atlanta locations.[190] TADs are created in accordance with Georgia's Redevelopment Powers Law.[191] A TAD is a geographic area within a redevelopment area from which a tax allocation increment will be derived. "Redevelopment" may include "the development, construction, reconstruction, repair, demolition, alteration or expansion of structures, equipment and facilities for mass transit."[192]

Atlanta has taken advantage of TADs to finance public transportation infrastructure as a component of the development of redevelopment districts. One is the Atlantic Steel Brownfield Redevelopment Plan and TAD project, now known as Atlantic Station, which involves the redevelopment of over 138 acres of contaminated land previously used for industrial purposes. The Atlantic Station Project is designed to serve as a transit-oriented development. To access MARTA transit, the Atlantic Station project contemplates the construction of a new multimodal bridge over the downtown connector that will provide a direct interface with MARTA's Arts Center Station and Midtown's urban transportation grid. The Eastside Atlanta Redevelopment Plan and TAD Number 5—Eastside assumes that the improvements listed in MARTA's Transit-Related Development Program will be incorporated into the Eastside TAD's redevelopment efforts. It is anticipated that $10 million to $20 million in TAD funds will be used for transportation improvements, including public transportation improvements.[193] The city's Westside TAD also establishes transportation objectives that seek to maximize the area's access to MARTA and future commuter rail.

C. Transportation Assessment Districts—Boston's Northpoint Development Project

In response to the national survey that went out to approximately 300 transit agencies, the Massachusetts Bay Transportation Authority reported the recent enactment of legislation that allows for tax revenues paid by developers to be utilized to finance infrastructure investments, including transit-related infrastructure in connection with the Northpoint development project.[194] The Northpoint project consists of a plan to create a mixed-use, transit-oriented neighborhood in an underutilized industrial area straddling the cities of Cambridge, Boston, and Somerville. The Northpoint plan includes the replacement of the Lechmere T station operating on the Green Line, currently under construction at an anticipated cost of $70 million and scheduled to open in 2010.

In accordance with the legislation, the Massachusetts Development Finance Agency was authorized to borrow money and issue and secure its bonds for the purpose of financing public infrastructure within or adjacent to the Northpoint development district.[195] Such bonds are to be paid from the revenues of infrastructure assessments imposed by the agency upon development parcels within the district. The legislation requires the development of an assessment plan that is required to, among other things, describe the public infrastructure projects to be constructed as part of the Northpoint project, describe the boundaries of each assessment parcel within the development district, and describe the methodology for calculation of infrastructure improvements to be levied by the agency to recover the costs of the public infrastructure.

The legislation authorizes the agency to fix, and in each fiscal year thereafter, charge and collect, a special assessment upon each assessment parcel in an amount equal to that assessment parcel's allocable share of the costs of public infrastructure improvements. The legislation expressly includes rail and other transportation facilities as infrastructure improvements.

VI. TRANSIT IMPACT FEE CASE STUDIES

The use of impact fees for transit improvements, while rare, is best described in the following case stud-

[190] Bleakly Advisory Group, *A Livable Communities Coalition Report: Survey and Analysis of Tax Allocation Districts (TADs) in Georgia—A Look at the First Eight Years*, Oct. 4, 2007, *summary available at* http://www.livablecommunitiescoalition.org/uploads/100012_bodycontentfiles/100585.pdf (last visited Apr. 1, 2008).

[191] GA. CODE ANN. § 36-44-1 *et seq*.

[192] GA. CODE ANN. § 36-44-3(5)(G).

[193] East Atlanta Stakeholders and Huntley & Associates, *Eastside Atlanta Redevelopment Plan & Tax Allocation District #5—Eastside*, Nov. 2003, http://www.atlantada.com/ada_website_qa/buildDev/documents/EastsideRedevelopmentPlan.pdf. (Last visited Apr. 1, 2008).

[194] 2006 Mass. Acts ch. 123, § 114.

[195] The "Northpoint development district" is defined to include the several contiguous parcels of real property owned or leased by the developer in the cities of Somerville and Boston.

ies. An examination of these case studies demonstrates the planning detail necessary to support substantive legal validity requirements. Also demonstrated is the variety of ways in which impact fees can be structured, the innovative ways used to structure the programs, and the close cooperation required of all parties involved.

A. Seattle, Washington: Multimodal Approaches to Impact Mitigation[196]

In the State of Washington, impact fees are authorized under the Growth Management Act (GMA),[197] as part of "voluntary agreements,"[198] under the "Local Transportation Act,"[199] and as mitigation for impacts under the State Environmental Policy Act (SEPA).[200] GMA impact fees are only authorized for public streets and roads, publicly-owned parks, open space and recreation facilities, school facilities, and fire facilities in jurisdictions that are not part of a fire district. Transportation impact fees for streets and roads are probably the most commonly imposed of all types of impact fees in Washington.[201]

The City of Seattle recognized that, because of the GMA's implicit prohibition on the collection of fees for transportation modes other than roads, such as pedestrian, bicycle, and transit improvements, the GMA did not meet the city's emerging transportation funding needs. Seattle opted to pursue a nontraditional approach to mitigate the transportation impacts of new development by using a "voluntary agreement" in accordance with SEPA to fund multimodal transportation improvements through environmental mitigation payments. Developers arguably benefit from participation in the city's mitigation program, which in many cases is faster than the permit review process, as comprehensive mitigation is essentially built into the developer's proposal. The developer is relieved of traditional impact studies if it agrees to pay the fees.

The Washington Appellate Court has considered the use of impact fees exacted under SEPA for traffic mitigation purposes. In *Castle Homes and Development, Inc. v. The City of Brier*,[202] the court found that state law did not prohibit impact fees where paid pursuant to "voluntary agreements," specifically to mitigate a direct impact that has been identified as a consequence of a proposed development. However, in developing such fees a city must identify the development-specific impacts to be mitigated[203] and "show the required improvements were reasonable necessary 'to mitigate the direct impact of the development.'"[204]

The City of Seattle set up an impact mitigation program using authority under SEPA. This is done through negotiated agreements with developers in lieu of requiring the mitigation required by permit conditions imposed by SEPA as part of the environmental review conducted in the permitting process. Payments are based on the cost of transportation improvements identified in an area-wide transportation study prepared by the City of Seattle. Payments are calculated by general land-use categories and amount of floor area or number of dwelling units in a proposed development. The payments must be applied to a comprehensive set of transportation improvements identified in the transportation study, based on a developer's impact.[205] Funds received through transportation mitigation payments are earmarked specifically for projects on a predetermined list of projects. The funds are retained in a special reserve account and funds not used within 5 years will be refunded with interest, unless the delay can be attributable to the developer.

B. San Francisco Transit Impact Development Fee (1981)

On May 5, 1981, the San Francisco Board of Supervisors passed the country's first TIDF ordinance.[206] The 1981 TIDF was enacted pursuant to the city's police power regulations[207] and preceded California's Mitigation Fee Act.[208] The fee was designed to provide revenue for the Muni, to offset the anticipated increased capital expansion and operating costs of Muni required to ac-

[196] Tom Noguchi, *Multi-Modal Approaches to Development Impact Mitigation*: *Managing Congestion Can We Do Better,* Institute of Transportation Engineers 2007 Technical Conference and Exhibit (2007).

[197] WASH. REV. CODE § 82.02.050–.100. *See* Hugh D. Spitzer, *Taxes vs. Fees*, 38 GONZ. L. REV. 335, 24–31 (2003); *See also* Joseph D. Lee, *Sudden Impact: The Effect of Dolan v. City of Tigard*, 71 WASH. L. REV. 205 (1996), for a discussion of the historical development of impact fees in the State of Washington.

[198] WASH. REV. CODE § 82.02.020.

[199] WASH. REV. CODE § 39.92.040.

[200] WASH. REV. CODE ch. 43.21C.

[201] http://www.mrsc.org/Subjects/Planning/transimpactfees.aspx (Last visited Apr. 1, 2008).

[202] 72 Wash. App. 95, 882 P.2d 1172 (Wash. App. Div. 1, 1994).

[203] *Id*. at 1178.

[204] *Id*.; citing to *Southwick, Inc. v. Lacey*, 58 Wash. App. 886, 795 P.2d 712 (1990).

[205] Transportation Mitigation Payments: South Lake Union, Oct. 10, 2005, *Seattle Permits*, Client Assistance Memo 243, City of Seattle, Department of Planning and Development, *available at* http://www.seattle.gov/dpd/publications/cam/CAM243.pdf (Last Visited Apr. 1, 2008).

[206] (Ord. No. 224-81), codified at City of San Francisco Admin. Code § 38.1 *et seq*. (referred to herein as the "1981 TIDF").

[207] *See* Russ Bldg. P'ship v. City and County of San Francisco, 199 Cal. App. 3d 1496, 1505, 246 Cal. Rptr. 21, 25 (1987). ("Typically, a development fee is an exaction imposed as a precondition for the privilege of developing the land…. This is one of the most common subjects of local police power regulations.")

[208] CAL. GOV'T CODE §§ 60000 *et seq*.

commodate new transit ridership during peak commuting hours generated by the construction of new office space in the downtown area.

Significant development in downtown San Francisco in the late 1970s led to concerns that Muni would be unable to sustain then-current levels of service without substantial investment. The Board of Supervisors found that "The demand for public transit service from downtown area office uses imposes a unique burden on the Muni qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Muni during peak periods can be attributed in substantial part to office uses of property in the downtown area."[209] The city had historically provided transit out of general revenues, and residents and local politicians worried that the burden of increased costs would be borne through increased taxes. After a review of alternative funding methods, the city decided on impact fees to pay for development's effect on transit.[210]

The 1981 TIDF was intended to capture

> all costs incurred by the [Muni] in meeting peak period public service transit service demands created by office uses in each new development subject to the fee, including the expansion of service capacity through the purchase of new rolling stock, the installation of new lines, the addition of existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.[211]

As discussed earlier, the 1981 TIDF withstood a legal challenge and was successfully used to generate revenues for transit service;[212] however, the city recognized that the 1981 TIDF had certain inherent structural limitations.

• *1981 TIDF Limited to Office Uses*: While it was initially determined that office use was the primary trip generator and thus posed the largest service burden on Muni, subsequent study revealed that other land uses, such as major retail and entertainment developments, hotels, institutions, and cultural developments, and some business service and industrial uses, generated as many, or more, peak period trips on Muni as office space. Total daily trips were estimated to make such a comparison even more dramatic, as office uses have a rush-hour demand pattern different than other uses, such as retail, hotel, and entertainment uses.

• *Conversion to Office Uses*: Conversions of existing buildings, previously used as warehouses or for light industrial should come under TIDF when converted, but are often difficult to track.

• *Potential for Refunds*: The 1981 TIDF was set up to collect, prior to occupancy, the incremental cost of providing transit service for a presumed 45-year building life. Developers may request a refund if the building is converted to another use. While the city had not experienced such a refund request, the possibility existed, leaving the city open to a potentially unfunded contingent liability.

• *New Areas of Development*: Office uses extended beyond downtown, creating new and more expensive demand for transit services to new employment concentrations. With the fee collection area limited to downtown, it was not possible for the city to recoup the costs of providing additional services to these new areas.

• *Limitations on Spending*: The 1981 TIDF restricted operating funds to uses that increase peak period service over 1981 levels. As overall funding diminished, Muni found it increasingly difficult to maintain service. Further, service expansion needs are not limited to the peak period; incremental service costs are the same, regardless of the hour, with the only variable being the capital cost of a new vehicle. The 1981 TIDF Ordinance did not permit Muni to expand its service in nonpeak hours to meet increasing demand in those hours.[213]

C. San Francisco Transit Impact Development Fee (2004)

In 2000, the City of San Francisco's Planning Department assessed the need to revise the 1981 TIDF. The various issues for consideration included whether the TIDF should be expanded to include types of land uses in addition to offices; whether the TIDF should be expanded geographically beyond the original TIDF Assessment Districts; whether the fee amounts should vary by geographic or land-use categories; what standards should be used for measuring baseline performance of the Muni; and the amount of developer fees that would be necessary to fund public transit to meet the additional demand resulting from new development.[214]

The city's assessment resulted in an expansion of the TIDF to all nonresidential uses throughout the city. It also established the required nexus between new development and transit expansion, recognizing that it is not legally possible to create a nexus that would assess development for the costs of addressing system deficiencies.[215]

The city chose to adopt a performance measure based on revenue hours per trip standard. It identifies a reasonable relationship between the type of development and the need for new facilities based on trip gen-

[209] City of San Francisco Admin. Code § 38.2 (May 1981).

[210] *Transit Impact Development Fee: San Francisco Municipal Railway, San Francisco California*, *in* FUNDING STRATEGIES FOR PUBLIC TRANSPORTATION (Part B), at 64 (TCRP Report 31, Vol. 2, 1998).

[211] City of San Francisco Admin. Code § 38.2 (May 1981).

[212] Russ Bldg. P'ship v. City and County of San Francisco, 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987).

[213] Nelson/Nygaard, *supra* note 10, at 1-7–1-9 (2001).

[214] San Francisco Bd. of Supervisors, Ord. No. 199-04, § 38.2, Findings, July 12, 2004.

[215] *See* Russ Bldg. P'ship v. City and County of San Francisco, 188 Cal. App. 3d 977, 234 Cal. Rptr. 1 1987 (Russ 1), where the court emphasized that the use of the impact fee must be related to the incremental financial burden imposed upon the transit agency by new development.

eration rates by land-use category. Further, fee revenues can be used to increase revenue hours up to the extent needed to maintain the existing service standard. Funded services may be for any location within the Muni system and for any period of the day.[216] TIDF's 2004 funds could be used to increase revenue service hours reasonably necessary to mitigate the impacts of new nonresidential development on public transit and maintain the applicable base service standard, including, but not limited to funding 1) capital and operating and maintenance costs associated with new transit routes, expanded transit routes, or increases in service on existing routes; 2) capital or operating costs required to add revenue hours to existing routes; and 3) related overhead costs.[217] Ineligible uses would include replacement vehicles, operating and maintenance costs of existing transit vehicles, costs to improve service quality that does not also increase revenue hours, and costs to increase service quantity above the existing standard of revenue-hours per trip.[218]

The 2004 TIDF is also subject to a continuing 5-year review to determine whether the TIDF for each economic activity category should be increased, decreased, or remain the same. Any such determination would be based on updated information regarding, among other things, the base service standard, capital and operating costs, levels of federal and state grant funding, fare revenue, revenue service hours, trip generation rates, and costs per service-hour, per trip, and per gross square foot of development by economic activity category. The board of supervisors may make revisions to the fee schedule upon a finding that the new fees would be reasonably related to and would not exceed the costs incurred by Muni to maintain the applicable base service standard, in light of demands caused by new development.

TIDF revenues have increased substantially since the adoption of the 2004 TIDF Ordinance. For fiscal years ending June 30, 1996, 1997, 1998, 1999, and 2000, Muni reported TIDF collections of $1,291,935, $3,299,379, $2,268,636, $749,725, $5,515,492, respectively. Muni's Final Revenue and Expenditure Report for the fiscal year ended June 30, 2005, reflects a TIDF appropriation of $10,160,399.[219]

[216] Nelson/Nygaard, *supra* note 10, at 5-10–5-11.

[217] City of San Francisco Admin. Code § 38.8 (July 2004).

[218] *See* Russ Bldg. P'ship v. City and County of San Francisco, 188 Cal. App. 3d 977, 234 Cal. Rptr. 1 1987 (Russ 1).

[219] San Francisco Municipal Railway, Final Review and Expenditure Reports 2001 and 2005.

D. Broward County, Florida—Transit Concurrency Fees [220]

The county's Transit Oriented Concurrency (TOC) Management System was initiated in 2003 when the Broward County Commissioners eliminated the Transportation Impact Fee system that was developed to make development pay a share of road expansion. At that time, the county recognized that there needed to be a more effective development mitigation measure geared toward the improvement of transit facilities. In fact, the county's current population of 1.6 million is estimated to grow to 2.6 million by 2030. Most roads in Broward County currently fail or will fail the Florida DOT's Level of Service Standards by 2030. In addition, in Broward County there is not enough right-of-way and funding to expand the local, state, and federal road/highway network to address road network overflow. After further analysis and amendment of the Broward County Comprehensive Plan and Land Use Development Code, the TOC Management System was adopted April 26, 2005.[221]

The TOC Management System divides Broward County into 10 Concurrency Districts. Two of these are "Standard Concurrency Districts," where roadway improvements are anticipated to be the dominant form of transportation enhancement, while the remainder are "Transit Oriented Concurrency Districts," defined as "a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or models are available for common trips."[222] The Land Development Code establishes levels of service standards for each of the TOC Districts. For example, for the *North Central District*: achieve headways of 30 minutes or less on 90 percent of routes, establish at least one neighborhood transit center, establish at least one additional community bus route, and expand coverage area to 53 percent; and for the *Eastern Core District*: achieve headways of 30 minutes or less on 90 percent of routes, achieve headways of 20 minutes or less on 40 percent of routes, establish at least one neighborhood transit center, and establish at least two additional community bus routes.[223]

Prior to application for a building permit with any local government within Broward County, a developer is required to obtain a Transportation Concurrency Satisfaction Certificate from the Broward County Development Management Division. The county will issue such a certificate if the developer has paid to Broward County a Transit Concurrency Assessment for the de-

[220] Much of the information relied upon for this case study was produced by Jonathan Roberson, Senior Planner, Broward County Transit, in a presentation entitled, "Broward County's Transit Oriented Concurrency Management System," Sept. 20, 2006, *slide presentation available at* http://www.ftpn.cutr.usf.edu/Wordfiles_PDF/PDW_2006_CUTR TOC Presentation.pdf (Last visited Apr. 1, 2008).

[221] Broward County Ordinance No. 2005-08.

[222] Broward County Land Development Code § 5-201.

[223] *Id.*

velopment proposed in the building permit application. The concurrency assessment is based on a 5-year, financially feasible, County Transit Program (CTP) that was recommended by the Broward metropolitan planning organization and approved by the Broward County Commission. The CTP was required to include transit projects in each of the 10 districts. Projects funded and scheduled for development between 2006 and 2010 include two new fixed routes, two new limited-stop routes, headway improvements on five routes, 10 new community buses, three new neighborhood transit centers, and funding for additional pedestrian improvements.[224]

Total CTP capital costs are estimated at $11,140,000, while total CTP operating and maintenance costs are estimated at $27,450,100. Of the total operating and capital costs, $10,800,000, or 28 percent, is estimated to be funded by concurrency assessments. Ongoing operating and maintenance costs of new transit service and infrastructure after 2010 are expected to cost the county an additional $7 million to $10 million annually.

The Land Development Code requires the concurrency assessment to be calculated as "the total peak-hour trip generation of the proposed development multiplied by a constant (for each year) dollar figure for each District, that represents the cost per trip of all the enhancements in that District described in the [CTP.]"[225] The Broward County ordinance exempts developments that promote public transportation, meaning development that directly affects the provision of public transit, including transit terminals, transit lines and routes, separate lanes for the exclusive use of public transit services, transit stops, and office buildings that include fixed rail or transit terminals as part of the building. Developments that encourage transit usage receive credits toward the transit concurrency assessment.[226]

The Broward County concurrency assessment is a one-time charge to developers prior to the building permit stage of development and as such addresses only the cost of transit capital improvements and operating and maintenance costs over a 5-year period. After 2010, Broward County must assume $7 million to $10 million for the TOC-created service and related amenities. This anticipated funding gap has focused concern on the structure of the TOC Management System. Further, the program may be too short (2006–2010) to be considered as a local match for Federal Transit Administration New Starts and State New Starts funding.[227]

It has not been decided whether the TOC program will continue after 2010. An analysis of the success of TOC investments will follow after complete implementation in 2010. Other Broward County transit modes, such as light rail and rapid bus, will be eligible for TOC funding if the program is extended after 2010.

E. Portland, Oregon—System Development Charge

Portland's "system development charge" (SDC), has been in place since 1997 and has been used to fund a specified list of multimodal transportation projects, including right-of-way improvements required to accommodate a light rail system through a portion of downtown Portland; reconstruction of utilities in the right-of way, plus street improvements serving the new central city street car project; upgrading the bus dispatch system; new signals, shelters, lighting, and sidewalks to accommodate new TriMet bus service; widening roadways to accommodate bicycles; bridge construction and roadway improvements; and construction of a pedestrian bridge.

The city found that, due to a lack of agency funding, "New development within the City of Portland contributes to the need for capacity increases for roads, multimodal transportation and related transportation improvements, to enable new development to take advantage of transit systems and, that new development should contribute to the funding for such capacity increasing improvements."[228] While the principal transit provider for the City of Portland is TriMet, the city could adopt an SDC supportive of transit needs such as improvements to rights-of-way, bus pull-outs, and bus shelters, all of which are supportive of costs that are traditionally incurred by municipalities. The city could not incur costs for rolling stock, rails, or transit operations, but it could fund supportive infrastructure. As discussed above under "Use of Impact Fees for Transit—Developer Response to Impact Fee Programs," Section II.E herein, the city's initial commitment to community outreach proved critical to stakeholder support and acceptance of the SDC adopted in 1997.

The City Code and Charter clearly articulates the legal rationale and statutory basis for the SDC. The City Code and Charter specifically recites that the SDC is separate from other fees provided by law or imposed as a condition of development. "It is a fee for service because it contemplates a development's receipt of transportation services based upon the nature of that development."[229]

[224] See Roberson presentation entitled, "Broward County's Transit Oriented Concurrency Management System," Sept. 20, 2006, slide presentation available at http://www.ftpn.cutr.usf.edu/Wordfiles_PDF/PDW_2006_CUTR TOC_Presentation.pdf (Last visited Apr. 1, 2008).

[225] Broward County Land Development Code § 5-182.

[226] *Id*.

[227] See Roberson presentation entitled "Broward County's Transit Oriented Concurrency Management System," Sept. 20, 2006, slide presentation available at http://www.ftpn.cutr.usf.edu/Wordfiles_PDF/PDW_2006_CUTR TOC_Presentation.pdf (Last visited Apr. 1, 2008). Roberson also identifies a disconnect between the mandatory placement of transit and transit amenities in the 10 TOC Districts compared to what Broward County Transit needs overall. Some of the approved TOC transit services may not be among Broward County Transit capital and operating priorities, resulting in an inefficient use of resources.

[228] City of Portland Code and Charter § 17.15.010(A).

[229] *Id*. § 17.15.010(C).

> The SDC Imposed by this Chapter is not a tax on property or on a property owner as a direct consequence of ownership of property within the meaning of Section 11b, Article XI of the Oregon Constitution or legislation implementing that section. This Chapter does not shift, transfer or convert a government product or service, wholly or partially paid for by ad valorem property taxes, to be paid for by a fee, assessment or other charge, within the meaning of Section 11g, Article XI of the Oregon Constitution.
>
> The funding provided by this Chapter constitutes a mandatory collection method based upon the guidelines set forth in ORS 223.297 through 23.314 and HB 3480 (1996 Special Session) to assure the construction of capacity increasing improvements to arterial, boulevard and collector roads as well as to bicycle, pedestrian and transit facilities as contemplated in the City Comprehensive Plan, City of Portland Transportation capital Improvement Program and the list of projects, referred to as the SDC-CIP, to be funded with money under this Chapter and incorporated as Table 3-1 in the attached Transportation System Development Charges Rate Study, (dated June 11, 1997).[230]

The ordinance relates to all "New Development"[231] throughout the City of Portland and is incurred upon application for a permit to develop property for a specific use or at a specific density. The SDC due for a specific project must be determined by estimating the trip generation of the previous uses on the property and the trip generation for all of the proposed uses and then calculating the total SDC for the previous uses and the proposed uses as provided in the city's Rate Study. If the SDC attributable to the proposed use of the New Development is more than 115 percent of the SDC attributable to the previous use, then the applicant pays the difference between the SDC attributable to the proposed use and the SDC attributable to the previous use.[232]

The Portland SDC is automatically subject to annual adjustment based upon the 10-year moving average percentage fluctuation of the Oregon Construction Cost Index. In no event does the dollar amount change to the SDC exceed 6 percent. The Portland SDC provides for exemptions for, among other things, affordable housing and transit-oriented development.

VII. CONCLUSION

It is hard to escape the conclusion that impact fees for transit are underutilized as a resource for capital improvements for transit infrastructure in the United States. While statutory limitations exist, at least one-half of all states expressly or impliedly authorize local jurisdictions to utilize impact fees for transit purposes. Case law in the area of impact fees generally, and with respect to transportation impact fees specifically, is well developed. A municipality must be willing to devote the resources to 1) perform studies prior to adopting legislation, 2) reach out to all stakeholders and bring them into the public approval process, and 3) craft the language of a local ordinance in accordance with applicable state law. In this way, the likelihood of litigation is minimized.

Certain jurisdictions have experienced tremendous development growth over the last several decades. Growth communities rely heavily on transportation systems for their current and future development. In many cases, but for the gap between transportation planning and municipal planning, impact fees for transit purposes could have been implemented years ago to provide local funds for burgeoning transit capital needs. For impact fees to become a successful financing tool for transit infrastructure, coordination between planners and transit providers is crucial. Coordination and cooperation between municipalities, counties, transportation agencies, and the private sector is also important. The current successful use of impact fees for transit in a limited number of jurisdictions should be instructive for those municipalities that face continued development growth in the years to come.

[230] *Id*. § 17.15.010(D), (E).

[231] "New Development" is defined to mean all improvements on a site, including buildings and other structures, parking and loading areas, landscaping, paved or graveled areas, and areas devoted to exterior display, storage, or activities that have the effect of generating additional weekday or weekend trips. Development includes improved open areas such as plazas and walkways, but does not include natural geologic forms or unimproved land. City of Portland Code and Charter § 17.15.020(O).

[232] *Id*. § 17.15.040(A)(3).

APPENDIX A

TRB Survey
TCRP J-5, Study Topic 9-02
Use of Fees or Alternatives to Fund Transit Questionnaire

The Transportation Research Board has retained a consultant to do a study with the goal of ascertaining the extent to which impact fees, benefit assessments and benefit districts have been used to fund transit, the scope of enabling legislation, the restrictions imposed by state constitutions and statutes and the extent to which proposed and/or implemented impact fee programs have passed United States Constitutional muster.

The purpose of this survey is to collect information from transit systems, companies and other institutions involved in the transit industry to develop an industry-wide perspective on the successful use of impact fees, benefit assessments and benefit districts for transit purposes and the hurdles and obstacles in the respective States to impact fees, benefit assessments and benefit districts.

---

1. Please provide the name and address of your agency or firm.

____

____

____

2. Please provide the name, telephone number and email address of an appropriate contact person who is primarily responsible for legal or finance matters for your agency or firm.

Name: ____

Telephone: ____

Email: ____

3. Has your State legislature adopted legislation which authorizes the imposition of impact fees or exactions to finance *transit-related* projects associated with development?

Yes_____ • No •_____

If no, please skip to question 14 below.

4. If yes, please give the citation of the legislation or e-mail, fax or mail the text of the legislation.

____

4.a. Is this legislation a statewide enabling statute or a delegation to certain municipalities?

____

____

4.b. Please give the citation of any applicable local ordinance:

____

____

5. Please describe the formula for calculating or the actual calculation of the impact fee or exaction:

____

____

____

6. Please describe the manner in which the proceeds from the fee will be used to serve the developments which pay the fee:

____

____

____

7. Please describe when and under what conditions payments begin and provisions for lack of payment:

____

____

____

8. Please describe any model legislation or projects, case law or other planning and policy based research that you may know of that was consulted when preparing the formula:____

____

____

9. As you know, impact fees may be challenged on one of several bases: violation of equal protection; failure to provide due process; the imposition of double taxation; and the formula for calculating or actual calculation of the fee. Was the validity of this legislation, constitutional or otherwise, challenged in litigation?

Yes______ • No______ •

9.a. If yes, Please give the case citation (or citations):

____

9.b. Please briefly describe the issues raised in the case (or cases):

____

____

____

10. Has your state or municipality's transit-related impact fee legislation and /or local ordinance been implemented to fund transit projects?

Yes_____ • No _____•

10.a. If yes, please describe the project, *including a description of the formula for calculating and / or the actual calculation of the fee,* and attach or list any additional materials which may by publicly available which describe the project.

____

____

____

11. If you answered yes to 10 above, was this a new project or the extension and/or improvement of an existing facility?

____

____

12. If you answered yes to 10 above, please describe the size of the population and the rate of growth of the community or communities served by the transit project or projects:

____

____

13. If you answered yes to 10 above, what is the property tax rate in the community or communities served by the transit project or projects:

____

____

14. If you answered no to question 3 above, was *transit-related* impact fee legislation ever proposed and rejected by the State legislature?

Yes_____ • No _____•

14.a. If yes, in what year or years and on what basis?

____

____

15. If you answered no to question 3 above, was *transit-related* impact fee legislation ever adopted by the legislature and vetoed by the Governor?

Yes_____ • No_____ •

15.a. If yes, in what year or years and on what basis?

____

____

16. If you answered no to question 3 above, is impact fee legislation currently under consideration?

Yes_____ • No_____ •

16.a. If yes, please give citation to proposed legislation: ______________________

17. Please add or share anything in your experience which relates to impact fees or exactions for transit purposes which I may not have asked in this survey:

____

____

____

18. May I call you for a telephone interview regarding your responses?

Yes_____ • No_____ •

18.a. If yes, please leave a phone number where I may make an appointment for an interview:

____

APPENDIX B

Summary of Survey Responses

Transit Agency	Transit Impact Fees	Comments
Washington Metropolitan Area Transit Authority Washington, DC	No	Md. Ann. Code Art. 66B § 10.01 (1998)—statewide enabling statute permitting counties and municipal corporations to enact laws for adequate public facilities and off-site improvements essential for development (no knowledge of ordinances enacted to date); and Va. Code Ann. § 15.2-2317 to 15.2-2327 (2003 and 2006)—authorizes localities to assess and impose impact fees on new development for "road improvements" attributable to new development. Does not cover transit.
Bloomington–Normal Public Transit System Bloomington, IL	No	"Bloomington NPTS not a taxing authority."
Transit Authority of River City Louisville, KY	No	Considered Tax Increment Financing Districts as a funding mechanism for light rail, but the study was suspended.
Massachusetts Bay Transportation Authority Boston, MA	No	Section 114 of Chapter 125 of Acts of 2006 authorized infrastructure assessments for the Northpoint Development District.
Metro Transit Madison, WI (MW)	No	Impact fee legislation adopted in Wisconsin but not transit related (S.66.0617).
Metropolitan Atlanta Rapid Transit Authority Atlanta, GA		At least two tax allocation districts that allow revenues to be used for transit. Also, multiple community improvement districts are able to utilize assessment revenue for various purposes, including transit.

Transportation authorities and agencies that responded to the survey, but indicated no use of impact fees for transit funding included the following (by region):

Northeast—Southeastern Pennsylvania Transportation Authority (SEPTA), Philadelphia, PA (NE); New York State Metropolitan Transportation Authority, New York, NY (NE); Maryland Transit Administration, Baltimore, MD; Greater Portland Transit District, Portland, ME; Niagara Frontier Transportation Authority, Buffalo, NY.

South—Knoxville Area Transit, Knoxville, TN; Asheville Transit System, Asheville, NC.

West—Regional Transportation District, Denver, CO; Omnitrans, San Bernadino, CA; Transfort, Fort Collins, CO; Livermore Amador Valley Transit Authority, Livermore, CA; Mountain Line, Missoula, MT; Albuquerque Transit Department, Albuquerque, NM; City of Phoenix Public Transit Department, Phoenix, AZ.

Midwest—LaCrosse Municipal Transit Utility, LaCrosse, WI; Waukesha Metro Transit, Waukesha, WI; Star Tran, Lincoln, NE; Milwaukee County Transit System, Milwaukee, WI; Metro, Cincinnati, OH; Ohio Valley Regional Transportation Authority and Eastern Ohio Regional Transit Authority, Wheeling, OH; Metro Transit, Minneapolis, MN; Gary Public Transportation Corporation, Gary, IN.

APPENDIX C

Summary Table: Tax Increment Financing State Statutes

State	Duration	Enabling Statute
Alabama	30 years per district; Tax Increment Districts	Code of Alabama 11-99.1 *et seq*.
Alaska	None specified; Improvement Area Projects	Alaska Statutes 29.47.460.
Arizona		**None**
Arkansas	25 years per district	Community Redevelopment, Arkansas Code 14-168-301 *et seq.*
California	30 years (plus up to 15-year extension)	Community Redevelopment Law, California Code 33000 *et seq*.
Colorado	25 years per project to fund bonds	Urban Renewal Law, Colorado Revised Statutes, 31-25-101 *et seq.*
Connecticut	As determined by CT Development Authority	Tax Incremental Financing Program, Title 8, Chapter 130, § 8-124 *et seq*.
Delaware	30-year bond issuance	Municipal Tax Increment Financing Act, 22-1701 *et seq*.
District of Columbia	Per project area	Tax Increment Financing, § 2-1217.01 *et seq*.
Georgia	Dissolve by resolution of council and no debt	Redevelopment Powers Law, 36-44-1 *et seq*.
Hawaii	Dissolve as established by ordinance	Tax Increment Financing Act, 46-101 *et seq*.
Florida	40 years from adoption of redevelopment plan	Community Redevelopment Act, 163.330 *et seq*.
Idaho	24 years	Local Economic Development Act, § 50-2901 *et seq*.
Illinois	23 years per district	Tax Increment Allocation Redevelopment Act, 65 Illinois Compiled Statutes 5/11-74.4-1 *et seq*.
Kansas	20 years	Kansas Revised Statutes 12-1770 *et seq*.
Indiana	30 years	Indiana Code 36-7-14 *et seq.*
Iowa	20 years per district	Urban Renewal Law, Iowa Administrative Code 50-8-1 § 403.1 *et seq*.
Kentucky	20 years	Increment Financing Act, Kentucky Revised Statutes 65-680–699.
Louisiana	30 years	Tax Increment Development Act, Title 47, Subtitle 9, Chapter 1.
Massachusetts	30 years	District Improvement Financing, Chapter 40Q, § 1-4.
Maine	30 years per district	Title 30-A, § 5227.
Maryland	Per development district agreement	Tax Increment Financing Act, § 14-201 *et seq*. (2001).
Michigan	Active until purpose has been accomplished	Tax Increment Finance Authority Act, § 125.1801 *et seq*.
Minnesota	25 years per district (30 for pre-	Tax Increment Financing Act,

	1979)	Minnesota Statutes 469.174–469.179
Mississippi	Per individual financing plans	Tax Increment Financing Act, § 21-45-1 *et seq*. (2001).
Missouri	23 years per district	Real Property Tax Increment Allocation Redevelopment Act, 99.800 Missouri Revised Statutes *et seq*.
Montana	15 years	Urban Renewal Law, § 7-15-4201 *et seq*.
Nebraska	15 year per districts; no limit of number per city	Community Development Law, Nebraska Revised Statute 18-2100 *et seq*.
Nevada	Up to 45 years	Community Redevelopment Law, § 279.382 *et seq*.
New Hampshire	30 years	Municipal Economic Development and Revitalization Districts, § 162-K *et seq*.
New Jersey	Until obligations for any project in the district cease to be outstanding	Revenue Allocation District Financing Act, C.52:27D-459 *et seq*.
New Mexico	5 years	Urban Development Law, § 3-46-1 *et seq*.
New York	Per redevelopment plan	Municipal Redevelopment Law, § 970-a *et seq*.
North Carolina	30 years	Project Development Financing Act, Chapter 159, Article 6
North Dakota	By local ordinance	Urban Renewal Law, § 40-58-01 *et seq*.
Ohio	30 years	Municipal Tax Increment Financing Act, § 5709.40 *et seq*.
Oklahoma	25 years	Local Development Act, § 850 *et seq*.
Oregon	30 years	Urban Renewal Law, § 457.010 *et seq*.
Pennsylvania	20 years	Tax Increment Financing Act, Title 53.§ 6930.1 *et seq*.
Rhode Island	By project plan	Tax Increment Financing Act, § 45-33.2-1 et seq.
South Carolina	Per redevelopment plan	Tax Increment Financing Law, § 31-6-10 *et seq*.
South Dakota	15 years	Tax Incremental Districts, § 11-9-1 *et seq*.
Tennessee	Per redevelopment plan	Redevelopment § 13-20-201 *et seq*.
Texas	By local ordinance or when all project costs, tax increment bonds, and interest are paid	Tax Increment Financing Act, § 311.001 *et seq*.
Utah	25 years	Redevelopment Agencies Act, § 17 B-4-101 *et seq*.
Vermont	On project basis	Tax Increment Financing, Title 24, § 1891 *et seq*.
Virginia	For so long as any obligations or development project costs are unpaid	Tax Increment Financing, § 58.1-3245 *et seq*.
Washington	30 years	Community Revitalization Financing, § 39.89.010 *et seq*.
West Virginia	30 year district; no limit of number per municipality	West Virginia Tax Increment Financing Act, West Virginia Code 7-11B-1 *et seq*.

Wisconsin	27 years (raised from 23 in 2003)	Tax Increment Law, § 66.1105 *et seq.*
Wyoming	25 years	Wyoming Urban Renewal Code, § 15-9-101 *et seq*.

Source: Council of Development Finance Agencies at http://www.cdfa.net/cdfa/cdfaweb.nsf/pages/tifstatestatutes.html.

ACKNOWLEDGMENTS
This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Darrell Brown**, Transit Management of Southeast Louisiana, Inc., RTA New Orleans, New Orleans, Louisiana; **Dorval Ronald Carter, Jr**., Chicago Transit Authority, Chicago, Illinois; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; and **Alan S. Max**, City of Phoenix Public Transit Department, Phoenix, Arizona. **Rita M. Maristch** provides liaison with the Federal Transit Administration, and **James P. LaRusch** serves as liaison with the American Public Transportation Association. **Gwen Chisholm Smith** represents the TCRP staff.

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